

Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

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 November 14, 2018 appellant, then a 27-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on October 17, 2018 he felt a sharp pain and injured his right ankle up to his knee when running up stairs to respond to an altercation while in the performance of duty. He did not stop work.

An October 17, 2018 injury assessment form completed by M. Hernandez, a physician assistant, noted that appellant had right calf pain and tenderness of the medial calf muscle as a result of a work-related fall.

In a development letter dated December 11, 2018, OWCP informed appellant that, when his claim was first received, it appeared to be a minor injury that resulted in minimal or no lost time from work, and therefore payment of a limited amount of medical expenses was administratively approved without formal consideration of the merits of his claim. It had now reopened his claim for consideration of the merits. OWCP advised appellant of the deficiencies of his claim, requested additional factual and medical evidence, and provided a questionnaire for his completion. It afforded him 30 days to submit the requested information.

OWCP subsequently received aftercare instructions dated November 11, 2018 noting that appellant was seen in urgent care and assessed with an acute strain and sprain of the ankle. In a note of even date, Jonathan Luna, a physician assistant, indicated that appellant was under his care.

In medical reports dated November 13 to 29, 2018, Dr. Samir Nayyar, a Board-certified orthopedist, indicated that appellant presented with complaints of right ankle pain, swelling and an inability to weight bear after twisting his ankle approximately four weeks prior. He noted that appellant had bruising at his ankle and assessed tear of deltoid ligament of right ankle. Dr. Nayyar held appellant off work through January 15, 2019.

² 5 U.S.C. § 8101 *et seq.*

³ 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.*

A November 21, 2018 magnetic resonance imaging (MRI) scan of the right ankle revealed moderate anterior and posterior subtalar joint effusion and torn anterior tibiofibular and talofibular ligaments.

In a December 19, 2018 response to OWCP's development questionnaire, appellant clarified that he was claiming a traumatic injury.

On January 8, 2019 appellant was treated by Dr. Jeremy Busch, a podiatrist, who noted that he could return to work on February 1, 2019.

By decision dated January 17, 2019, OWCP accepted that the October 17, 2018 incident occurred as alleged. However, it denied appellant's traumatic injury claim because he had not submitted any evidence containing a medical diagnosis in connection with the accepted employment incident. Consequently, OWCP found that the requirements had not been met to establish an injury as defined by FECA.

On January 23, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. In a statement of even date, he authorized a representative to represent him during the hearing.

In a February 11, 2019 report, Dr. Busch noted that appellant was under his care and could not return to work at that time. He restricted appellant's activity to no running, jumping or standing for more than four hours and indicated that he must wear a boot at all times.

In an April 8, 2019 notice, OWCP's hearing representative informed appellant that his oral hearing was scheduled for May 8, 2019 at 12:30 p.m. Eastern Standard Time (EST). The hearing representative instructed him to "call the toll free number listed below and when prompted, enter the pass code." He mailed the notice to appellant's last known address of record. Appellant did not phone in and no request for postponement of the hearing was made.

By decision dated May 22, 2019, OWCP found that appellant had failed to appear at the oral hearing and had abandoned his request. It indicated that he had received written notice 30 days in advance of the hearing scheduled for May 8, 2019, and that he 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.⁴ 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

⁴ 20 C.F.R. § 10.616(a).

representative at least 30 days before the scheduled date.⁵ 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.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 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 properly determined that appellant abandoned his request for an oral hearing before an OWCP hearing representative.

The record establishes that appellant filed a timely request for an oral hearing before a representative of OWCP's Branch of Hearings and Review following its January 17, 2019 decision. In an April 8, 2019 letter, a hearing representative notified appellant that it had scheduled a telephonic hearing to be held on May 8, 2019 at 12:30 p.m., EST. The hearing representative properly mailed the hearing notice to appellant's last known address of record and provided instructions on how to participate. However, appellant failed to call in for the scheduled hearing and 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.⁸ The Board thus finds that OWCP properly determined that appellant abandoned his request for an oral hearing.⁹

On appeal appellant contends that he never received the April 8, 2019 notice providing the date and time for the scheduled hearing. However, 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.¹⁰ Appellant did not submit evidence of nondelivery of OWCP's hearing notice, such that the presumption of receipt would be rebutted. The Board, therefore, finds that appellant abandoned his request for an oral hearing.

⁵ *Id.* at § 10.617(b).

⁶ *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).

⁷ 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); *A.J.*, Docket No. 18-0830 (issued January 10, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

⁸ *E.S.*, Docket No. 19-0567 (issued August 5, 2019).

⁹ *Supra* note 7.

¹⁰ *See C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 22, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 16, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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