

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

|   |   |                          |
|---|---|--------------------------|
| S.W., Appellant   | ) |                          |
|   | ) |                          |
| and   | ) | Docket No. 24-0722       |
|   | ) | Issued: October 11, 2024 |
| U.S. POSTAL SERVICE, PROCESSING &<br>DISTRIBUTION CENTER, Birmingham, AL, | ) |                          |
| 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 June 25, 2024 appellant filed a timely appeal from January 17 and 23, April 22 and May 7, 2024 merit decisions, and May 31, 2024 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant has met her burden of proof to establish the remaining claimed intermittent disability from work for the period May 13 through October 17, 2023 causally related to the accepted April 14, 2021 employment injury; and (2) whether OWCP properly denied appellant's requests for a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).

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

## **FACTUAL HISTORY**

On August 19, 2021 appellant, then a 34-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on August 14, 2021 she injured her neck and left shoulder when carrying heavy trays while in the performance of duty. OWCP accepted the claim for bicipital tendinitis of the left shoulder, cervical disc displacement at C5-6 and at the occipito-atlanto-axial region, and bursitis of the left shoulder. It paid appellant wage-loss compensation.

On October 5, 2021 appellant accepted a position as a modified mail processing clerk. The job offer noted that it was within her medical restrictions of no standing more than five hours per day, and no climbing, twisting, pulling/pushing, reaching above the shoulder, or operating machinery.

On May 22, 2023 appellant filed claims for compensation (Form CA-7) for intermittent disability from work during the period May 6 through 19, 2023.

In a development letter dated June 5, 2023, OWCP informed appellant of the deficiencies of her claim for wage-loss compensation. It advised her of the type of medical evidence needed to establish her claim and afforded her 30 days to submit the necessary evidence.

Appellant subsequently submitted a receipt from an urgent care facility visit dated May 13, 2023. In reports dated May 15 and 16, 2023, Dr. Robert Agee, Board-certified in family medicine, advised that he had seen appellant in his office on those dates. Office visit notes indicated that she had undergone therapy and provided diagnoses of left shoulder bicipital tendinitis, cervical disc displacement, and left shoulder bursitis. On May 18, 2023 Dr. Agee advised that appellant “stated she has been off work due to extreme discomfort and flare-ups in her neck and shoulders, due to overuse.” He further related that appellant had received treatment on May 22, 23, and 30, and June 2, 20, 26, and 27, 2023. Dr. Agee also submitted accompanying treatment notes describing her therapy on those dates. In a duty status report (Form CA-17) dated June 26, 2023, Dr. Agee diagnosed cervical sprain, cervicgia, and shoulder sprain, provided work restrictions, and found that appellant could resume work on that date.

On June 19, 2023 appellant filed a Form CA-7 claim for intermittent disability from work during the period May 20 through June 2, 2023. The employing establishment challenged the claim, contending that appellant did “not have work hour restrictions for the dates claimed.”

On July 26, 2023 OWCP referred appellant to Dr. Richard Rex Harris, a Board-certified orthopedic surgeon, for a second opinion examination.

By decision dated August 7, 2023, OWCP authorized payment for 3.02 hours on May 15, 2023 and 4 hours on May 16, 2023. However, it denied the remaining claimed intermittent disability, finding that the medical evidence of record was insufficient to establish disability from work causally related to the accepted employment injury.

In an August 11, 2023 second opinion report, Dr. Harris reviewed appellant’s history of injury and provided findings on examination of tenderness to palpation of the neck and bilateral shoulders with full range of motion of the upper extremities. He found minimal cervical degenerative changes and opined that the employment-related condition had not resolved.

However, Dr. Harris further determined that appellant could work with restrictions. In a work capacity evaluation (Form OWCP-5c), he reported that she could perform sedentary or light work for eight hours per day.

Appellant continued to file Form CA-7 claims for intermittent disability from work. The employing establishment challenged the claims, contending that appellant did not have work-hour restrictions.

By decisions dated October 23, 2023 and January 17, 2024, OWCP authorized four hours of compensation due to time lost for medical appointments on May 22, 23, and 30, and June 2, 20, 26, and 27, 2023. However, it denied the remaining claimed disability, finding that the medical evidence of record was insufficient to establish disability from work during the claimed period causally related to the accepted employment injury.

OWCP subsequently received additional evidence, including July 10 August 8, 2023 reports, wherein Dr. Agee advised of his treatment of appellant. In a Form CA-17 dated July 17, 2023, Dr. Agee diagnosed cervical/shoulder sprain and provided work restrictions, including no sitting, standing, or walking for more than two hours per day.

By decisions dated January 23, 2024, OWCP authorized four hours of compensation for time lost due to medical appointments on certain dates during the period July 10 through August 8, 2023. However, it denied the remaining claimed intermittent disability, finding that the medical evidence of record was insufficient to establish disability from work during the claimed period causally related to the accepted employment injury.

Appellant continued to file additional Form CA-7 claims for wage-loss compensation.

OWCP subsequently received progress notes, wherein Dr. Agee indicated that he had provided therapy for appellant on certain dates during the period August 14 through October 20, 2023. In CA-17 forms dated August 24 and September 26, 2023, Dr. Agee again provided work restrictions.

On April 15, 2024 appellant requested reconsideration of OWCP's August 7, 2023 decision. By decision dated April 22, 2024, OWCP denied modification.

By decisions dated May 7, 2024, OWCP authorized 4 hours of compensation for time lost due to medical treatment on certain dates during the period August 14 through October 17, 2023. However, it denied the remaining claimed intermittent disability, finding that the medical evidence of record was insufficient to establish the claimed disability causally related to the accepted employment injury.

On May 14, 2024 appellant filed requests for review of the written record by a representative of OWCP's Branch of Hearings and Review with regard to the October 23, 2023 and January 23, 2024 decisions.

By decision dated May 31, 2024, OWCP denied appellant's request for review of the written record with regard to the October 23, 2023 decision, finding that the request was untimely filed. It further exercised its discretion and determined that the issue in the case could equally well

be addressed by a request for reconsideration before OWCP, along with the submission of new evidence.

By separate decision dated May 31, 2024, OWCP denied appellant's request for review of the written record with regard to the January 23, 2024 decisions, finding that the request was untimely filed. It further exercised its discretion and determined that the issue in the case could equally well be addressed through a request for reconsideration before OWCP along with the submission of new evidence.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>2</sup> has the burden of proof to establish the essential elements of his or her claim including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>3</sup> 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.<sup>4</sup> Whether a particular injury causes an employee to become disabled from work, and the duration of that disability are medical issues which must be proven by a preponderance of the reliable, probative, and substantial medical evidence.<sup>5</sup>

Under FECA, the term disability means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>6</sup> Disability is, thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.<sup>7</sup> An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.<sup>8</sup> When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical

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<sup>2</sup> *Id.*

<sup>3</sup> *A.R.*, Docket No. 20-0583 (issued May 21, 2021); *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>4</sup> *E.B.*, Docket No. 22-1384 (issued January 24, 2024); *C.B.*, Docket No. 20-0629 (issued May 26, 2021); *D.S.*, Docket No. 20-0638 (issued November 17, 2020); *William A. Archer*, 55 ECAB 674 (2004); *Kathryn Haggerty*, 45 ECAB 383 (1994).

<sup>5</sup> 20 C.F.R. § 10.5(f); *L.M.*, Docket No. 21-0063 (issued November 8, 2021); *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

<sup>6</sup> 20 C.F.R. § 10.5(f); *see J.M.*, Docket No. 18-0763 (issued April 29, 2020); *Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>7</sup> *D.W.*, Docket No. 20-1363 (issued September 14, 2021); *L.W.*, Docket No. 17-1685 (issued October 9, 2018).

<sup>8</sup> *See M.W.*, Docket No. 20-0722 (issued April 26, 2021); *D.G.*, Docket No. 18-0597 (issued October 3, 2018).

standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for loss of wages.<sup>9</sup>

The medical evidence required to establish causal relationship between a claimed period of disability and the accepted employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the claimed disability and the accepted employment injury.<sup>10</sup>

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.<sup>11</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not met her burden of proof to establish the remaining claimed intermittent disability from work during the period May 13 through October 17, 2023 causally related to the accepted April 14, 2021 employment injury.

On May 18, 2023 Dr. Agee noted that appellant advised that she had been off work due to increased discomfort of her shoulder and neck condition as a result of overuse. In CA-17 forms dated June 26, July 17, August 24, and September 26, 2023, he provided work restrictions. However, Dr. Agee failed to provide an opinion on causal relationship. Without an opinion regarding how the accepted conditions caused the claimed disability, these reports are of no probative value and are insufficient to establish the remaining claimed disability.<sup>12</sup>

Appellant also submitted treatment notes from Dr. Agee dated May 15 through October 20, 2023, however, these notes did not address disability from work. Thus, they are of no probative value and are insufficient to establish the remaining claimed disability claim.<sup>13</sup>

As the medical evidence of record is insufficient to establish the remaining claimed intermittent disability during the claimed period due to her accepted employment injury, the Board finds that appellant has not met her burden of proof.

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<sup>9</sup> See *D.R.*, Docket No. 18-0323 (issued October 2, 2018).

<sup>10</sup> *D.S.*, Docket No. 23-0414 (issued December 4, 2023); *Y.S.*, Docket No. 19-1572 (issued March 12, 2020).

<sup>11</sup> *A.G.*, Docket No. 21-0756 (issued October 18, 2021); *J.B.*, Docket No. 19-0715 (issued September 12, 2019); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

<sup>12</sup> See *C.G.*, Docket No. 20-1092 (issued September 22, 2021); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

<sup>13</sup> *Id.*; see also *E.M.*, Docket No. 20-0668 (issued April 28, 2021).

Appellant may submit new evidence or argument with a 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.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b)(1) of FECA provides that “a claimant for compensation 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 or her claim before a representative of the Secretary.”<sup>14</sup> Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.<sup>15</sup> A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier’s date marking and before the claimant has requested reconsideration.<sup>16</sup> Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant’s request and must exercise its discretion.<sup>17</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied appellant’s requests for review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).

On May 14, 2024 appellant filed requests for review of the written record by a representative of OWCP’s Branch of Hearings and Review with regard to OWCP’s October 23, 2023 and January 23, 2024 decisions. However, these requests were postmarked more than 30 days after OWCP’s January 23 and October 23, 2023 decisions. As noted above, a claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier’s date marking, and before the claimant has requested reconsideration.<sup>18</sup> Section 8124(b)(1) is unequivocal on the time

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<sup>14</sup> 5 U.S.C. § 8124(b).

<sup>15</sup> 20 C.F.R. §§ 10.616, 10.617.

<sup>16</sup> *Id.* at § 10.616(a).

<sup>17</sup> *M.F.*, Docket No. 21-0878 (issued January 6, 2022); *W.H.*, Docket No. 20-0562 (issued August 6, 2020); *P.C.*, Docket No. 19-1003 (issued December 4, 2019); *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

<sup>18</sup> *Supra* note 16.

limitation for filing a request for a hearing.<sup>19</sup> As such, appellant's requests were untimely filed, and appellant was not entitled to a review of the written record as a matter of right.<sup>20</sup>

The Board further finds that OWCP, in its May 31, 2024 nonmerit decisions, properly exercised its discretionary authority, explaining that it had considered the matter, and denied appellant's requests for review of the written record as the issue in the case could equally well be addressed through a reconsideration request.

The Board has held that the only limitation on OWCP's authority is reasonableness. 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 deductions from established facts.<sup>21</sup> In this case, the evidence of record establishes that OWCP acted reasonably in denying appellant's requests for a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).

### CONCLUSION

The Board finds that appellant has not met her burden of proof to establish the remaining claimed intermittent disability from work for the period May 13 through October 17, 2023, causally related to the accepted April 14, 2021 employment injury. The Board further finds that OWCP properly denied appellant's requests for review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).

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<sup>19</sup> See *supra* note 14; *K.N.*, Docket No. 22-0647; *G.H.*, Docket No. 22-0122 (issued May 20, 2022).

<sup>20</sup> See *D.R.*, Docket No. 22-0361 (issued July 8, 2022); *D.S.*, Docket No. 21-1296 (issued March 23, 2022); *P.C.*, Docket No. 19-1003 (issued December 4, 2019).

<sup>21</sup> See *S.I.*, Docket No. 22-0538 (issued October 3, 2022); *T.G.*, Docket No. 19-0904 (issued November 25, 2019); *Daniel J. Perea*, 42 ECAB 214 (1990).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 17 and 23, April 22, and May 7 and 31, 2024 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 11, 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