

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

T.B., Appellant

and

**ENVIRONMENTAL PROTECTION AGENCY,
HEADQUARTERS, Washington, DC, Employer**

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**Docket No. 12-244
Issued: June 8, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 14, 2011 appellant filed a timely appeal from a June 16, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) and an October 24, 2011 decision denying his request for an oral hearing. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant met his burden to establish that he is entitled to wage-loss compensation for the period March 8 to May 8, 2009; and (2) whether OWCP properly denied appellant's request for an oral hearing as untimely.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 14, 2009 appellant, then a 55-year-old financial specialist, slipped and fell while in the performance of duty. He stopped work that date. OWCP accepted appellant's traumatic injury claim for right elbow contusion and thoracic sprain.² Appellant received continuation of pay from January 15 to February 28, 2009. In a January 15, 2009 medical note, Dr. Rajesh K. Sethi, a Board-certified neurologist, excused appellant from work until January 22, 2009. A February 5, 2009 return-to-work certificate from Dr. Mahmood Mohamadi, a Board-certified internist, postponed his release to February 6, 2009. In a March 29, 2009 attending physician's report, Dr. Ronald J. Singer, a chiropractor, specified that appellant was disabled from January 13 to February 25, 2009, but could resume regular work on March 31, 2009.

On February 10, 2010 appellant filed a claim for intermittent disability compensation for the period March 8 to May 8, 2009.³ He subsequently detailed in a time analysis form that he used 230 hours of leave without pay (LWOP), 56 hours of sick leave and 20 hours of annual leave.

OWCP informed appellant in a March 16, 2011 letter that additional evidence was needed to establish his claim. It gave him 30 days to submit a rationalized medical report from a qualified physician explaining how his accepted right elbow contusion and thoracic sprain rendered him unable to perform his federal employment from March 8 to May 8, 2009.

Appellant provided additional medical records. An April 24, 2009 note from Dr. Singer indicated that he provided chiropractic treatment from February 5 to April 3, 2009. In an undated report, Dr. Singer added that appellant could not use either of his legs as well as his right arm on the job. On examination, he observed limited thoracic range of motion (ROM) and loss of joint function, pain and minor edema from T4 through T9. Dr. Singer pointed out that appellant's work entailing standing, sitting, driving, walking, pulling, pushing, grasping, torquing and typing, *inter alia*.

By decision dated June 16, 2011, OWCP denied appellant's compensation claim, finding that the medical evidence did not sufficiently establish an intermittent disability for the period March 8 to May 8, 2009.

Appellant mailed a September 28, 2011 request for a telephonic hearing.⁴ By decision dated October 24, 2011, OWCP denied the request on the grounds that it was not made within 30 days after the issuance of the June 16, 2011 merit decision. After considering whether to grant a discretionary hearing, it determined that the issue could be further addressed by requesting reconsideration and submitting additional evidence.

² OWCP originally denied the claim by decision dated July 7, 2010. Its hearing representative reversed this decision on December 27, 2010.

³ The case record shows that appellant also identified March 1 and 9, 2009 as starting dates. In his AB-1 application for review, he clarified that March 8, 2009 was the proper date.

⁴ The envelope containing the request, which is part of the case record, displays an illegible postmark.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence. For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury. Whether a particular injury causes an employee to become disabled for work and the duration of that disability are medical issues that must be proved by a preponderance of reliable, probative and substantial medical opinion evidence.⁵ Such medical evidence must include findings on examination and the physician's opinion, supported by medical rationale, showing how the injury caused the employee disability for his or her particular work.⁶

Monetary compensation benefits are payable to an employee who has sustained wage loss due to disability for employment resulting from the employment injury.⁷ The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.⁸

ANALYSIS -- ISSUE 1

OWCP accepted appellant's traumatic injury claim for right elbow contusion and thoracic sprain arising from the January 14, 2009 employment incident. Thereafter, he claimed wage-loss compensation for intermittent disability, asserting that he incurred 230 hours of LWOP, 56 hours of sick leave and 20 hours of annual leave for the period March 8 to May 8, 2009 and submitted medical evidence.

The Board finds that appellant did not establish his entitlement to wage-loss compensation because the medical evidence did not sufficiently demonstrate that he was disabled during the claimed period due to his accepted conditions.

In January 15 and February 5, 2009 records, Dr. Sethi and Dr. Mohamadi placed appellant off duty until January 22 and February 5, 2009, respectively. Neither physician, however, presented any medical rationale setting forth the pathophysiological mechanism by which the accepted right elbow contusion and thoracic sprain rendered him unable to perform his

⁵ *Amelia S. Jefferson*, 57 ECAB 183 (2005); *William A. Archer*, 55 ECAB 674 (2004).

⁶ *Dean E. Pierce*, 40 ECAB 1249 (1989).

⁷ *Laurie S. Swanson*, 53 ECAB 517, 520 (2002). *See also Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

⁸ *Jefferson*, *supra* note 5.

regular employment.⁹ Furthermore, neither Dr. Sethi nor Dr. Mohamadi addressed the specific dates of disability for which appellant claimed compensation.¹⁰

Appellant also offered several medical records from his chiropractor, Dr. Singer, including a March 29, 2009 attending physician's report, an April 24, 2009 treatment note and an undated report. The Board has held that a chiropractor's report cannot constitute competent medical evidence on the issue of disability related to conditions other than a spinal subluxation demonstrated by x-ray.¹¹ Dr. Singer did not diagnose a spinal subluxation based on x-ray. In light of this and since the accepted conditions in this case were right elbow contusion and thoracic sprain, his opinion has no probative value. In the absence of rationalized medical opinion evidence, appellant failed to meet his burden of proof.

Appellant contends on appeal that he was entitled to disability compensation because OWCP accepted his traumatic injury claim. This fact did not relieve him of his burden to provide rationalized medical opinion evidence demonstrating that he was intermittently disabled for the period alleged due to his accepted conditions. As noted, the evidence of record did not sufficiently establish appellant's entitlement.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that a claimant for compensation who is not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.¹² A claimant is afforded the choice of either an oral hearing or a review of the written record.¹³ While a claimant is no longer entitled to an oral hearing or a review of the written record as a matter of right if his request is filed past the 30-day period, OWCP may grant the request within its discretionary power and must exercise that discretion.¹⁴

⁹ *Emma R. Bowman*, Docket No. 94-2431 (issued September 13, 1996); *Arita M. Cruz*, Docket No. 94-1694 (issued June 11, 1996).

¹⁰ *M.F.*, Docket No. 08-1927 (issued April 16, 2009).

¹¹ *E.W.*, Docket No. 09-6 (issued February 17, 2009); *Mary C. Samuel*, Docket No. 03-1557 (issued April 14, 2005). See *George E. Williams*, 44 ECAB 530 (1993); 5 U.S.C. § 8101(2).

¹² 5 U.S.C. § 8124(b)(1); *Joseph R. Giallanza*, 55 ECAB 186, 190-91 (2003).

¹³ 20 C.F.R. § 10.615.

¹⁴ See *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

ANALYSIS -- ISSUE 2

Appellant filed a request for an oral hearing dated September 28, 2011,¹⁵ which was more than 30 days after OWCP issued its June 16, 2011 decision.¹⁶ Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.¹⁷ Because the application was not timely filed, appellant was not entitled to an oral hearing.

OWCP has the discretionary power to grant an oral hearing when a claimant is not entitled to one as a matter of right. In this case, it exercised this discretion in its October 24, 2011 decision, finding that appellant's issue could be addressed by requesting reconsideration and submitting additional evidence. This basis for denying his request for a hearing is a proper exercise of OWCP's authority.¹⁸ Accordingly, the Board finds that OWCP properly denied appellant's request for an oral hearing.

Appellant suggests on appeal that he was uninformed of his appeal rights. The case record shows that OWCP attached a notice of such rights in the June 16, 2011 merit decision.

Appellant may submit new evidence or argument as part of a formal written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not establish his entitlement to wage-loss compensation. Furthermore, the Board finds that OWCP properly denied his request for an oral hearing as untimely.

¹⁵ Under OWCP's regulations and procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope containing the request. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011). If the postmark is not legible, the request will be deemed timely unless OWCP has kept evidence of date of delivery on the record reflecting that the request is untimely. *Id.*

¹⁶ The 30-day period for determining the timeliness of an employee's request for an oral hearing or review commences the day after the issuance of OWCP's decision. *See Donna A. Christley*, 41 ECAB 90 (1989). Here, since OWCP's decision was issued on Thursday, June 16, 2011, the time limit began on Friday, June 17, 2011 and expired on Sunday, July 17, 2011. Because this was not a regular business day, the deadline extended to Monday, July 18, 2011. *See id.*

¹⁷ *William F. Osborne*, 46 ECAB 198 (1994).

¹⁸ *Mary B. Moss*, 40 ECAB 640, 647 (1989).

ORDER

IT IS HEREBY ORDERED THAT the October 24 and June 16, 2011 merit decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: June 8, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board