

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

_____)	
W.R., Appellant)	
)	
and)	Docket No. 22-1016
)	Issued: September 30, 2022
DEPARTMENT OF DEFENSE, DEFENSE)	
LOGISTICS AGENCY DISTRIBUTION)	
REGION WEST, Texarkana, TX, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On June 23, 2022 appellant filed a timely appeal from a February 24, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated October 19, 2021, 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 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.

FACTUAL HISTORY

On August 26, 2021 appellant, then a 68-year-old wood worker, filed a traumatic injury claim (Form CA-1) alleging that on August 24, 2021 he sustained two broken left ribs, broken left

¹ 5 U.S.C. § 8101 *et seq.*

elbow, broken left knee, and scraped skin while in the performance of duty. He indicated in a separate statement that he was on a forklift to “put up foam” and felt lightheaded before the alleged injury. Appellant stated that he lost his footing while placing the foam above his head and fell forward, hitting his side, elbow, and knee in the fall. He stopped work on August 24, 2021.

In support of his claim, appellant submitted reports dated August 24 and 25, 2021 from Dr. Andrew Frost, an osteopath Board-certified in family medicine and an emergency medicine specialist. He was seen in the emergency department on August 24, 2021 for a rib fracture, and allowed to return to work on August 27, 2021 with no restrictions.

On August 25, 2021 appellant was seen by Michael Crabtree, a nurse practitioner. The report indicates that appellant was seen regarding two broken ribs and was given a return-to-work date of September 27, 2021.

In an August 31, 2021 work status report (Form CA-3), the employing establishment indicated that appellant stopped work on August 24, 2021 and was placed on temporary total disability (TTD) until September 1, 2021.

In a development letter dated September 15, 2021, OWCP informed appellant that additional factual and medical evidence was necessary to establish his claim and provided a questionnaire for his completion. It afforded appellant 30 days to submit the requested evidence.

On September 23, 2021 appellant was seen again by Mr. Crabtree. Mr. Crabtree noted that appellant remained off work and was given a return-to-work date of October 6, 2021.

By decision dated October 18, 2021, OWCP denied appellant’s traumatic injury claim, finding that the evidence of record was insufficient to establish that the August 24, 2021 employment incident occurred, as alleged. It concluded, therefore, that the requirements had not been met to establish an injury as defined under FECA.

On October 18, 2021 the employing establishment contacted OWCP indicating that a factual statement was previously submitted by appellant on August 26, 2021.

By decision dated October 19, 2021, OWCP rescinded the October 18, 2021 decision and issued a revised notice of decision. It accepted that the August 24, 2021 employment incident occurred as alleged and that medical conditions were diagnosed. However, OWCP denied appellant’s claim, finding that the medical evidence of record was insufficient to establish a causal relationship between his diagnosed conditions and the accepted August 24, 2021 employment incident.

On October 21, 2021 appellant requested a telephonic hearing before a representative of OWCP’s Branch of Hearings and Review.

OWCP received progress reports dated August 23, 2021 through October 14, 2021 from Dr. Frost, and Mr. Crabtree, wherein they reiterated their diagnoses of rib fractures. In an x-ray report dated September 23, 2021, Dr. Elizabeth Robert, a Board-certified diagnostic radiologist, reported findings of fractures on the left 7th and 8th ribs. Dr. James Jean, a Board-certified diagnostic radiologist, interpreted a computerized tomography (CT) scan dated August 24, 2021 of appellant’s abdomen/pelvis and noted no acute intra-abdominal abnormalities and bilateral hip

degenerative changes. Further, a CT scan report dated August 24, 2021, signed by Dr. D.S. Campanini, a diagnostic radiology specialist, did not show skull fracture.

In an attending physician's report (Form CA-20) dated October 18, 2021, Dr. William Kelly, Board-certified in family practice, noted appellant's history of injury and reiterated the diagnoses from appellant's previously submitted medical reports. He indicated by checking a box marked "Yes" that the diagnosed condition was causally related to the employment activity described. Dr. Kelly noted appellant's return to work date as October 6, 2021.

OWCP additionally received a factual statement from appellant on October 27, 2021 reiterating the accepted employment incident.

In a January 10, 2022 notice, OWCP's hearing representative informed appellant that his oral hearing was scheduled for February 10, 2022 at 12:15 p.m. Eastern Standard Time (EST). She provided appellant with a toll-free number and passcode for access to the hearing. The hearing representative mailed the notice to appellant's last known address of record. Appellant failed to appear for the hearing.

By decision dated February 24, 2022, OWCP 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 noted that there was no indication in the 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

Under FECA and its implementing regulations, a claimant who has received a final adverse decision by OWCP is entitled to receive 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 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 notice of the scheduled hearing to a claimant and any representative of record.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.⁵ 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

² 20 C.F.R. § 10.616(a).

³ *Id.* at § 10.617(b).

⁴ *M.S.*, Docket No. 22-0362 (issued July 29, 2022); *L.L.*, Docket No. 21-1194 (issued March 18, 2022); *L.T.*, Docket No. 20-1539 (issued August 2, 2021); *V.C.*, Docket No. 20-0798 (issued November 16, 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).

⁵ 20 C.F.R. § 10.622(f).

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.⁶ 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.⁷

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.

Following OWCP's October 19, 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 January 10, 2022 notice, OWCP's Branch of Hearings and Review notified him that she had scheduled a telephonic hearing for February 10, 2022 at 12:15 p.m. EST. The hearing representative mailed the notice to appellant's last known 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.⁸

Appellant failed to call in for the scheduled hearing at the prescribed time. He did not request a postponement or provide an explanation to OWCP for failure to appear for the hearing within 10 days of the scheduled hearing. As appellant 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, the Board finds that OWCP properly determined that he abandoned his request for an oral hearing.⁹

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.

⁶ *Id.*

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6g (February 2020); *see also M.S. and L.L.*, *supra* note 4; *K.H.*, Docket No. 20-1198 (issued February 8, 2021); *A.J.*, Docket No. 18-0830 (issued January 10, 2019).

⁸ *See M.S., L.L., and V.C.*, *supra* note 4.

⁹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 30, 2022
Washington, DC

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

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

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