

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

E.H., Appellant)	
)	
and)	Docket No. 23-1011
)	Issued: January 24, 2024
DEPARTMENT OF DEFENSE, DEFENSE)	
LOGISTICS AGENCY, Stockton, CA, Employer)	

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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 20, 2023 appellant filed a timely appeal from a March 28, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated October 24, 2022 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

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 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the March 28, 2023 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.*

FACTUAL HISTORY

On July 21, 1997 appellant, then a 51-year-old supply management officer, filed a traumatic injury claim (Form CA-1) alleging that he sustained injuries on July 16, 1997 when his right leg below his prosthesis caught on a floor covering and he tripped while in the performance of duty. OWCP accepted the claim for lumbar strain and right hip strain. It subsequently expanded its acceptance to include lumbar spondylolisthesis; pain due to internal orthopedic prosthetic devices, implants and grafts; displacement of a lumbar intervertebral disc without myelopathy; and mechanical complication of internal orthopedic device, implant, and graft on the right side. Appellant stopped work in July 1997 and did not return.³ OWCP paid him wage-loss compensation for total disability, including on the supplemental rolls effective March 1, 2020 and on the periodic rolls effective September 12, 2021.

By decision dated October 24, 2022, OWCP denied appellant's request for authorization for removal of a septic tank, finding that it was not medically necessary due to his accepted July 16, 1997 employment injury.

On November 11, 2022 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a February 8, 2023 notice, OWCP's hearing representative informed appellant that a telephonic hearing was scheduled for March 14, 2023 at 12:30 p.m., Eastern Standard Time (EST). The notice provided a toll-free number and the required passcode to participate in the telephone hearing. The hearing representative mailed the notice to his last known address of record.

Appellant did not call-in for the scheduled hearing and there is no indication that he requested postponement.

By decision dated March 28, 2023, OWCP found that appellant had abandoned his request for an oral hearing. It determined that he had failed to appear at the telephonic hearing scheduled for March 14, 2023, and had failed to contact OWCP either before or within 10 days after the scheduled hearing to request a postponement or 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.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 proof to

³ Appellant previously filed a claim for a traumatic injury on August 20, 1993, assigned OWCP File No. xxxxxx402. By decisions dated April 17, 2001 and October 4, 2010, the Board affirmed OWCP's finding that appellant had not sustained avascular necrosis of both hips causally related to the August 20, 1993 employment incident. Docket No. 99-1572 (issued April 17, 2001); Docket No. 10-0241 (issued October 4, 2010). OWCP File No. xxxxxx402 is a subsidiary of the current file number, OWCP File No. xxxxxx025.

⁴ 20 C.F.R. § 10.616(a).

⁵ *Id.* at § 10.617(b).

establish that it properly mailed to a claimant and any representative of record a notice of a scheduled hearing.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. 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.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 24, 2022 decision, appellant filed a timely request for an oral hearing before a representative of OWCP's Branch of Hearings and Review. In a February 8, 2023 letter, OWCP's hearing representative notified him that a telephonic hearing was scheduled for March 14, 2023 at 12:30 p.m., EST. She properly mailed the hearing notice to appellant's last known address of record and provided instructions on how to participate.⁸ 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 presumption is commonly referred to as the mailbox rule.⁹ Appellant did not request a postponement and failed to call-in for the scheduled hearing or otherwise provide notification to OWCP's Branch of Hearings and Review within 10 days of the scheduled hearing explaining his failure to appear. The Board, therefore, finds 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.

⁶ *K.A.*, Docket No. 22-1168 (issued December 8, 2022); *T.R.*, Docket No. 19-1952 (issued April 24, 2020); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

⁷ 20 C.F.R. § 10.622(f); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.6g (September 2020); *K.A.*, *id.*; *A.J.*, Docket No. 18-0830 (issued January 10, 2019).

⁸ *J.F.*, Docket No. 23-0348 (issued July 24, 2023); *J.W.*, Docket No. 22-1094 (issued January 23, 2023).

⁹ *G.C.*, Docket No. 23-0135 (issued July 27, 2023); *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).

¹⁰ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 24, 2024
Washington, DC

Patricia H. Fitzgerald, Deputy 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