

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

A.N., Appellant)	
)	
and)	Docket No. 19-1496
)	Issued: December 31, 2019
DEPARTMENT OF HOMELAND SECURITY,)	
U.S. CUSTOMS & BORDER PROTECTION,)	
Santee, CA, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 2, 2019 appellant filed a timely appeal from a June 25, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated January 2, 2019, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

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

FACTUAL HISTORY

On August 27, 2018 appellant, then a 41-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that he injured his lower back that day when he bent over to

¹ 5 U.S.C. § 8101 *et seq.*

inflate a tire on an all-terrain vehicle (ATV) and heard a loud pop and immediately felt pain in his lower back while in the performance of duty. In an August 28, 2018 authorization for examination and/or treatment (Form CA-16), Dr. Jennifer Doumas, Board-certified in family medicine, diagnosed lumbar sprain and left-side sciatica, which she attributed to appellant bending over filling tires at work on August 27, 2018. She excused him from work through September 4, 2018.

Dr. Doumas treated appellant for follow up on September 4, 11, 19, October 3, 17, 31, and November 14, 2018. She continued to diagnose lumbar sprain. Dr. Doumas also prescribed physical therapy and released appellant to return to work with restrictions effective September 12, 2018. OWCP also received appellant's physical therapy records from September 21 to November 2, 2018, which documented his treatment for lumbar sprain.

In a development letter dated November 21, 2018, OWCP informed appellant that his claim initially appeared to be a minor injury that resulted in minimal or no lost time from work and that continuation of pay was not controverted by the employing establishment, and thus, limited expenses had been authorized. However, a formal decision was now required. OWCP advised him of the type of factual and medical evidence required to establish his traumatic injury claim and requested a narrative medical report from appellant's physician which provided the physician's rationalized medical explanation as to how the alleged employment incident caused the diagnosed condition. It afforded appellant 30 days to respond.

OWCP subsequently received follow-up treatment records from Dr. Doumas dated November 28, 2018. Dr. Doumas continued to diagnose lumbar sprain/strain and provided work restrictions. She also referred appellant to an orthopedist for further evaluation.

In a December 4, 2018 report, Dr. John Finkenberg, a Board-certified orthopedic surgeon, noted appellant's lumbar sprain in relation to an injury he sustained three months prior and recommended that he undergo a magnetic resonance imaging (MRI) scan for further evaluation. In a December 17, 2018 note, he indicated that appellant could perform desk duty pending approval of an MRI scan or until his next appointment on January 18, 2019.

By decision dated January 2, 2019, OWCP denied appellant's traumatic injury claim. It found that the medical evidence of record was insufficient to establish causal relationship between appellant's lumbar sprain and the accepted August 27, 2018 employment incident.

On January 30, 2019 appellant timely requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. OWCP also received additional medical evidence following issuance of its January 2, 2019 decision.

In a May 7, 2019 letter, OWCP's hearing representative notified appellant that a telephonic hearing was scheduled for Tuesday, June 11, 2019 at 2:45 p.m. Eastern Standard Time (EST). The notice included a toll-free number to call and provided the appropriate passcode. The hearing representative mailed the notice to appellant's last known address of record.²

² When appellant requested an oral hearing, he provided a new address that was different than the address previously noted on OWCP's January 2, 2019 decision. OWCP mailed the May 7, 2019 hearing notice to the address appellant identified on his request for a hearing, which is the same address appellant subsequently identified with respect to the current appeal.

By decision dated June 25, 2019, OWCP's hearing representative determined that appellant had abandoned his request for an oral hearing. The hearing representative indicated that he received a 30-day advance written notice of the hearing scheduled for June 11, 2019, and that he failed to appear. The hearing representative further noted that there was no indication in the record that appellant contacted OWCP prior to request a postponement or provide an explanation to OWCP for his failure to appear at the hearing within 10 days of the scheduled hearing. Consequently, appellant was deemed to have abandoned his request for an oral hearing.

LEGAL PRECEDENT

A claimant who has received a final adverse decision by OWCP may obtain a hearing by writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.³ Unless otherwise directed in writing by the claimant, OWCP's 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.⁴ OWCP has the burden of proving that it properly mailed to a claimant and any representative of record a notice of a scheduled hearing.⁵

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. 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.⁶

ANALYSIS

The Board finds that OWCP properly determined that appellant abandoned his request for an oral hearing before an OWCP hearing representative.

Following OWCP's January 2, 2019 decision, appellant filed a timely request for an oral hearing before a representative of OWCP's Branch of Hearings and Review. In a May 7, 2019 letter, OWCP's hearing representative notified him that OWCP's Branch of Hearings and Review had scheduled a telephonic hearing for June 11, 2019 at 2:45 p.m. EST. The hearing representative properly mailed the hearing notice to appellant's last known address and provided instructions on how he was to participate. On appeal appellant contends that he never received OWCP's letter. However, the record reflects that the May 7, 2019 hearing notice was mailed to the correct address of record and was not returned as undeliverable.⁷ The Board has held, in the absence of evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is

³ 20 C.F.R. § 10.616(a).

⁴ *Id.* at § 10.617(b).

⁵ *M.R.*, Docket No. 18-1643 (issued March 1, 2019); *T.P.*, Docket No. 15-0806 (issued September 11, 2015); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

⁶ 20 C.F.R. § 10.622(f); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.6(g) (October 2011); *see also R.S.*, Docket No. 15-1358 (issued December 4, 2015).

⁷ *K.F.*, Docket No. 18-0839 (issued November 19, 2018).

presumed to have been received. This is known as the mailbox rule.⁸ Accordingly, without evidence to the contrary, the May 7, 2019 hearing notice is presumed to have arrived at appellant's mailing address. Appellant failed to call in for the June 11, 2019 scheduled hearing using the provided telephone number and passcode. He did not request a postponement or provide an explanation to OWCP for his failure to attend the hearing within 10 days of the scheduled hearing. Thus, the Board finds that OWCP properly determined that appellant abandoned his request for an oral hearing.⁹

CONCLUSION

The Board finds that OWCP properly determined that appellant abandoned his request for an oral hearing before an OWCP hearing representative.

ORDER

IT IS HEREBY ORDERED THAT the June 25, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 31, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

⁸ See *A.J.*, Docket No. 18-0830 (issued January 10, 2019); see also *R.M.*, Docket No. 14-1512 (issued October 15, 2014); *V.M.*, Docket No. 06-0403 (issued December 15, 2006).

⁹ See *D.D.*, Docket No. 19-0455 (issued October 10, 2019); *R.S.*, Docket No. 15-1358 (issued December 4, 2015).