

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

S.M., Appellant

and

**U.S. POSTAL SERVICE, ARLINGTON SOUTH
STATION, Arlington, VA, Employer**

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**Docket No. 08-884
Issued: September 15, 2008**

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 February 4, 2008 appellant filed a timely appeal of an October 9, 2007 merit decision of the Office of Workers' Compensation Programs, denying her claim for wage-loss compensation for total disability from July 27 through August 20, 2007 and a January 11, 2008 nonmerit decision, denying her request for a review of the written record as untimely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

ISSUES

The issues are: (1) whether appellant has established that she was totally disabled from July 27 through August 20, 2007 due to her February 24, 2006 injuries; and (2) whether the Office properly denied her request for a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124.

FACTUAL HISTORY

On February 24, 2006 appellant, then a 35-year-old causal letter carrier, sprained her left ankle as she ran from dogs while in the performance of duty. She stopped work on the date of injury. By letter dated April 3, 2006, the Office accepted the claim for left ankle sprain/strain. It subsequently accepted the claim for fractured left calcaneus and authorized surgery, which was performed on January 17, 2007 by Dr. Paul S. Cooper, an orthopedic surgeon.

On June 26, 2006 appellant accepted the employing establishment's June 15, 2006 limited-duty job offer. She worked from June 26 through July 10, 2006, when she informed the employing establishment that she was resigning her limited-duty position and moving to Georgia. On July 10, 2006 the employing establishment terminated her employment due to her move.

By decision dated September 12, 2006, the Office terminated appellant's compensation on the grounds that she abandoned suitable work. In a November 17, 2006 decision, an Office hearing representative reversed the termination decision.¹

On August 20, 2007 appellant filed a claim for wage-loss compensation for total disability for the period July 27 through August 20, 2007.

By letter dated August 27, 2007, the Office advised Dr. Dennis A. Carlini, appellant's attending Board-certified orthopedic surgeon, about appellant's accepted employment-related injuries and resultant surgery. As it appeared that she experienced pain related to the surgery and additional surgery was possible, Dr. Carlini was asked to address her ability to return to some form of employment and whether any work restrictions were necessary. On August 27, 2007 the Office also advised appellant that her case record did not contain any updated medical evidence from her attending physician which covered the claimed period of total disability. She was afforded 30 days to submit additional evidence.

In a September 11, 2007 letter, Dr. Carlini advised the Office that Dr. Cooper would have to address any questions regarding appellant's ability to return to work as he performed her surgery. In June 2007, he advised her to see Dr. Cooper regarding these questions.

By decision dated October 9, 2007, the Office denied appellant's claim, finding the medical evidence of record did not establish that she was totally disabled during the period July 27 through August 20, 2007 due to her February 24, 2006 employment injuries.²

¹ The Board notes that the Office hearing representative's November 17, 2006 decision is not contained in the case record.

² Following the issuance of the Office's October 9, 2007 decision, the Office received additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and request reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

On an appeal request form dated December 14, 2007, appellant requested a review of the written record by an Office hearing representative. The envelope containing the request form was postmarked December 17, 2007.

By decision dated January 11, 2008, the Office denied appellant's request for a review of the written record on the grounds that it was untimely filed. It determined that the issue of whether she was entitled to for the period July 27 through August 20, 2007 could equally well be addressed by requesting reconsideration and submitting new evidence.

LEGAL PRECEDENT-- ISSUE 1

Under the Federal Employees' Compensation Act, the term disability is defined as an inability, due to an employment injury, to earn the wages the employee was receiving at the time of the injury, *i.e.*, an impairment resulting in loss of wage-earning capacity.³ 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.⁴ 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 probative and reliable medical opinion evidence.⁵ The fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.⁶ The Board will not require the Office 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 her disability and entitlement to compensation.⁷

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a left ankle sprain/strain and fractured left calcaneus on February 24, 2006 in the performance of duty. On August 20, 2007 she sought wage-loss compensation for total disability from July 27 through August 20, 2007. By decision dated October 9, 2007, the Office found that appellant had not established her disability for work during the claimed period due to her accepted employment-related injuries. Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her claimed disability and the accepted condition.⁸

The only medical evidence submitted by appellant was Dr. Carlini's September 11, 2007 letter. However, Dr. Carlini merely noted that Dr. Cooper was better qualified to provide an opinion regarding appellant's ability to work as he had performed her surgery. He did not

³ See *Prince E. Wallace*, 52 ECAB 357 (2001).

⁴ *Dennis J. Balogh*, 52 ECAB 232 (2001).

⁵ *Gary J. Watling*, 52 ECAB 278 (2001).

⁶ *Manuel Garcia*, 37 ECAB 767 (1986).

⁷ *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁸ *Alfredo Rodriguez*, 47 ECAB 437 (1996).

provide any opinion on whether appellant was totally disabled for work during the claimed period. The Board finds that Dr. Carlini does not support appellant's claim of total disability from July 27 through August 20, 2007.

Appellant failed to submit rationalized medical evidence establishing that her total disability during the period July 27 through August 20, 2007 resulted from the residuals of her accepted February 24, 2006 left ankle sprain/strain and fractured left calcaneus. The Board finds that she has not met her burden of proof.

LEGAL PRECEDENT-- ISSUE 2

Section 8124(b)(1) of the Act provides that before review under section 8128(a) of this title, 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 her claim before a representative of the Secretary.⁹ Section 10.615 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.¹⁰ Section 10.616(a) further provides that the 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 a hearing is sought and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.¹¹

Additionally, the Board has held that the Office, in its broad discretionary authority in the administration of the Act,¹² has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.¹³ The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of Board precedent.¹⁴

ANALYSIS -- ISSUE 2

The Board finds that the Office properly denied appellant's request for a review of the written record as untimely filed. The Office's decision denying her claim for disability was dated October 9, 2007. Appellant's request for a review of the written record was dated December 14, 2007 and postmarked December 17, 2007, more than 30 days following issuance of the October 9, 2007 decision.

⁹ 5 U.S.C. § 8124(b)(1).

¹⁰ 20 C.F.R. § 10.615.

¹¹ *Id.* at § 10.616(a).

¹² 5 U.S.C. §§ 8101-8193.

¹³ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

¹⁴ *Teresa M. Valle*, 57 ECAB 542 (2006). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

Although the Office determined that appellant's request was untimely, it nevertheless exercised its discretion by examining her request for review. It determined that appellant's case would be best served by her submission of a request for reconsideration together with new supporting evidence. The Board has held that, as the only limitation on the Office's authority is reasonableness, 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.¹⁵ In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for a review of the written record, which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a review of the written record under section 8124 of the Act.¹⁶

CONCLUSION

The Board finds that appellant has failed to establish that she was totally disabled during the period July 27 through August 20, 2007 due to her February 24, 2006 employment-related injuries. The Board further finds that the Office properly denied her request for a review of the written record as untimely.

¹⁵ *Samuel R. Johnson*, 51 ECAB 612 (2000).

¹⁶ On appeal, appellant contends for the first time that she did not receive the Office's "letter of appeal" because she had moved to Georgia where she did not receive her mail. She stated that if she had not telephoned her case manager in Jacksonville, Florida, she would have never received the appeal letter. This contention was not raised before or adjudicated by the Office and cannot be considered for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2008 and October 9, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 15, 2008
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