

FACTUAL HISTORY

On December 1, 2003 appellant, then a 50-year-old mail handler, filed a traumatic injury claim alleging that he injured his right shoulder and left elbow when lifting a heavy box. By letter dated December 18, 2003, the Office accepted the claim for arthropathy both shoulders.

On July 20, 2004 Dr. Timothy H. Krahn, a Board-certified orthopedic surgeon, performed a diagnostic arthroscopy of the right shoulder with repair of type 2 superior labrum anterior to posterior lesion. In a note of the same date, he asked that appellant be excused from work through July 26, 2004 at which time he would be seen for a postoperative visit. Appellant also submitted notes indicating that he had a July 26, 2004 appointment with Dr. Krahn.

On August 13, 2004 appellant filed a claim for compensation for the period July 22 to August 23, 2004. The employing establishment indicated that he used leave without pay from July 22 to August 23, 2004. On September 8, 2004 the employing establishment indicated that it was controverting appellant's entitlement to compensation based on the fact that he took sick leave from July 22 through August 23, 2004. It submitted leave request forms signed by a supervisor, in which appellant requested and was approved sick leave for this time period.

By decision dated September 22, 2004, the Office denied appellant's claim for wage-loss compensation from July 22 until August 23, 2004, based on its conclusion that he used sick and annual leave during the period claimed.

Subsequent to this decision, the employing establishment submitted a sheet detailing appellant's leave which indicated that he took eight days of leave without pay between August 14 and 23, 2004. He also submitted a July 26, 2004 medical report from Dr. Krahn, who indicated that appellant would be off work for the next five weeks.

In a letter dated October 22, 2004, postmarked October 23, 2004, appellant requested a review of the written record. By letter dated October 23, 2004, which accompanied the form and captioned. He noted that he was appealing the prior decision and that he was submitting further evidence in support of his claim.

By decision dated November 22, 2004, the Office denied appellant's request for a review of the written record because it was not filed within 30 days of the September 23, 2004. The Office further denied the request for the reason that the issue could equally well be addressed by requesting reconsideration from the district office and submitting evidence not previously considered which established that he did not use sick and annual leave during the period July 22 to August 23, 2004.

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of the Federal Employees' Compensation Act² defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee

² 5 U.S.C. §§ 8101-8193.

is receiving compensation, he may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.³

ANALYSIS -- ISSUE 1

In the instant case, the Office denied appellant's claim for compensation for the period from July 22 to August 23, 2004 on the grounds that the evidence supported that he used sick and/or annual leave during the period claimed. The Board finds that the evidence of record does not appear to support that fact. Although the employing establishment controverted appellant's claim on the basis that he was paid sick leave during this period, the evidence is in conflict. The employing establishment submitted requests for leave that were approved by his supervisor for this period of time. However, on the original claim for compensation, the employing establishment indicated that appellant used leave without pay from July 22 to August 23, 2004 and submitted pay records that supported this. The Office did not explain why it considered the requests for leave more accurate than the earlier reports of leave without pay. Accordingly, this case is not in posture for decision and will be remanded for the Office to further develop the evidence on this matter.⁴

CONCLUSION

The Board will remand this case for the Office to further develop the evidence with regard to whether appellant is entitled to compensation from July 22 through August 23, 2004.

³ 5 U.S.C. § 8116(a).

⁴ In light of the disposition of this issue, the issue as to whether the Office improperly denied appellant's request for a hearing or review of the written record is moot.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 22 and September 22, 2004 are hereby vacated and this case remanded for further consideration consistent with this opinion.

Issued: December 7, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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