

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

J.H., Appellant

and

**DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
Leesburg, VA, Employer**

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**Docket No. 22-0934
Issued: March 2, 2023**

Appearances:
*Aaron Wilt, for the appellant*¹
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 May 31, 2022 appellant, through her representative, filed a timely appeal from a February 7, 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 5, 2021, to the

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on an appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative’s collection of a fee without the Board’s approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

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.³

ISSUE

The issue is whether OWCP properly determined that appellant abandoned her request for an oral hearing.

FACTUAL HISTORY

On August 28, 2021 appellant, then a 39-year-old air traffic controller, filed a traumatic injury claim (Form CA-1) alleging that on August 26, 2021 she sustained psychological trauma when she witnessed two aircraft under her control in unsafe proximity while in the performance of duty. On the reverse side of the claim form, appellant's supervisor, J.P., acknowledged that she was injured in the performance of duty but challenged the claim, opining that this loss of standard separation did not warrant an extended amount of time off of work and that appellant did not ensure positive separation between aircraft with a significant speed differential. Appellant stopped work on August 27, 2021.

In a September 2, 2021 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of evidence required and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

Appellant subsequently submitted an August 28, 2021 evaluation and an August 28, 2021 attending physician's report (Form CA-20) from Dr. Glenn N. Paule-Carres, a licensed clinical psychologist.

The employing establishment submitted a September 23, 2021 challenge statement contending that there was no potential for midair collision.

By decision dated October 5, 2021, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the August 26, 2021 employment incident occurred as alleged. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

OWCP thereafter received an employing establishment status report dated October 12, 2021 from Dr. Paule-Carres and a work capacity evaluation for psychiatric/psychological conditions (Form OWCP-5a) of even date.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the February 7, 2022 decision, appellant submitted additional evidence to OWCP and to the Board 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.*

On October 17, 2021 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In a December 14, 2021 notice, OWCP's hearing representative informed appellant that her oral hearing was scheduled for January 25, 2022 at 9:00 a.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, OWCP found that appellant had abandoned her request for an oral hearing as she 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 she had contacted the Branch of Hearings and Review either prior to or after the scheduled hearing to explain her 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.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 representative at least 30 days before the scheduled date.⁵ OWCP has the burden of proving that it properly mailed notice of the scheduled hearing to a claimant and any representative of record.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.⁷ 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 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.⁸

⁴ 20 C.F.R. § 10.616(a).

⁵ *Id.* at § 10.617(b).

⁶ *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).

⁷ 20 C.F.R. § 10.622(f).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6g (September 2020); *see also L.L.*, and *V.C.*, *supra* note 6; *K.H.*, Docket No. 20-1198 (issued February 8, 2021); *A.J.*, Docket No. 18-0830 (issued January 10, 2019).

ANALYSIS

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

Following OWCP's October 5, 2021 decision denying appellant's traumatic injury claim, she filed a timely request for an oral hearing before a representative of OWCP's Branch of Hearings and Review. In a December 14, 2021 notice, OWCP's hearing representative notified her that she had scheduled a telephonic hearing for January 25, 2022 at 9:00 a.m. EST. OWCP's 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. She 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 failure to appear, the Board finds that OWCP properly determined that she abandoned her request for an oral hearing.¹⁰

CONCLUSION

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

⁹ See *L.L., V.C. and L.T.*, *supra* note 6.

¹⁰ *Id.*

ORDER

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

Issued: March 2, 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