

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

_____)	
J.P., Appellant)	
)	
and)	Docket No. 22-1225
)	Issued: April 6, 2023
U.S. POSTAL SERVICE, POST OFFICE,)	
San Francisco, CA, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 16, 2022 appellant filed a timely appeal from a May 9, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated June 15, 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.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the May 9, 2022 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 a representative of OWCP's Branch of Hearings and Review.

FACTUAL HISTORY

On June 15, 2020 appellant, then a 54-year-old equipment operator, filed a traumatic injury claim (Form CA-1) alleging that on June 9, 2020 he strained his lower back and had radiating pain on the left side when lifting sacks from the floor, while in the performance of duty. On the reverse side of the claim form, appellant's supervisor acknowledged that appellant was injured in the performance of duty.

Appellant submitted progress notes from Dr. Mandeep Bajwa, a Board-certified family physician, dated June 15 through September 16, 2020. On June 15, 2020 he related that he experienced left lower back pain that radiated down his left leg. Appellant indicated that the pain began after lifting heavy mail sacks at work. Dr. Bajwa assessed lumbar strain. On June 24, 2020 he noted that appellant related a history regarding a previous back injury and that the pain from the prior injury symptomatically felt identical to the current pain. Appellant also presented copies of magnetic resonance imaging (MRI) scans from his previous back injury. In his notes dated July 7, 2020, Dr. Bajwa related that appellant indicated some improvement of his pain. He indicated that appellant was working, but on modified duty. On July 28, 2020 Dr. Bajwa noted that appellant had possibly reinjured his lower back while kneeling at work. On September 16, 2020 he reviewed appellant's current and previous MRI scan reports and noted changes not found in previous reports.

OWCP also received a state occupational injury or illness report dated June 15, 2020 from Dr. Bajwa. Appellant related lower back pain radiating down left side and left leg. Dr. Bajwa diagnosed lumbar strain and affirmatively indicated that appellant's previous lumbar disc abnormality would impede or delay appellant's recovery. He also provided work restrictions.

An MRI scan report, dated August 25, 2020, from Dr. Mamata Myneni, a Board-certified radiologist, indicated: (1) a 3 millimeter (mm) grade 1 anterolisthesis of L5 on S1 and mild inflammatory changes of the left L5-S1 facet joint; (2) mild bilateral neural foraminal narrowing at L2-3; (3) moderate-to-severe left and moderate right neural foraminal narrowing at L3-4; (4) mild canal stenosis, mild left neural foraminal narrowing and mild-to-moderate right neural foraminal narrowing at L4-5; (5) mild left neural foraminal narrowing at L5-S1; and (6) multilevel small annular fissures.

OWCP received duty status reports (Form CA-17) dated June 15 and 24, July 7 and 28, August 19, and September 16, 2020 signed by Dr. Bajwa. In these reports, Dr. Bajwa diagnosed lumbar strain and placed appellant on continuous work restrictions.

A work status note dated September 23, 2020 and signed by Dr. Mark J. Sontag, a Board-certified physiatrist, released appellant to modified duty with restrictions.

On September 30, 2020 OWCP accepted the claim for strain of muscle, fascia and tendon of lower back, initial encounter.

A work status note dated November 10, 2020 and signed by Dr. Sontag advised appellant to remain off work through November 24, 2020. On November 24, 2020 he released appellant to modified duty after December 10, 2020.

In a report dated March 23, 2021, Dr. Sontag related his impression as: (1) Grade 1 L5-S1 degenerative spondylolisthesis with left L5-S1 facet inflammatory changes, small central fissure with mild L5 foraminal narrowing causing left L5 and S1 radicular pain; and (2) 5 mm L3-4, 3.5 mm L4-5 disc bulge with severe facet arthropathy with annual fissure with foraminal stenosis causing bilateral L5 and S1 radicular pain. He diagnosed: (1) Other intervertebral disc displacement, lumbar region; and (2) radiculopathy, lumbar region. Dr. Sontag noted that appellant would continue with modified duty.

On April 17, 2021 appellant accepted an offer of modified assignment as a mail handler. The duties of the assignment indicated that he would sweep letters and flats for one to four hours a day and rewrap "nixie" for one to two hours a day.

OWCP received a claim for compensation (Form CA-7) form dated April 21, 2021 for leave without pay (LWOP) for April 13 and 14, 2021. A subsequent Form CA-7 dated April 29, 2021 claimed compensation for April 17 through 28, 2021.

In a development letter dated May 7, 2021, OWCP informed appellant that additional factual and medical evidence was necessary to establish his recurrence claim. It noted that he was claiming two hours of LWOP each day. OWCP advised appellant that his claim was accepted for lumbar strain only and that the medical evidence of record did not establish causal relationship between his additional diagnosed conditions and the accepted employment incident. It further advised that he should provide a narrative report from a physician providing a rationalized explanation as to how the work injury caused or aggravated the additional and preexisting conditions. OWCP afforded appellant 30 days to respond.

By decision dated June 15, 2021, OWCP denied appellant's recurrence claim, finding that he did not establish disability due to a material change or worsening of his accepted employment-related condition.

On June 22, 2021 OWCP received a supplemental report from Dr. Sontag dated June 14, 2021. Dr. Sontag noted that he had been treating appellant since September 23, 2020, but that he had not been treating appellant for a lumbar strain condition. He related that he had diagnosed appellant with: (1) Grade 1 L5-S1 degenerative spondylolisthesis with left L5-S1 facet inflammatory changes, small central fissure with mild L5 foraminal narrowing causing left L5 and S1 radicular pain; and (2) 5 mm L3-4, 3.5 mm L4-5 disc bulge with severe facet arthropathy with annual fissure with foraminal stenosis causing bilateral L5 and S1 radicular pain. Dr. Sontag further opined that appellant's ability to work limited hours was directly related to his employment injury.

On June 22, 2021 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In a progress note dated August 5, 2021, Dr. Sontag reiterated his prior assessment and recommended an electromyography and nerve conduction velocity study. A work status note of even date from him continued to restrict appellant to modified duty.

In a March 16, 2022 notice, OWCP's hearing representative informed appellant that his oral hearing was scheduled for April 26, 2022 at 1:30 p.m. Eastern Standard Time (EST). She provided him 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 May 9, 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.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 representative at least 30 days before the scheduled date.⁴ OWCP has the burden of proving that it properly mailed notice of the scheduled hearing to a claimant and any representative of record.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.⁶ 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.⁷ Where it

³ 20 C.F.R. § 10.616(a).

⁴ *Id.* at § 10.617(b).

⁵ *W.R.*, Docket No. 22-1016 (issued September 30, 2022); *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).

⁶ 20 C.F.R. § 10.622(f).

⁷ *Id.*

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.⁸

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 June 15, 2021 decision denying appellant's recurrence claim, he filed a timely request for an oral hearing before a representative of OWCP's Branch of Hearings and Review. In a March 16, 2022 notice, OWCP's hearing representative notified him that OWCP had scheduled a telephonic hearing for April 26, 2022 at 1:30 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.⁹

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.¹⁰

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.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6g (September 2020); *see also M.S. and L.L. supra* note 5; *K.H.*, Docket No. 20-1198 (issued February 8, 2021); *A.J.*, Docket No. 18-0830 (issued January 10, 2019).

⁹ *See M.S., L.L., and V.C., supra* note 5.

¹⁰ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the May 9, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 6, 2023
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