United States Department of Labor
Employees' Compensation Appeals Board

K.S., Appellant	)	
and	)	**Docket No. 20-0304**
	)	**Issued: December 1, 2022**
U.S. POSTAL SERVICE, POST OFFICE, St. Louis, MO, Employer	)	

Appearances:
Frederick Wolfmeyer, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On November 25, 2019 appellant, through his representative, filed a timely appeal[2] from an August 6, 2019 merit decision and an October 3, 2019 nonmerit decision of the Office of

[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 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.

[2] Appellant, through counsel, submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of his oral argument request, appellant asserted that oral argument should be granted in order to present argument demonstrating that he had greater right lower extremity permanent impairment than had previously been found by OWCP. The Board, in exercising its discretion, denies his request for oral argument because this matter requires an evaluation of the medical evidence required. As such, the arguments on appeal can be adequately addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

Workers' Compensation Programs (OWCP).[3] Pursuant to the Federal Employees' Compensation Act[4] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[5]

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish disability from work during the period May 16 through October 26, 2018 due to the accepted January 15, 2018 employment injury; and (2) whether OWCP abused its discretion when it denied appellant's September 6, 2019 request for an oral hearing before an OWCP hearing representative as untimely filed pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On January 24, 2018 appellant, then a 58-year-old tractor trailer operator, filed a traumatic injury claim (Form CA-1) alleging that on January 15, 2018 he sustained bilateral elbow injuries when manually unloading a lift while in the performance of duty. OWCP accepted the claim for bilateral elbow contusions, lower back strain, and left shoulder/upper arm strain. Appellant stopped work on January 17, 2018. The record reflects that he returned to work on January 24, 2018, but stopped work again. OWCP paid appellant wage-loss compensation on the supplemental rolls from March 30 to April 29, 2018.

On February 12, 2018 the employing establishment offered appellant a modified assignment as a manual clerk in the processing manual unit. Appellant accepted the assignment on February 16, 2018, but did not return to work.

In a March 12, 2018 report, Dr. John W. Ellis, a Board-certified family practitioner, noted the history of appellant's January 15, 2018 employment injury and his medical treatment. He reported that a January 24, 2018 x-ray of appellant's lumbar spine revealed mild lumbar spondylosis and January 24, 2018 x-rays of his elbows were negative. Dr. Ellis recommended additional diagnostic testing including a magnetic resonance imaging (MRI) scan of the cervical and lumbar spine, bilateral shoulders and bilateral elbows and electromyogram (EMG) studies of the bilateral upper and lower extremities. He opined that appellant was totally disabled from work due to severe weakness in the bilateral upper and lower extremities. However, in a March 12,

[3] The Board notes that, during the pendency of this appeal, OWCP issued December 31, 2019 and January 13, 2020 nonmerit decisions, and June 11 and July 23, 2020 merit decisions, which addressed the same issues that are the subject of the current appeal. The Board and OWCP may not simultaneously exercise jurisdiction over the same issue(s). 20 C.F.R. §§ 501.2(c)(3), 10.626. *See J.A.*, Docket No. 19-0981 (issued December 30, 2019); *Arlonia B. Taylor*, 44 ECAB 591 (1993); *Douglas E. Billings*, 41 ECAB 880 (1990). Consequently, OWCP's December 31, 2019 and January 13, June 11, and July 23, 2020 decisions are set aside as null and void.

[4] 5 U.S.C. § 8101 *et seq*.

[5] The Board notes that, following the October 3, 2019 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*.

2018 work status form, Dr. Ellis indicated that appellant could work full time with restrictions as of March 13, 2018.

On April 12, 2018 Dr. Ellis provided updated work restrictions. This included lifting five pounds intermittently for eight hours; limited walking; limited simple grasping and limited fine manipulation/keyboarding with five-minute breaks once every hour and frequent change of positions from sit to stand and stand to sit.

In a letter to the employing establishment dated April 18, 2018, appellant forwarded Dr. Ellis' work restrictions and related that he was more than willing to return to work as long as the work assignment was within Dr. Ellis' work restrictions.

On April 27, 2018 the employing establishment offered appellant a modified clerk position with filing duties, effective April 30, 2018. The physical requirements of the job included lifting five pounds 1 to 8 hours a day; fine manipulation of 1 to 8 hours a day; and simple grasping 1 to 8 hours per day. The offer was signed by Manager K.J. and accepted by appellant on May 2, 2018. Appellant returned to work from May 2 to 9, 2018.

In a May 14, 2018 work status note, Dr. Ellis indicated that appellant was temporarily totally disabled from work.

On May 25, 2018 appellant filed a Form CA-7 claim for compensation alleging disability from work for the period May 16 through 25, 2018. He continued to file CA-7 forms for disability from work through October 26, 2018.[6]

In a development letter dated June 5, 2018, OWCP noted that it was unclear why appellant could not perform the duties of the position he began on May 2, 2018. It requested that he submit medical evidence from his treating physician that provided objective examination findings and medical rationale, which supported that he was not able to return to work in the limited-duty capacity he began on May 2, 2018. OWCP afforded appellant 30 days to submit the necessary evidence.

In June 11 and 15, 2018 reports, Dr. Patricia F. McKelvy, a Board-certified internist, opined that appellant was temporarily totally disabled from his usual job due to his accepted conditions and that he was unable to work eight hours without restrictions.

OWCP received an August 15, 2018 report from Dr. McKelvy, who reported that appellant was seen on January 18, 2018 with complaints of right elbow and back pain related to a January 15, 2018 employment incident. Dr. McKelvy indicated that, after a brief return to work, appellant was unable to complete his duties. She noted that an MRI scan of appellant's right elbow showed a contusion of the distal humerus and a subchondral cyst and that a lumbar MRI scan showed degenerative joint disease. Dr. McKelvy opined that appellant sustained an employment-related

[6] A May 31, 2018 notice of 14-day suspension notified appellant that he would be suspended for a period of 14 days for failing to follow instructions regarding assistance with clerk duties in the dispatch office on May 14, 2018. A July 6, 2018 Step 2 Grievance Settlement indicated that appellant's 14-day notice of suspension dated May 30, 2018 for failure to follow instructions on May 14, 2018 would be expunged from his record on November 30, 2019.

traumatic injury which caused him to have restricted activity and lost time for treatment of the injury.

In an October 4, 2018 email, the employing establishment advised that it had 40 hours of work available within appellant's restrictions, during his claimed period of disability.

In an email dated October 25, 2018 to the employing establishment, appellant's representative indicated that, in May 2018, appellant had received two modified assignments. A May 1, 2018 job offer, from supervisor L.S., pertained to work in the dispatch office. The May 2, 2018 job offer, provided by Manager K.J., was the job offer, which appellant accepted. The representative confirmed that appellant was working the assignment from K.J. when L.S. instructed him to work in the dispatch office. He indicated that appellant was given a 14-day suspension and that appellant called Dr. Ellis who found that appellant was disabled as he could not perform the dispatch work. A copy of the April 27, 2018 job offer for modified clerk, signed by K.J and accepted by appellant on May 2, 2018, was provided. An assignment order signed by both appellant and supervisor L.S. on May 1, 2018 contained a directed assignment for clerk vehicle dispatching, with a start date of April 28, 2018.

On October 25, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF), a list of questions, and the medical evidence of record, to Dr. Richard T. Katz, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the relationship between appellant's claimed conditions and factors of his employment. In a December 5, 2018 report, Dr. Katz noted appellant's history of injury and his review of the medical records and related his physical examination findings. He indicated that appellant's behavior was highly somatoform, belligerent in a quiet way, and he would not answer many simple questions. Dr. Katz reported that appellant demonstrated almost no range of motion at the neck, low back and shoulders. Appellant's movements were slowed non-physiologically, he was painful everywhere to the touch, he had diffuse give-way weakness on manual muscle testing, and showed poor effort on grip testing. He noted that the examination findings for the cervical region, right shoulder and lumbosacral region, were either unremarkable or unreliable due to appellant's behaviors. Dr. Katz also noted that there was no radiological imaging to review. He indicated that appellant's evaluation was most notable by complaints suggestive of mental health issues and marked somatoform behaviors; thus, malingering had to be considered. Dr. Katz opined that the accepted lumbosacral sprain, shoulder sprain and elbow sprains should have resolved within a three-month window. He refuted the diagnosis of epicondylitis, noting that it was a chronic repetitive use disorder, and found no evidence of radiculopathy. Dr. Katz emphasized that he could not state whether appellant's lack of cooperation with the examination was intentional or not. He concluded that appellant could return to his previous employment and no further treatment was indicated for the employment-related injury.

In a January 2, 2019 statement, appellant related that he was working limited duty until the employing establishment changed his assignment. He indicated that he filed for wage-loss compensation benefits after he was ordered to clock out. A copy of appellant's July 2, 2018 statement explaining the job offers and discipline received was enclosed.

By decision dated January 8, 2019, OWCP denied appellant's claim for wage-loss compensation for the period May 16, 2018 and continuing. It found that the medical evidence of

record was insufficient to establish that disability from work during the claimed period due to the accepted employment injury. OWCP accorded the weight of the medical evidence to the December 5, 2018 opinion of Dr. Katz, the second opinion examiner.

On January 25, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP received a May 21, 2018 MRI scan of appellant's left shoulder, which noted mild acromioclavicular arthritis; a May 22, 2018 MRI scan of the lumbar spine, which noted mild degenerative disc disease; a June 13, 2018 MRI scan of the right elbow, which noted subchondral cyst, small contusion or osteochondritis dissecans of distal humeral articular surface; and a normal June 13, 2018 MRI scan of the left elbow.

In a June 11, 2018 report, Dr. McKelvy advised that, as of May 14, 2018, appellant was temporarily totally disabled from his usual job duties and was unable to work eight-hour days without restrictions.

By decision dated April 30, 2019, OWCP's hearing representative vacated OWCP's January 8, 2019 decision, discrepancy needed to be resolved to determine if appellant was entitled to wage-loss compensation. The hearing representative remanded the case for further development.[7]

By development letter dated May 10, 2019, OWCP requested additional information from the employing establishment.

In a May 24, 2019 response, employing establishment supervisor L.S., confirmed that appellant had received and accepted two limited-duty assignments. L.S. indicated that the April 27, 2018 limited-duty assignment, which appellant accepted and worked, was available as recently as April 2019, when appellant opted to take disability retirement. In a July 16, 2019 statement, L.S. explained that there were two modified assignments because appellant never showed up for the first assignment dated February 12, 2018. He also clarified that the April 27, 2018 assignment appellant accepted remained available after May 17, 2018 and that was the job that returned available to appellant.

By decision dated August 6, 2019, OWCP denied appellant's claim for wage-loss compensation for the period May 16 through October 26, 2018.[8]

[7] The hearing representative found that appellant accepted job offers for both a clerk vehicle dispatch position and a modified clerk position. The hearing representative found that further information from the employing establishment was necessary to determine the reason why two job assignment offers were made to appellant, which assignment appellant was working prior to his May 16, 2018 work stoppage, and to verify the reason why disciplinary action was issued to appellant.

[8] The record reflects that OPM approved appellant's request for disability retirement, effective April 15, 2019.

By appeal request form dated September 5, 2019 and postmarked September 6, 2019, appellant requested an oral hearing of the August 6, 2019 decision before a representative of OWCP's Branch of Hearings and Review.

By decision dated October 3, 2019, OWCP's Branch of Hearings and Review denied appellant's hearing request, finding that its request was untimely as it was not filed within 30 days of the August 6, 2019 decision. After exercising its discretion, OWCP's Branch of Hearings and Review further found that the merits of the claim could equally well be addressed through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.[9] Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.[10]

Under FECA, the term disability means an incapacity because of an employment injury, to earn the wages the employee was receiving at the time of the injury.[11] When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.[12]

To establish causal relationship between the disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such causal relationship.[13] The opinion of the physician must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.[14]

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

[9] *See L.F.,* Docket No. 19-0324 (issued January 2, 2020); *T.L.,* Docket No. 18-0934 (issued May 8, 2019); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

[10] *See* 20 C.F.R. § 10.5(f); *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

[11] *Id.* at § 10.5(f); *see, e.g., G.T.*, Docket No. 18-1369 (issued March 13, 2019); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

[12] *G.T., id.*; *Merle J. Marceau*, 53 ECAB 197 (2001).

[13] *See S.J.*, Docket No. 17-0828 (issued December 20, 2017); *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

[14] *C.B.*, Docket No. 18-0633 (issued November 16, 2018); *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

claimed. To do so, would essentially allow a claimant to self-certify his or her disability and entitlement to compensation.[15]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish disability during the period May 16 through October 26, 2018 due to his accepted January 15, 2018 employment injury.

Dr. Ellis, in a May 14, 2018 work status note, and Dr. McKelvy, in a June 11, 2018 report, indicated that appellant was disabled from work as of May 14, 2018. However, neither Dr. Ellis, nor Dr. McKelvy provided an opinion on causal relationship between the claimed disability and the accepted employment injury.[16] Thus, these reports from Dr. Ellis and Dr. McKelvey are of no probative value and are insufficient to establish appellant's claim for compensation.[17]

Dr. McKelvy opined, in her June 11 and 15, 2018 reports, that appellant was able to work eight-hour days with restrictions. The Board has held that medical evidence that negates causal relationship is of no probative value.[18] This report is, therefore, insufficient to establish the claim.

In an August 15, 2018 report, Dr. McKelvy opined that appellant had an employment-related traumatic injury and, after a brief return to work on April 3 through May 1, 2018, he was unable to complete his duties. Dr. McKelvy's report contains a conclusory opinion without the necessary rationale explaining how and why the employment injury caused disability for work.[19] Therefore, this report is insufficient to establish appellant's claim.

Appellant also submitted several MRI scan studies of the lumbar spine, and bilateral elbows. However, the Board has held that diagnostic studies, standing alone, lack probative value as they do not address whether the accepted employment injury caused appellant to be disabled from work during the claimed period.[20]

As appellant has not submitted rationalized medical opinion evidence sufficient to establish employment-related disability during the period May 16 through October 26, 2018 due to his accepted January 15, 2018 employment injury, the Board finds that he has not met his burden of proof.

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[15] *T.L.*, Docket No. 18-0934 (issued May 8, 2019); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

[16] *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

[17] *J.T.*, Docket No. 19-1813 (issued April 14, 2020).

[18] *T.W.*, Docket No. 19-0677 (issued August 16, 2019).

[19] *C.E.*, Docket No. 19-0192 (issued July 16, 2019).

[20] *See V.H.*, Docket No. 18-1282 (issued April 2, 2019); *J.S.*, Docket No. 17-1039 (issued October 6, 2017).

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides: "Before review under section 8128(a) of this title [relating to reconsideration], a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his [or her] claim before a representative of the Secretary."[21]

Section 10.615 of Title 20 of the Code of Federal Regulations provides, "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record."[22] The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which the hearing is sought.[23] However, OWCP has discretion to grant or deny a request that is made after this 30-day period.[24] In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.[25]

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's September 6, 2019 hearing request as untimely filed pursuant to 5 U.S.C. § 8124(b).

Appellant had 30 days from OWCP's August 6, 2019 merit decision to request a hearing before OWCP's Branch of Hearings and Review. He requested an oral hearing by appeal request form dated September 5, 2019, and postmarked September 6, 2019. As the postmark date of his appeal request form was more than 30 days after OWCP's August 6, 2019 decision, appellant was not entitled to an oral hearing as a matter of right.[26] Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.[27]

[21] 5 U.S.C. § 8124(b)(1).

[22] 20 C.F.R. § 10.615.

[23] *Id.* at § 10.616(a); *M.H.*, Docket No. 19-1087 (issued October 17, 2019); *B.V.*, Docket No. 18-1473 (issued April 23, 2019).

[24] *G.W.*, Docket No. 10-0782 (issued April 23, 2010); *James Smith*, 53 ECAB 188, 191-92 (2001).

[25] *K.L.*, Docket No. 19-0480 (issued August 23, 2019); *C.C.*, Docket No. 18-1769 (issued April 5, 2019); *James Smith*, *id.*

[26] 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 2.1601.4a (October 2011). In this case, 30 days after OWCP's August 6, 2019 decision is September 5, 2019. As appellant's request was a hearing was postmarked September 6, 2019, it is untimely filed.

[27] 5 U.S.C. § 8124(b)(1); *see R.H.*, Docket No. 18-1602 (issued February 22, 2019); *William F. Osborne*, 46 ECAB 198 (1994).

The Board finds that OWCP properly exercised its discretion in denying appellant's request for a hearing by determining that the issue in the case could be addressed equally well by requesting reconsideration and submitting new evidence relevant to the issue of appellant's wage-loss compensation claim for the period May 16, 2018 and continuing.[28] The Board has held that the only limitation on OWCP's authority is reasonableness, and an abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[29] In this case, the record does not indicate that OWCP abused its discretion in its denial of appellant's untimely request for an oral hearing. Accordingly, the Board finds that OWCP properly denied his request for a hearing as untimely filed under 5 U.S.C. § 8124(b).[30]

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish disability during the period May 16 through October 26, 2018 due to his January 15, 2018 employment injury. The Board also finds that OWCP did not abuse its discretion when it denied appellant's September 6, 2019 request for an oral hearing before an OWCP hearing representative as untimely filed under 5 U.S.C. § 8124(b).

[28] *M.H.,* Docket No. 15-0774 (issued June 19, 2015).

[29] *M.G.,* Docket No. 17-1831 (issued February 6, 2018); *Daniel J. Perea,* 42 ECAB 214, 221 (1990).

[30] *Id.*; *R.P.,* Docket No. 16-0554 (issued May 17, 2016).

ORDER

IT IS HEREBY ORDERED THAT the August 6 and October 3, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 1, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board