

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

A.R., Appellant)	
)	
and)	Docket No. 19-1691
)	Issued: February 24, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Corte Madera, CA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On August 7, 2019 appellant filed a timely appeal from a May 6, 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 her request for an oral hearing before an OWCP hearing representative.

FACTUAL HISTORY

On October 25, 2018 appellant, then a 44-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on the same day she experienced sharp pains in her back and

¹ 5 U.S.C. § 8101 *et seq.*

shortness of breath after injuring her back while in the performance of duty. She explained that she believed that she pulled something in her back when she reached for her delivery point sequence (DPS) tray in an over-the-road (OTR) container. Appellant stopped work the same day.

In an October 25, 2018 medical note, Gillian Emblad, a physician assistant, advised that appellant may return to work on October 31, 2018 with restrictions of no lifting over five pounds until November 7, 2018.

On October 29, 2018 Dr. Jonathan Noble, a Board-certified internist, opined that appellant was totally/partially incapacitated from October 29 to November 7, 2018 and as of November 7, 2018 she sufficiently recovered to resume a normal workload.

In a note dated November 5, 2018, Dr. Noble indicated that appellant was incapacitated from work from November 5 to December 1, 2018.

By development letter dated November 27, 2018, OWCP informed appellant that her 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 appellant of the type of medical evidence required to establish her traumatic injury claim and requested a narrative medical report from appellant's physician which provided a diagnosis and the physician's rationalized medical explanation as to how the alleged employment incident caused the diagnosed condition. It afforded her 30 days to respond.

OWCP subsequently received an October 31, 2018 copy of an investigation interview. In response to interview questions about the October 25, 2018 employment incident, appellant explained that she suffered her injury when she bent down to the OTR container to retrieve the DPS trays. After pulling the trays she felt a sharp pain in her back.

In a letter of even date, appellant's postmaster, A.S., controverted her traumatic injury claim, explaining that, in appellant's four years of employment, she had experienced four separate accidents on October 18 and November 24, 2015, November 24, 2017, and October 25, 2018. He pointed out that these were normally the times where the mailing season for the holidays begins and that, in his opinion, appellant may not have been truthful in her injury claim.

In a medical note dated November 28, 2018, Dr. Noble indicated that appellant was totally/partially incapacitated and unable to return to work from December 1, 2018 to January 2, 2019.

In a December 17, 2018 letter, Postmaster A.S. further controverted appellant's traumatic injury claim. He noted that when she reported her injury on October 25, 2018 she was not in any pain that a person might have experienced when someone hurts themselves. A.S. explained that the topics of discussion also included the fact that appellant had no more annual or sick leave remaining and that he believed that this was the reason she filed her traumatic injury claim. He noted that, on surveillance video, she was seen moving trays one by one, before she tried to move multiple trays at once and began to show signs of injury. A.S. provided that he believed that appellant was only showing injury because "[appellant] knew a surveillance camera was above her and could be used as her alibi."

By decision dated January 2, 2019, OWCP found that the medical evidence of record was insufficient to establish a diagnosis in connection with the accepted October 25, 2018 employment incident. Thus, it found that the requirements had not been met to establish an injury as defined by FECA.

Appellant submitted a November 24, 2017 provider note from Marin General Hospital containing an illegible signature. The note revealed that she would need to remain out of work for two days.

In an October 25, 2018 report, Ms. Emblad provided appellant with home care instructions to treat a neck sprain/strain and contusions in her lower extremity and hand.

Appellant also submitted a narrative statement of even date wherein she again explained that, on October 25, 2018, she bent down to reach DPS trays in the back of an OTR container when she felt a sharp pain in her back.

In a note dated January 2, 2019, Dr. Noble indicated that appellant was incapacitated and unable to return to work from October 25, 2018 to January 17, 2019. In a subsequent note dated January 11, 2019, he indicated that she was incapacitated through that date and was unable to return to a normal workload as of January 12, 2019.

Appellant timely requested an oral hearing before a representative of OWCP's Branch of Hearings and Review on January 11, 2019. She also submitted additional pages of Ms. Emblad's October 25, 2018 medical report, in which Ms. Emblad noted that she provided treatment instructions to appellant for a back sprain/strain, hypertension and a work release form.

In a March 7, 2019 letter, OWCP's hearing representative notified appellant that a telephonic hearing was scheduled for Friday, April 26, 2019 at 12:45 p.m. Eastern Standard Time (EST). The notice included a toll-free number to call and provided the appropriate passcode. OWCP's hearing representative mailed the notice to appellant's last known address of record. Appellant did not make an appearance.

By decision dated May 6, 2019, OWCP's hearing representative determined that appellant had abandoned her request for an oral hearing. The hearing representative indicated that appellant received a 30-day advance written notice of the hearing scheduled for April 26, 2019, and that she failed to appear. OWCP's 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 her failure to appear at the hearing within 10 days of the scheduled hearing. Consequently, appellant was deemed to have abandoned her 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.² Unless otherwise directed in writing by the claimant, OWCP's hearing

² 20 C.F.R. § 10.616(a).

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.³ OWCP has the burden of proving that it properly mailed to a claimant and any representative of record a notice of a scheduled hearing.⁴

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.⁵

ANALYSIS

The Board finds that OWCP properly determined that appellant abandoned her 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 March 7, 2019 letter, OWCP's hearing representative notified her that OWCP's Branch of Hearings and Review had scheduled a telephonic hearing for April 26, 2019 at 12:45 EST. The hearing representative properly mailed the hearing notice to appellant's last known address of record⁶ and provided instructions on how to participate. Appellant failed to call in for the scheduled hearing using the provided telephone number. She did not request a postponement or provide an explanation to OWCP for her failure to attend the hearing within 10 days of the scheduled hearing.⁷ The Board thus finds that OWCP properly determined that appellant abandoned her request for a telephonic hearing.⁸

CONCLUSION

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

³ *Id.* at § 10.617(b).

⁴ *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).

⁵ 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 A.J.*, Docket No. 18-0830 (issued January 10, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

⁶ 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 C.Y.*, Docket No. 18-0263 (issued September 14, 2018). Appellant did not submit evidence of nondelivery of OWCP's March 7, 2019 hearing notice such that the presumption of receipt would be rebutted.

⁷ *E.S.*, Docket No. 19-0567 (issued August 5, 2019).

⁸ *A.J.*, *supra* note 5.

ORDER

IT IS HEREBY ORDERED THAT the May 6, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 24, 2020
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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