

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

M.P., Appellant)
and) Docket No. 19-0589
DEPARTMENT OF DEFENSE, NATIONAL) Issued: July 25, 2019
SECURITY AGENCY, Fort Meade, MD,)
Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 17, 2019 appellant filed a timely appeal from a July 20, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated October 31, 2017, 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 to review the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. 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.*

ISSUE

The issue is whether OWCP properly determined that appellant abandoned her request for a telephonic hearing before an OWCP hearing representative.

FACTUAL HISTORY

On July 19, 2017 appellant, then a 60-year-old administrative services specialist, filed a traumatic injury claim (Form CA-1) alleging that on April 4, 2017 she experienced shoulder inflammation during a closed-caption presentation she attended in excess of two and one-half hours without a break. No evidence was submitted with her claim. The employing establishment controverted the claim.

OWCP, in a development letter dated September 27, 2017, advised appellant of the deficiencies in her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond. No response was received.

By decision dated October 31, 2017, OWCP denied appellant's traumatic injury claim finding that the evidence of record failed to establish that the events occurred on April 4, 2017, as alleged.

On November 2, 2017 appellant responded to OWCP's September 27, 2017 development questionnaire. She provided a narrative of what tasks she was performing and how she believed the injury occurred.

In an appeal request form dated and postmarked November 30, 2017, appellant requested an oral hearing with a representative of OWCP's Branch of Hearings and Review regarding the October 31, 2017 decision. In a March 9, 2018 letter, an OWCP hearing representative notified appellant that OWCP's Branch of Hearings and Review had scheduled a hearing for April 25, 2018 at 12:30 p.m., and provided her the location of the hearing. The hearing notice was mailed to appellant's address of record.

In a letter dated March 28, 2018, Counsel Avery M. Muller advised OWCP that he had been authorized to represent appellant and requested a copy of her case file. He enclosed an authorization for representation signed by appellant on March 23, 2018.

In a letter dated April 3, 2018, OWCP's hearing representative notified counsel that, based on their telephone conversation on that day, the scheduled in-person hearing was changed to a telephonic hearing.³ The telephonic hearing was scheduled for the same date and time. The hearing representative advised counsel that, pursuant to their telephonic conversation, she would call his office at the designated time and that appellant would be present at his office. This letter was returned to OWCP as undeliverable as addressed and unable to forward.

³ A copy of this letter was also mailed to appellant.

In a record of a telephone conversation dated April 17, 2018, counsel informed OWCP's hearing representative that he was withdrawing his representation of appellant, but indicated that she still wanted to have a hearing. He requested postponement of the April 25, 2018 telephonic hearing because appellant would be incapacitated due to nonelective surgery which was scheduled for April 21, 2018. By letter dated April 17, 2018, counsel informed OWCP's hearing representative that "I am representing [appellant] in the above-referenced workers' compensation claim." He requested that she reschedule the April 25, 2018 telephonic hearing, explaining that appellant was undergoing abdominal surgery on April 21, 2018, unrelated to her workers' compensation claim. Counsel noted that she would be incapacitated for four to six weeks following the surgical procedure. He submitted supportive medical evidence. In a record of a telephone conversation dated April 18, 2018, appellant also requested that OWCP's hearing representative reschedule her telephonic hearing due to her April 21, 2018 surgery.

In a June 5, 2018 letter, OWCP's hearing representative notified appellant that OWCP's Branch of Hearings and Review had scheduled a telephonic hearing for July 9, 2018 at 10:00 a.m. Eastern Standard Time (EST). The hearing notice was again mailed to appellant's address of record and she was provided with a toll-free number to call and the appropriate passcode. Appellant did not, however, call in for the hearing at the appointed time. She also did not contact OWCP's Branch of Hearings and Review within 10 days thereafter to explain her absence.

By decision dated July 20, 2018, OWCP's hearing representative determined that appellant had abandoned her request for a telephonic hearing, which had been scheduled for July 9, 2018. She found that appellant had been afforded notice 30 days prior to the scheduled hearing and that appellant had failed to attend. The hearing representative further found that there was no indication that she contacted the Branch of Hearings and Review either before or after the scheduled hearing to explain her absence.

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.⁴ Unless otherwise directed in writing by the claimant, the 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 properly mailed the notice to a claimant and any representative of record of a scheduled hearing.⁶

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

⁴ 20 C.F.R. § 10.616(a).

⁵ *Id.* at § 10.617(b).

⁶ T.P., Docket No. 15-0806 (issued September 11, 2015).

to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing.⁷

ANALYSIS

The Board finds that OWCP improperly determined that appellant abandoned her request for a telephonic hearing before an OWCP hearing representative.

Following OWCP's October 31, 2017 decision denying appellant's traumatic injury claim, she timely requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, but subsequently had her request changed to a telephonic hearing. The record reflects that on March 28, 2018 counsel informed OWCP that she had authorized his representation in matters related to her claim. In a subsequent record of a telephone conversation dated April 17, 2018, he notified OWCP's hearing representative that he was withdrawing his representation of appellant. However, counsel also informed the same hearing representative, in a letter of the same date, that "I am representing [appellant] in the above-referenced workers' compensation claim." In a June 5, 2018 letter, OWCP's hearing representative notified appellant that a telephonic hearing was scheduled for July 9, 2018, at 10:00 a.m. EST. The Board finds that there is no written confirmation from counsel that he had withdrawn his representation. The only evidence of a purported withdrawal was the notes of a telephone conversation (Form CA-110) as written by the hearing representative. Therefore, based on counsel's April 17, 2018 letter, which specifically indicated that he continued to represent appellant, OWCP was required to send him a copy of the June 5, 2018 notice of the scheduled telephonic hearing.⁸

The Board further finds that, while the record establishes that OWCP properly mailed the June 5, 2018 telephonic hearing notice to appellant at her last known address of record,⁹ it does not establish that the hearing notice was mailed to counsel. The copy of the notice sent to appellant does not, on its face, reflect that a copy was sent to counsel's address of record. There is no indication in the record that OWCP sent the hearing notice to him. For these reasons, the Board finds that counsel was not notified of the date and time of the scheduled telephonic hearing pursuant to 20 C.F.R. § 10.617(b).¹⁰ Accordingly, the case is remanded to OWCP for scheduling

⁷ 20 C.F.R. § 10.622(f); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(g) (October 2011). *See also* A.J., Docket No. 18-0830 (issued January 10, 2019).

⁸ 20 C.F.R. § 10.617(b).

⁹ Absent evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have been received. This is called the mailbox rule. *See M.R.*, Docket No. 18-1643 (issued March 1, 2019); *C.Y.*, Docket No. 18-0263 (issued September 14, 2018). Appellant did not submit evidence of nondelivery of OWCP's June 5, 2018 hearing notice such that the presumption of receipt would be rebutted.

¹⁰ *See Connie L. Sauerwein*, Docket No. 04-1227 (issued June 13, 2005) (where the Board remanded the case to provide appellant an opportunity for a hearing when the record failed to demonstrate that his representative was notified of the scheduled hearing).

of another hearing before a representative of OWCP's Branch of Hearings and Review with proper notice provided to all parties, including counsel.¹¹

CONCLUSION

The Board finds that OWCP improperly determined that appellant abandoned her request for a telephonic hearing before an OWCP hearing representative.

ORDER

IT IS HEREBY ORDERED THAT the July 20, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 25, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹¹ *Id.*