

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

D.D., Appellant	)	
	)	
and	)	Docket No. 19-0455
	)	Issued: October 10, 2019
DEPARTMENT OF JUSTICE, FEDERAL	)	
BUREAU OF PRISONS, Chicago, IL, 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  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On December 27, 2018 appellant filed a timely appeal from a July 23, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> As more than 180 days has elapsed from OWCP's last merit decision, dated February 5, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (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 a telephonic hearing before an OWCP hearing representative.

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<sup>1</sup> Appellant timely requested oral argument before the Board. By order dated September 5, 2019, the Board exercised its discretion and denied the request as the matter could be adequately addressed based on a review of the case record. *Order Denying Oral Argument*, Docket No. 19-0455 (issued September 5, 2019).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On October 18, 2001 appellant, then a 40-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on October 12, 2001 he tore a muscle in his left shoulder and arm when he slipped and fell while in the performance of duty. He subsequently stopped work and returned to limited-duty employment on September 18, 2003. OWCP accepted appellant's claim for left ruptured biceps tendon and repair and subsequently expanded acceptance of his claim to include left shoulder strain and injury to left radial nerve. On August 23, 2002 it granted him a schedule award for 19 percent permanent impairment of the left upper extremity.<sup>4</sup> The award ran for 59.28 weeks from May 23, 2002 to July 11, 2003.

On December 20, 2017 appellant filed a notice of recurrence (Form CA-2a) alleging that he sustained a recurrence of disability beginning November 8, 2017 due to his accepted October 12, 2001 employment injury. He described that while lifting a gallon of milk he felt a tear, burning sensation. Appellant indicated that when the pain did not subside he sought medical treatment and was informed that this condition was scar tissue building up again. He noted that he had retired in 2016.

In a January 3, 2018 development letter, OWCP advised appellant that additional evidence was needed to establish his recurrence claim, including an attending physician's opinion supported by medical rationale explaining how his claimed recurrence of disability was due to a worsening of his original injury, without an intervening cause or new exposure. It also requested that he complete an attached questionnaire. OWCP afforded appellant 30 days to submit the necessary evidence.

Appellant submitted a January 11, 2018 operative report and a January 24, 2018 left shoulder magnetic resonance imaging (MRI) scan report.

By decision dated February 5, 2018, OWCP denied appellant's recurrence claim finding that the medical evidence of record was insufficient to establish a recurrence of disability due to his accepted October 12, 2001 employment injury. It determined that the medical reports submitted in support of his claim did not establish an objective worsening or material change of his October 12, 2001 employment injury.

On February 27, 2018 appellant requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review. In a June 5, 2018 letter, OWCP's hearing representative notified him that OWCP's Branch of Hearings and Review had scheduled a telephonic hearing for

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<sup>3</sup> Docket No. 03-0376 (issued February 27, 2003).

<sup>4</sup> By decision dated February 27, 2003, the Board affirmed the August 23, 2002 OWCP decision which granted appellant a schedule award for 19 percent permanent impairment of the left upper extremity. Docket No. 03-0376 (issued February 27, 2013).

July 12, 2018 at 11:30 a.m. Eastern Standard Time (EST). She mailed the hearing notice to appellant's last known address and provided him with a toll-free number to call and the appropriate passcode. Appellant did not, however, call in for the hearing at the appointed time. He also did not contact OWCP's Branch of Hearings and Review within 10 days thereafter to explain his failure to participate in the scheduled telephonic hearing.

By decision dated July 23, 2018, OWCP's hearing representative determined that appellant had abandoned his request for a telephonic 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.<sup>5</sup> 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.<sup>6</sup> OWCP has the burden of proving that it properly mailed to a claimant and any representative of record a notice of a scheduled hearing.<sup>7</sup>

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.<sup>8</sup>

### **ANALYSIS**

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

Following OWCP's February 5, 2018 decision denying appellant's recurrence claim, he filed a timely request for a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. In a June 5, 2018 letter, OWCP's hearing representative notified him that OWCP's Branch of Hearings and Review had scheduled a telephonic hearing for July 12, 2018 at 11:30 a.m. EST. OWCP's 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 a letter or telephone call. However, the record reflects that the June 5, 2018 hearing notice was mailed to the correct address of record and was not returned as

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<sup>5</sup> 20 C.F.R. § 10.616(a).

<sup>6</sup> *Id.* at § 10.617(b).

<sup>7</sup> *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).

<sup>8</sup> 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).

undeliverable.<sup>9</sup> 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 presumed to have been received. This is called the mailbox rule.<sup>10</sup> Accordingly, without evidence to the contrary, the June 5, 2018 hearing notice is presumed to have arrived at appellant's mailing address. Appellant failed to call-in for the 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. The Board thus finds that OWCP properly determined that appellant abandoned his request for a telephonic hearing.<sup>11</sup>

### CONCLUSION

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

### ORDER

**IT IS HEREBY ORDERED THAT** the July 23, 2018 nonmerit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 10, 2019  
Washington, DC

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

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

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

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<sup>9</sup> *K.F.*, Docket No. 18-0839 (issued November 19, 2018).

<sup>10</sup> *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).

<sup>11</sup> *See supra* note 7; *see also R.S.*, Docket No. 15-1358 (issued December 4, 2015).