

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)	
W.H., Appellant)	
)	
and)	Docket No. 18-0369
)	Issued: November 29, 2018
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS HEALTH ADMINISTRATION,)	
Birmingham, AL, Employer)	
_____)	

Appearances:
*Calvin D. Biggers, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 20, 2018 appellant, through counsel, filed a timely appeal from a November 27, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated May 26, 2017 to the filing of this appeal,

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

ISSUE

The issue is whether OWCP properly determined that appellant abandoned her request for an oral hearing.

FACTUAL HISTORY

On September 11, 2008, a 43-year-old nurse manager, filed a notice of traumatic injury (Form CA-1) alleging that she sustained an injury to “both knees and left thigh” after she “slipped on steps near [the emergency room]” while at work.

By decision dated November 3, 2008, OWCP accepted the claim for bilateral chondromalacia patellae.

OWCP later denied appellant's claims for wage-loss compensation for the period February 10 to March 27, 2009 and a recurrence of total disability for intermittent disability commencing March 8, 2013 in decisions dated May 12, 2009 and August 20, 2013, respectively.

By decision dated May 26, 2017, OWCP granted appellant a schedule award for four percent permanent impairment of the right leg and four percent permanent impairment of the left leg. The award ran for 23.04 weeks for the period December 1, 2016 to May 11, 2017.

On June 13, 2017 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The request was postmarked June 9, 2017.

In a September 14, 2017 notice, a representative of OWCP's Branch of Hearings and Review notified appellant that an oral hearing was scheduled for November 7, 2017 at 3:30 p.m. Eastern Standard Time (EST). He provided appellant with a toll-free number and passcode for the telephone hearing. OWCP's hearing representative instructed appellant to “call the toll free number listed below and when prompted, enter the pass code also listed below.” He advised appellant that postponement of the hearing would only be permitted upon receipt of documentation showing her nonelective hospitalization or that the death of a spouse, parent, or child prevented her attendance. The notice was mailed to appellant's address of record.

On November 7, 2017 appellant failed to participate in the telephone hearing. She did not explain her failure to call in within 10 days of the scheduled hearing. Additionally, no request for postponement of the hearing was made.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the November 27, 2017 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: “The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

By decision dated November 27, 2017, an OWCP hearing representative found that appellant had failed to appear at the oral hearing and had abandoned her request. She found that there was no evidence that she had contacted OWCP either prior to or subsequent to the scheduled hearing to explain her failure to appear.

LEGAL PRECEDENT

Under FECA and its implementing regulations, a claimant who has received a final adverse decision by OWCP is entitled to receive a hearing upon writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.⁴ Unless otherwise directed in writing by the claims examiner, an OWCP hearing representative will mail a notice of the time and place of the hearing to the claimant and any representative at least 30 days before the scheduled date.⁵ OWCP has the burden of proving that it mailed notice of the scheduled hearing to a claimant.⁶ Section 10.622(f) of OWCP regulations provide that a claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled.⁷ Where good cause for failure to appear is shown, another hearing will be scheduled and conducted by teleconference. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing. Where good cause is shown for failure to appear at the second scheduled hearing, review of the matter will proceed as a review of the written record.⁸ Where it has been determined that a claimant has abandoned his or her right to a hearing, OWCP will issue a formal decision finding that the claimant abandoned the request for a hearing.⁹

ANALYSIS

The Board finds that OWCP properly determined that appellant abandoned her request for an oral hearing.

The record establishes that on September 14, 2017 in response to appellant's timely request for an oral hearing, a representative of the Branch of Hearings and Review mailed an appropriate notice of the scheduled hearing to be held by telephone on November 7, 2017 at 3:30 p.m. EST. The hearing notice was properly mailed to appellant's last known address of record. As the Board has held, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business is presumed to have arrived at the mailing address in due course. This is

⁴ 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a).

⁵ 20 C.F.R. § 10.617(b).

⁶ See *M.B.*, Docket No. 10-1077 (issued March 17, 2011).

⁷ 20 C.F.R. § 10.622(f).

⁸ *Id.*

⁹ See *N.L.*, Docket No. 15-0713 (issued July 14, 2015); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(g) (October 2011).

known as the mailbox rule.¹⁰ The Board finds that the notice was sent more than 30 days prior to the scheduled hearing date of November 7, 2017. The record establishes that appellant did not appear at the appointed time. Further, appellant did not request a postponement of the hearing prior to November 7, 2017 or explain her failure to appear at the hearing within 10 days of the scheduled hearing.

On appeal, counsel contends that appellant was unable to attend her hearing due to a catastrophic injury that resulted in her having surgery and submitted a November 7, 2017 medical report indicating that appellant fractured her wrist on November 4, 2017 and was going to have surgery on her wrist. The Board finds, however, that as this evidence was not before OWCP at the time that it rendered its November 27, 2017 decision, it is precluded from reviewing this contention for the first time on appeal.¹¹ Thus, the Board finds that appellant abandoned her request for an oral hearing.

CONCLUSION

The Board finds that OWCP properly determined that appellant abandoned her request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the November 27, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 29, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁰ See *R.M.*, Docket No. 14-1512 (issued October 15, 2014).

¹¹ See *supra* note 3.