

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

K.L., Appellant)	
)	
and)	Docket No. 21-0564
)	Issued: October 12, 2021
)	
DEPARTMENT OF JUSTICE, BUREAU OF)	
PRISONS, FEDERAL CORRECTIONAL)	
INSTITUTION FAIRTON, Fairton, NJ,)	
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 28, 2021 appellant filed a timely appeal from a December 2, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated July 28, 2020, 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 had abandoned his request for an oral hearing before a representative of OWCP's Branch of Hearings and Review.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 15, 2020 appellant, then a 26-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on June 8, 2020 he felt a sharp pain throughout his left leg and lower back, as well as tingling in his left foot, when he descended steps while in the performance of duty. On the reverse side of the claim form, appellant's supervisor indicated that appellant was injured in the performance of duty.

In a radiology report dated June 8, 2020, Dr. David Nussbaum, a Board-certified neuroradiology specialist, noted that appellant had chronic lower back pain. He diagnosed mild levoscoliosis.

In a report dated June 9, 2020, Dr. Shahnawez Khan, a Board-certified family practice specialist, related that appellant was seen for a follow up of back pain that began eight months ago.

Dr. Andrew J. Rickard, a chiropractor, completed a duty status report (Form CA-17) on June 9, 2020 wherein he noted appellant's work restrictions.

OWCP received a magnetic resonance imaging (MRI) scan report dated June 10, 2020 from Dr. Khan. Dr. Khan diagnosed appellant with levoscoliosis and a mild straightening of the lumbar spine with loss of the lumbar lordotic curvature. He also diagnosed a L5-S1 left posterior paracentral inferior disc extrusion, mild left neural foraminal stenosis at L5-S1, and mild central spinal stenosis at L4-5.

In a development letter dated June 22, 2020, OWCP advised appellant that additional factual and medical evidence was necessary to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence

In response to OWCP's development questionnaire, appellant stated that on June 8, 2020 he was walking down the steps of a housing unit and when he reached the landing he experienced immediate pain went through his back and entire left leg.

Appellant submitted an assessment dated November 16, 2019 from a registered nurse at the employing establishment health unit. The assessment indicated that appellant was injured on November 16, 2019 and had a sharp radiating pain from his lower back to his left knee.

OWCP received a letter dated July 21, 2020 from Dr. Khan, wherein he related appellant's history of injury at work on June 8, 2020. Dr. Khan related that appellant walked down uneven stairs, which caused him to twist his back and left leg. He diagnosed mild levoscoliosis, mild loss of intervertebral disc height at L5, and an annular disc bulge and foraminal disc osteophyte complex, which resulted in a mild central spinal canal stenosis. Dr. Khan opined that appellant sustained a temporary reagravation of a previously reported back condition, which disabled him for work from June 9 through 20, 2020.

By decision dated July 28, 2020, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish his diagnosed medical condition was causally related to the accepted employment incident.

On August 15, 2020 appellant timely requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In a letter dated September 30, 2020, addressed to appellant's last known address, OWCP's hearing representative advised him that a telephonic hearing would be held on November 5, 2020 at 12:45 p.m. Eastern Standard Time (EST). The hearing representative also provided appellant with a toll-free telephone number and passcode for access to the hearing. Appellant did not appear.

By decision dated December 2, 2020, OWCP's hearing representative found that appellant failed to appear at the telephonic hearing and had abandoned his request. The hearing representative indicated that appellant received a 30-day advance notice of the hearing scheduled for November 5, 2020 and found that there was no evidence that he had contacted OWCP either prior to or subsequent to the scheduled hearing to request a postponement or explain his failure to appear.

LEGAL PRECEDENT

Under FECA and its implementing regulations, a claimant who has received a final adverse decision by OWCP is entitled to receive a hearing upon writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought. Unless otherwise directed in writing by the claims examiner, an OWCP 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.² OWCP has the burden of proving that it mailed notice of the scheduled hearing to a claimant.³ Section 10.622(f) of OWCP's regulations provides that 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.⁴ 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. Where good cause is shown for failure to appear at the second scheduled hearing, review of the matter will proceed as a review of the written record.⁵ Where it has been determined that a claimant has abandoned his or her right to a hearing, OWCP will issue a formal decision finding that the claimant abandoned the request for a hearing.⁶

² *Id.* at § 10.617(b).

³ *T.R.*, Docket No. 19-1952 (issued April 24, 2020); *A.R.*, Docket No. 19-1691 (issued February 24, 2020).

⁴ 20 C.F.R. § 10.622(f).

⁵ *Id.*

⁶ *T.R.*, *supra* note 3; *A.J.*, Docket No. 18-0830 (issued January 10, 2019); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(g) (October 2011).

ANALYSIS

The Board finds that OWCP properly determined that appellant abandoned his request for an oral hearing before a representative of OWCP's Branch of Hearings and Review.

The record establishes that on September 30, 2020, 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 telephonic hearing scheduled for November 5, 2020 at 12:45 p.m. EST. The hearing notice was mailed to his last known address of record and provided instructions on how to participate. Appellant failed to appear and call in for the scheduled telephonic hearing. 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.⁷

CONCLUSION

The Board finds that OWCP properly determined that appellant abandoned his request for an oral hearing before a representative of OWCP's Branch of Hearings and Review.

ORDER

IT IS HEREBY ORDERED THAT the December 2, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 12, 2021
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

⁷ *Id.*