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<b>N.G., Appellant</b>	)	
	)	
<b>and</b>	)	
	)	<b>Docket No. 24-0031</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	<b>Issued: March 27, 2024</b>
<b>JAMES J. PETERS VA MEDICAL CENTER,</b>	)	
<b>Bronx, NY, Employer</b>	)	
	)	

### Case Submitted on the Record

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

On October 14, 2023 appellant filed a timely appeal from a July 19, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated January 30, 2023, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

The issue is whether OWCP properly determined that appellant abandoned her request for an oral hearing before a representative of OWCP's Branch of Hearings and Review.

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

### **FACTUAL HISTORY**

On January 23, 2023 appellant, then a 48-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that she contracted COVID-19 on December 19, 2022 while in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that appellant was not in the performance of duty when she contracted COVID-19.

In support of appellant's claim, she submitted a polymerase chain reaction (PCR) test result, collected on December 20, 2022, which revealed that she tested positive for COVID-19.

By decision dated January 30, 2023, OWCP denied appellant's claim for continuation of pay (COP), finding that she had not reported the alleged December 19, 2022 injury on an OWCP-approved form within 30 days of the date of injury. It further noted that the decision affected only her entitlement to COP and did not affect her entitlement to other compensation benefits.

On February 9, 2023 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a June 7, 2023 notice, OWCP's hearing representative informed appellant that her oral hearing was scheduled for July 7, 2023 at 9:30 a.m. Eastern Standard Time (EST). She provided a toll-free number and pass code for access to the hearing. The hearing representative mailed the notice to appellant's last known address of record. Appellant neither appeared for the telephonic hearing, nor requested postponement of the hearing.

By decision dated July 19, 2023, OWCP found that appellant had abandoned her request for an oral hearing as she had received written notice 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 within 10 days after the scheduled hearing to explain her 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.<sup>2</sup> 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.<sup>3</sup> OWCP has the burden of proof to establish that it properly mailed to a claimant and any representative of record a notice of a scheduled hearing.<sup>4</sup>

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<sup>2</sup> 20 C.F.R. § 10.616(a).

<sup>3</sup> *Id.* at § 10.617(b).

<sup>4</sup> *T.R.*, Docket No. 19-1952 (issued April 24, 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).

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.<sup>5</sup>

### **ANALYSIS**

The Board finds that OWCP properly determined that appellant abandoned her request for an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following OWCP's January 30, 2023 decision denying the claim for COP, appellant filed a timely request for an oral hearing before a representative of OWCP's Branch of Hearings and Review. In a June 7, 2023 letter, OWCP's hearing representative notified her that she had scheduled a telephonic hearing for July 7, 2023 at 9:30 a.m., EST. She mailed the hearing notice to appellant's last known address of record and provided instructions on how to participate. However, appellant failed to call in for the scheduled hearing and did not request a postponement or provide an explanation to OWCP for her failure to attend the hearing within 10 days of the scheduled hearing.<sup>6</sup> The Board thus finds that OWCP properly determined that appellant abandoned her request for an oral hearing.<sup>7</sup>

On appeal appellant contends that she did not receive the June 7, 2023 notice before the scheduled hearing on July 7, 2023. However, 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.<sup>8</sup> There is no evidence of record now before the Board indicating nondelivery of OWCP's hearing notice, such that the presumption of receipt would be rebutted.<sup>9</sup>

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant abandoned her request for an oral hearing before a representative of OWCP's Branch of Hearings and Review.

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<sup>5</sup> 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); *J.C.*, Docket No. 23-0090 (issued June 27, 2023); *A.J.*, Docket No. 18-0830 (issued January 10, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

<sup>6</sup> *E.S.*, Docket No. 19-0567 (issued August 5, 2019); *J.C.*, *id.*

<sup>7</sup> *Supra* note 5.

<sup>8</sup> *See C.Y.*, Docket No. 18-0263 (issued September 14, 2018).

<sup>9</sup> The Board notes that on July 21, 2023, OWCP received returned mail. As the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board is precluded from reviewing this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005). Rather, OWCP may review the returned mail it received on July 21, 2023 and determine its relevancy to the claim upon return of the claim file. *See S.M.*, Docket No. 15-1303 (issued August 3, 2016).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 19, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 27, 2024  
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