

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

T.D., Appellant)

and)

**U.S. POSTAL SERVICE, POST OFFICE,
Hammond, IN, Employer**)

**Docket No. 22-0705
Issued: October 7, 2022**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On April 7, 2022 appellant filed a timely appeal from a February 7, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days has elapsed from the last merit decision, dated September 21, 2021, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

ISSUE

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

¹ The Board notes that, following the February 7, 2022 decision, OWCP received additional evidence. 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.*

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 12, 2021 appellant, then a 39-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1) alleging that on July 30, 2021 he pulled his right shoulder when a mail machine on which he was standing, started, causing him to lose his balance and fall injuring his right shoulder while in the performance of duty. He stopped work on August 6, 2021.

Appellant submitted an authorization for examination and/or treatment (Form CA-16) dated August 5, 2021, noting that he was injured on July 30, 2021 when he fell and landed on his right shoulder.

Encounter notes from an August 6, 2021 visit with Dr. Randall Chube, a family practitioner, noted that on physical examination appellant demonstrated moderate tenderness and a limited range of motion of his right shoulder. Dr. Chube diagnosed an unspecified injury of the right shoulder and upper arm, prescribed medication, and instructed appellant to ice the affected area three to four times daily.

An August 6, 2021 report signed by Dr. Lloyd D. Wagner, a Board-certified radiologist, noted that appellant underwent a radiologic examination of his shoulder. Dr. Wagner noted that he reported pain in the posterior right shoulder and glenohumeral joint. A duty status report (Form CA-17) of even date from Dr. Chube reiterated his diagnosis of a shoulder injury and found that appellant was unable to return to work at that time.

In a letter dated August 11, 2021, appellant explained that on July 30, 2021 at approximately 4:00 p.m., the 100 machine was down and he was tasked with hand-feeding the mail. Someone unexpectedly turned on the machine that he was standing on to feed the mail, causing him to lose his balance and catch himself with his right arm. Appellant related that he fell on the machine belt, hurting his shoulder. He notified his manager and waited a few days to see if the pain subsided before his manager subsequently instructed him to seek medical attention.

OWCP also received an undated salary and occupational summary including appellant's pay and job title.

Encounter notes from an August 13, 2021 follow-up examination with Sheryl Weber, a certified nurse practitioner, noted that appellant presented with abnormal flexion, extension, and adduction in his right shoulder, as well as tenderness of the same.

Notes dated August 15, 16, and 18, 2021 indicated that appellant remained off work and that limited-duty work was not available.

In an August 20, 2021 development letter, 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 submit the necessary evidence.

Subsequently, OWCP received a report of work status (Form CA-3) dated August 25, 2021 relating that appellant stopped work on August 6, 2021. It also received a September 13, 2021

prescription order for a magnetic resonance imaging (MRI) scan from Debra Gbabiri, a certified nurse practitioner.

By decision dated September 21, 2021, OWCP accepted that the July 30, 2021 employment incident occurred as alleged. However, it denied appellant's traumatic injury claim, finding that he had not submitted medical evidence containing a medical diagnosis from a qualified physician 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.

Appellant continued to submit evidence, including a September 9, 2021 MRI scan order and clinic note from Dr. Chube requesting evaluation of a right shoulder injury. OWCP also received a September 13, 2021 prescription from Ms. Gbabiri for an MRI scan without contrast for a work-related strain or sprain with reduced range of motion and pain.

On October 15, 2021 appellant requested both a hearing before OWCP's Branch of Hearings and Review and a request for reconsideration. In a letter of even date, he explained that he was unaware that one of his documents was signed by a nurse practitioner and that this was not acceptable. Appellant related that the attached documents included a physician's signature and that his physician was requesting an MRI scan for a strain or sprain.

In an October 19, 2021 MRI scan report, Dr. Pankaj Patwari, a Board-certified diagnostic radiologist, noted an impression of mild subacromial spurring and hypertrophic changes at the right acromioclavicular joint.

In a December 13, 2021 notice, OWCP's hearing representative informed appellant that it had scheduled a telephonic hearing for January 28, 2021 at 3:00 p.m. Eastern Standard Time (EST). The notice included a toll-free number to call and provided the appropriate passcode for access to the hearing. The hearing representative mailed the notice to appellant's last known address of record. Appellant did not appear for the hearing and no request for postponement was made.

By decision dated February 7, 2022, an OWCP hearing representative found that appellant had abandoned his request for an oral hearing as he had received written notification of the hearing 30 days in advance, but failed to appear. It further found that there was no indication in the case record that he had contacted the Branch of Hearings and Review either prior to or after 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.³ 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

³ 20 C.F.R. § 10.616(a).

representative at least 30 days before the scheduled date.⁴ OWCP has the burden of proving that it properly mailed to a claimant and any representative of record a notice of a scheduled hearing.⁵

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.⁶

ANALYSIS

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

Following OWCP's September 21, 2021 decision denying appellant's traumatic injury claim, he filed a timely request for an oral hearing before a representative of OWCP's Branch of Hearings and Review. In a December 13, 2021 notice, OWCP's Branch of Hearings and Review notified him that it had scheduled a telephonic hearing for January 28, 2022 at 3:00 p.m. EST. The hearing notice was properly mailed to appellant's last known address of record and provided instructions on how to participate.⁷ 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.⁸ As appellant did not request a postponement and failed to call in to the scheduled hearing or provide notification to OWCP's Branch of Hearings and Review within 10 days of the scheduled hearing explaining his failure to appear, he abandoned his request for an oral hearing.⁹

On appeal appellant asserts that he did not receive the December 13, 2021 letter scheduling the oral hearing. As explained above, the Board finds that the mailbox rule applies as all documents were mailed by OWCP to his address of record.¹⁰ Appellant did not submit evidence

⁴ *Id.* at § 10.617(b).

⁵ *C.H.*, Docket No. 21-0024 (issued November 29, 2021); *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).

⁶ 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) (September 2020); *A.J.*, Docket No. 18-0830 (issued January 10, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

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

⁸ *L.L.*, Docket No. 21-1194 (issued March 18, 2022); *V.C.*, Docket No. 20-0798 (issued November 16, 2020); *L.T.*, Docket No. 20-1539 (issued August 2, 2021).

⁹ *Id.*

¹⁰ *See V.C.*, *supra* note 8; *C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

of nondelivery of OWCP's hearing notice, such that the presumption of receipt would be rebutted. The Board, therefore, finds that he abandoned his request for an oral hearing.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 7, 2022 decision of the Office of Workers' Compensation Programs is affirmed.¹¹

Issued: October 7, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

¹¹ The Board notes that the employing establishment issued a Form CA-16, dated August 5, 2021. A completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. § 10.300(c); *V.S.*, Docket No. 20-1034 (issued November 25, 2020); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).