

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

_____)
D.B., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
PITTSBURGH VA MEDICAL CENTER --)
UNIVERSITY DRIVE, Pittsburgh, PA, Employer)
_____)

Docket No. 22-1251
Issued: March 27, 2023

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On August 23, 2022 appellant filed a timely appeal from a March 18, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated November 2, 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 March 18, 2022 decision, appellant submitted additional evidence to OWCP. 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 her request for an oral hearing.

FACTUAL HISTORY

On October 15, 2020 appellant, then a 38-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on March 31, 2020 she contracted COVID-19 when she assisted a patient taking a shower while in the performance of duty. She stopped work on March 31, 2020. By decision dated November 2, 2021, OWCP accepted appellant's claim for COVID-19.

By separate decision dated November 2, 2021, OWCP denied appellant's claim for continuation of pay (COP), finding that she had not reported the March 31, 2020 employment injury on an OWCP-approved form within 30 days of the date of injury.

On December 2, 2021 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In a February 4, 2022 notice, OWCP's hearing representative informed appellant that it had scheduled a telephonic hearing for March 7, 2022 at 11:30 a.m. Eastern Standard Time (EST). The notice included the toll-free telephone number and appropriate passcode to 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 of the hearing was received.

By March 18, 2022, OWCP's hearing representative 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 found that there was no evidence in the record that appellant had contacted the Branch of Hearings and Review either prior to, or subsequent to, the scheduled hearing to request a postponement or 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.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

³ 20 C.F.R. § 10.616(a).

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 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 her request for an oral hearing.

Following OWCP's November 2, 2021 decision denying appellant's claim for COP, she filed a timely request for an oral hearing before a representative of OWCP's Branch of Hearings and Review. In a February 4, 2022 notice, a hearing representative notified her that it had scheduled a telephonic hearing for March 7, 2022 at 11:30 a.m. EST. The hearing notice was properly mailed to appellant's last known address of record and provided instructions on how to participate. The notice was not returned as undeliverable. The Board has held that, absent evidence to the contrary, a notice mailed in the ordinary course of business is presumed to have been received by the intended recipient.⁹ The presumption is commonly referred to as the "mailbox rule." 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

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.*

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6g (February 2020); *see also W.R., M.S., and L.L., supra* note 5; *D.F.*, Docket No. 21-0952 (issued April 21, 2022); *K.H.*, Docket No. 20-1198 (issued February 8, 2021); *A.J.*, Docket No. 18-0830 (issued January 10, 2019).

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

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.

ORDER

IT IS HEREBY ORDERED THAT the March 18, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 27, 2023
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁰ *J.S.*, Docket No. 21-0595 (issued February 13, 2023).