

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

M.M., Appellant	)	
	)	
and	)	<b>Docket No. 19-0665</b>
	)	<b>Issued: September 15, 2020</b>
U.S. POSTAL SERVICE, CURSEEN-MORRIS	)	
PROCESSING & DISTRIBUTION CENTER,	)	
Washington, DC, 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 February 4, 2019 appellant filed a timely appeal from a December 3, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> As more than 180 days has elapsed between the last merit decision, dated June 8, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (OWCP) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.5(b). By order dated September 8, 2020, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 19-0665 (issued September 8, 2020).

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

<sup>3</sup> The Board notes that, following the issuance of the December 3, 2018 decision, OWCP received additional evidence. 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 his request for an oral hearing before an OWCP hearing representative.

## **FACTUAL HISTORY**

On May 3, 2018 appellant, then a 54-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on February 22, 2016 he injured his left shoulder when he lifted a heavy mail sack while in the performance of duty. The employing establishment controverted the claim, contending that he was on leave on February 22, 2016 and had not reported an injury to his direct supervisor.

In support of his claim, appellant provided a series of reports dated from May 2, 2016 to September 19, 2017 by Dr. Vincent G. Desiderio, a Board-certified orthopedic surgeon, who diagnosed a superior labral tear from anterior to posterior (SLAP) tear of the left rotator cuff and moderate left acromioclavicular joint arthritis. Dr. Desiderio noted work restrictions.

In a development letter dated May 18, 2018, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed to establish his claim and provided a questionnaire for his completion. OWCP afforded appellant 30 days to provide the necessary evidence.

In response, appellant submitted May 28 and June 6, 2018 statements asserting that he informed E.S., his direct supervisor, of his left shoulder injury immediately after its occurrence. E.S. then consulted another supervisor for filing a FECA claim. Appellant accepted a modified-duty assignment on May 23, 2018.

In a June 8, 2018 statement, Coworker J.B. noted that during the night shift from Sunday, February 21, 2016 into Monday morning, February 22, 2016, appellant advised that he injured his left shoulder while lifting a heavy mail sack. He noted that appellant then spoke to supervisor E.S.

Dr. Desiderio opined in a June 12, 2018 report that the February 22, 2016 lifting incident at work exacerbated appellant's preexisting left shoulder conditions.

By decision dated June 18, 2018, OWCP accepted that the February 22, 2016 employment incident occurred, as alleged, but found that the evidence of record was insufficient to establish a diagnosed medical condition causally related to the accepted employment incident.

On June 29, 2018 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In an October 3, 2018 notice, OWCP's hearing representative informed appellant that the requested oral hearing was scheduled for November 8, 2018, at 2:15 p.m. Eastern Standard Time (EST). OWCP instructed him to "call the toll free number listed below and when prompted, enter the passcode." It mailed the notice to appellant's last known address of record. Appellant did not appear for the hearing and no request for postponement of the hearing had been made.

By decision dated December 3, 2018, OWCP determined that appellant had abandoned his request for a hearing. It found that appellant had received written notice of the scheduled hearing 30 days in advance, but failed to appear for the oral hearing. OWCP further found that there was no indication in the record that appellant had contacted the Branch of Hearings and Review either prior to or subsequent to the scheduled hearing to explain his failure to appear.

### **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>4</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>5</sup> OWCP has the burden of proof to establish that it properly mailed to a claimant and any representative of record a notice of a scheduled hearing.<sup>6</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. 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>7</sup>

### **ANALYSIS**

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

The record establishes that, on October 3, 2018, in response to appellant's timely request for an oral hearing, a representative of OWCP's Branch of Hearings and Review properly mailed a notice of the scheduled telephonic hearing to be held on November 8, 2018 at 2:15 p.m. EST. Appellant, however, 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 oral hearing.<sup>8</sup>

On appeal appellant contends that he did not receive proper notice of the scheduled hearing. However, the record establishes that OWCP mailed the hearing notice to appellant's last known

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<sup>4</sup> 20 C.F.R. § 10.616(a).

<sup>5</sup> *Id.* at § 10.617(b).

<sup>6</sup> *T.R.*, Docket No. 19-1952 (issued April 24, 2020); *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>7</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); *K.J.*, Docket No. 20-0414 (issued July 30, 2020); *A.J.*, Docket No. 18-0830 (issued January 10, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

<sup>8</sup> *Id.*

address of record. The Board has held that 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.<sup>9</sup> Appellant did not submit evidence of nondelivery of OWCP's hearing notice such that the presumption of receipt would be rebutted.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 3, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 15, 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

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<sup>9</sup> *K.J.*, *supra* note 7; *see C.Y.*, Docket No. 18-0263 (issued September 14, 2018).