



## **FACTUAL HISTORY**

On January 20, 2003 appellant, then a 49-year-old mail processor, filed an occupational disease claim (Form CA-2) alleging that she sustained injuries to her shoulders and elbows due to factors of her federal employment, including repetitive motions.

By decision dated June 20, 2003, OWCP accepted the claim for bilateral shoulder tendinitis and bilateral elbow tendinitis.

By decision dated April 17, 2009, OWCP granted appellant a schedule award for 11 percent permanent impairment of the right upper extremity and 19 percent permanent impairment of the left upper extremity. The award ran for 93.60 weeks for the period March 15, 2009 to December 30, 2010.

By decision dated July 30, 2009, OWCP reduced appellant's wage-loss compensation effective that day because she was no longer totally disabled for work and had the capacity to earn wages as a security guard at the rate of \$362.40 per week.

In a February 13, 2014 preliminary determination, OWCP found that appellant received an overpayment of compensation in the amount of \$1,607.32 because she had received payments at the 3/4 rate through February 8, 2014, but her daughter had turned 23 years old on March 2, 2012 and the semester ended on May 11, 2012. It found that she was with fault in the creation of the overpayment because she knew or reasonably should have known that she was not entitled to compensation payments at the 3/4 rate after her daughter turned 23 years old.

By decision dated December 10, 2014, OWCP finalized its overpayment decision, finding that appellant had received an overpayment of compensation in the amount of \$1,607.32 and she was at fault in the creation of the overpayment. It directed recovery of the overpayment by deducting \$50.00 per month from appellant's continuing compensation payments.

In a development letter dated March 13, 2018, OWCP referred appellant to Dr. Frederic Nicola, a Board-certified orthopedic surgeon, for a second opinion examination on April 12, 2018 to determine the nature and extent of her employment-related conditions.

In a May 13, 2018 letter, a case coordinator indicated that appellant did not keep the scheduled appointment with Dr. Nicola on April 12, 2018.

By decision dated May 4, 2018, appellant's compensation and medical benefits were suspended because she had failed to attend, or obstructed, an examination directed by OWCP.

On May 23, 2018 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In an August 16, 2018 notice, OWCP's Branch of Hearings and Review notified appellant that it had scheduled a telephonic hearing for October 3, 2018 at 3:15 p.m., Eastern Standard Time. It provided appellant with a toll free number and pass code for the telephonic hearing. The notice was mailed to appellant's address of record. Appellant did not appear at the appointed time and place.

By decision dated October 16, 2018, OWCP's hearing representative found that appellant had failed to appear for the telephonic hearing and therefore, had abandoned her request. The hearing representative noted that an oral hearing was scheduled to be conducted by telephone on October 3, 2018 and that appellant received written notification of the hearing 30 days in advance of the hearing. The hearing representative indicated that appellant failed to appear for the hearing and there was no indication in the file that she contacted OWCP either prior 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.<sup>2</sup> 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 a representative at least 30 days before the scheduled date.<sup>3</sup> OWCP has the burden of proving that it mailed notice of the scheduled hearing to a claimant.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

### **ANALYSIS**

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

The record establishes that on August 16, 2018, in response to appellant's timely request for an oral hearing, a hearing representative notified her that OWCP's Branch of Hearings and

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<sup>2</sup> 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a).

<sup>3</sup> 20 C.F.R. § 10.617(b).

<sup>4</sup> *M.B.*, Docket No. 10-1077 (issued March 17, 2011).

<sup>5</sup> 20 C.F.R. § 10.622(f).

<sup>6</sup> *Id.*

<sup>7</sup> *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).

Review scheduled a telephonic hearing to be held on October 3, 2018 at 3:15 p.m., Eastern Standard Time. 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 known as the mailbox rule.<sup>8</sup> Appellant did not request a postponement of the hearing prior to October 3, 2018 or explain her failure to appear at the hearing within 10 days of the scheduled hearing. Thus, the Board finds that she abandoned her request for an oral hearing.<sup>9</sup>

On appeal, appellant indicated that she lives in the Pacific Time zone. She contended that she was unaware of the time zone difference for her scheduled telephonic hearing and it was unclear to her, as English is not her first language, that the hearing would be scheduled for three hours ahead of her time zone. However, there is no evidence that appellant telephoned for the scheduled hearing on October 3, 2018 or provided this information to OWCP within 10 days of the scheduled hearing explaining her failure to appear.<sup>10</sup>

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

### **CONCLUSION**

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

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<sup>8</sup> *R.M.*, Docket No. 14-1512 (issued October 15, 2014).

<sup>9</sup> *See supra* note 5; *see also R.S.*, Docket No. 15-1358 (issued December 4, 2015).

<sup>10</sup> *See T.M.*, Docket No. 16-1373 (issued January 5, 2017) (where the Board found that appellant abandoned her request for a telephone hearing, even though she called into the scheduled hearing an hour late because she had incorrectly adjusted for Eastern Standard Time, because there was no evidence that she provided this information to OWCP within 10 days of the scheduled hearing).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 16, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 8, 2019  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board