

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

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**E.P., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Key West, FL, Employer**  
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**Docket No. 07-701  
Issued: September 21, 2007**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 17, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated June 28 and September 19, 2006 denying his claims for compensation. He also timely appealed a November 15, 2006 nonmerit decision from the Branch of Hearings and Review. Pursuant to 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 his burden of proof in establishing that he was disabled beginning February 15 to July 29, 2006; and (2) whether the Office properly found that he had abandoned his request for an oral hearing.

**FACTUAL HISTORY**

On November 28, 1984 appellant, then a 26-year-old letter carrier, filed a traumatic injury alleging that he injured his back and leg lifting while in the performance of duty. The Office accepted appellant's claim for lumbosacral strain and herniated disc at L5-S1. Appellant

filed a second claim for mental stress on October 10, 1985, alleging that he developed an emotional condition due to pressure from his supervisor to exceed his work restrictions. The Office accepted this claim for adjustment reaction, neurotic disorder and anxiety. Appellant underwent a right L5-S1 microdiscectomy on July 15, 1996, placement of a morphine pump in 1998 and multiple lysis of adhesions. He returned to work in a light-duty position on August 28, 2000. By decision dated November 2, 2000, the Office found that appellant's actual earnings as a modified clerk fairly and reasonably represented his wage-earning capacity.

Appellant filed a notice of recurrence of disability on May 21, 2002 alleging disability commencing on May 9, 2002. The Office authorized compensation benefits and appellant returned to light-duty work on July 13, 2002.

In a telephone memorandum dated February 28, 2006, appellant stated that he had stopped work because a coworker attacked him on "February 16, 2006." In a letter dated February 16, 2006, the employing establishment informed appellant that on February 15, 2006 he was placed in a nonduty, nonpay status due to a physical and verbal altercation with James Brady, a coworker.

The employing establishment submitted an investigative memorandum dated February 22, 2006 regarding the conduct of appellant and Mr. Brady on February 15, 2006. Mr. Brady stated that he interrupted a conversation between appellant and Joe Sicignano, a coworker, which upset appellant. This resulted in a loud argument. Supervisors intervened and appellant returned to his workstation. Appellant then suggested that Mr. Brady enter the restroom with him, which he declined. While Mr. Brady was on his break, appellant approached him in an aggressive and angry manner. Appellant then pursued Mr. Brady around the break room and spit in his face. Mr. Brady entered the restroom to wash his face and appellant followed and struck him on the left side of the face. He face was red and bleeding. Mr. Brady immediately left the restroom and reported the incident to a supervisor.

Appellant acknowledge that there was a verbal altercation, but stated that in the break room Mr. Brady became the aggressor and possibly spit in his face. He then entered the restroom to wash and "observed [Mr.] Brady standing in front of the sink scraping his eyebrow with his glasses." Mr. Brady then informed a supervisor that appellant had hit him. Appellant began to feel ill requested an ambulance and was transported to the hospital.

In a note dated March 1, 2006, Dr. Ronald DeMeo, a Board-certified anesthesiologist, reported appellant's complaint of pain in the right upper extremity "which occurred while working." He stated: "Another individual apparently was falling and fell into his right paracervical spine anteriorly." Dr. Joseph E. O'Lear, a Board-certified psychiatrist, completed a note on March 2, 2006 and stated that appellant should not return to work as he had exacerbated his symptoms of anxiety and depression since February 15, 2006. He noted that appellant experienced "some event at work on February 15, [2006]."

Appellant filed a claim for compensation on March 6, 2006 requesting compensation for leave without pay beginning February 15, 2006. In a letter dated March 15, 2006, the Office noted that his November 28, 1984 claim was accepted for anxiety state, adjustment reaction and displacement of lumbar disc. The Office further noted that appellant was involved in a verbal

and physical altercation with a coworker on February 15, 2006, which resulted in the employing establishment placing him in a nonpay status. The Office informed appellant that the evidence in the record suggested that he had sustained a new injury on February 15, 2006 and recommended that he file a traumatic injury claim. The Office also noted that, if appellant believed his current disability was due to his previously accepted employment injuries, he should submit supporting medical evidence. The Office allowed 30 days for a response.

On April 11, 2006 Dr. DeMeo performed a cervical epidural catheter placement. In a report dated April 20, 2006, he noted that appellant had continuing back pain and radiculopathy as well as depression. Dr. DeMeo provided appellant's work restrictions.

Dr. O'Lear completed a note on April 18, 2006 and diagnosed major depression disorder, anxiety disorder and post-traumatic stress disorder. He stated that appellant was currently unable to work.

In a report dated May 12, 2006, Dr. O'Lear stated that appellant's current emotional conditions were the result of his 1984 employment injury rather than the February 15, 2006 employment incident. He stated that the February 15, 2006 incident resulted as consequence of the employing establishment's failure to provide appellant with an appropriate workplace with minimal contact with people. Dr. O'Lear stated that appellant was forced to interact with employees on a minute-to-minute basis, to answer the telephone, to deal with customer problems and to obtain coffee for the postmaster. He stated that this work environment contributed to and aggravated appellant's conditions of major depressive disorder with psychotic features, post-traumatic stress disorder and generalized anxiety. Dr. O'Lear stated: "These tasks caused [appellant] more anxiety and stress and further contributed to his feelings of helplessness and hopelessness and exacerbated his low self-esteem thus worsening his underlying depression." He concluded that appellant's work environment was not appropriate for the accepted emotional conditions. Dr. O'Lear stated: "Any altercation based upon interaction with other people would have been entirely predictable under these circumstances. In the absence of adequate and reasonable accommodation, the employer must bear a substantial portion of the responsibility in this regard. While [appellant] is highly motivated to be a productive employee, it is my professional opinion that an adequate work environment based upon his limitations is essential for his success in this endeavor."

Appellant responded to the Office's request for information on May 24, 2006 and stated that the incident of February 15, 2006 was due to an aggravation of his previously accepted emotional conditions. He alleged that the employing establishment did not provide a work environment appropriate for his emotional conditions and this resulted in the February 15, 2006 employment incident.

By decision dated June 28, 2006, the Office denied appellant's claim for compensation beginning February 15, 2006. The Office stated that appellant had described a new injury on February 15, 2006 and must file a new claim for that date. The Office stated: "As of this date, the evidence of record at this time fails to support disability during the period you claimed."

Appellant filed a second claim for compensation on July 14, 2006 requesting compensation for leave-without-pay compensation from July 3, 2006. On July 31, 2006 he

requested compensation for leave-without-pay from July 4 to 29, 2006. The Office requested additional factual and medical evidence by letter dated August 15, 2006. The Office stated that Dr. O’Lear’s April 18, 2006 report was not sufficient to establish whether appellant’s disability for work was due to his November 28, 1984 employment injury or the February 15, 2006 incident. The Office noted that the evidence did not establish that his current total disability was due to his accepted 1984 employment injury and allowed appellant 30 days to submit new evidence.

Appellant requested an oral hearing regarding the June 28, 2006 decision on August 1, 2006 and indicated with a checkmark that he was open to the option of a teleconference.

In a report dated September 8, 2006, Dr. O’Lear stated that appellant’s disability for work was due to his original injury on November 28, 1984 rather than to a new injury or incidents.

By decision dated September 19, 2006, the Office denied appellant’s claim for compensation from July 4 to 29, 2006. The Office again noted that appellant must file a new claim not related to his November 28, 1984 employment injury. The Office stated that the medical evidence failed to support disability during the period claimed.

The Branch of Hearings and Review informed appellant by letter dated September 27, 2006 that an oral hearing would take place on October 26, 2006 at 8:45 a.m. eastern time. The Branch of Hearings and Review directed appellant: “A few minutes before the scheduled hearing time, please call the toll free number listed below and when prompted, enter the pass code listed below. This will connect you to the telephone hearing along with the hearing representative and the court reporter.”

By decision dated November 15, 2006, the Branch of Hearings and Review informed appellant that he had failed to appear for his oral hearing scheduled for October 26, 2006 and failed to contact the Office either prior or subsequent to the scheduled hearing to explain his failure to appear. The Office found that appellant had abandoned his request for hearing.

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

Appellant for each period of disability claimed, has the burden of proving by a preponderance of the reliable, probative and substantial evidence that he is disabled for work as a result of his employment injury. Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be proven by the preponderance of the reliable, probative and substantial medical evidence.<sup>1</sup>

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

Appellant returned to light-duty work as a result of his accepted employment injuries on July 13, 2002. He then stopped work on February 15, 2006 following an altercation with a coworker. Appellant filed claims for compensation requesting wage-loss compensation beginning February 15, 2006 and from July 4 to 29, 2006.

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<sup>1</sup> *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

In support of appellant's claim for disability, he submitted reports dated March 1 and April 11, 2006 from Dr. DeMeo, a Board-certified anesthesiologist, regarding pain in his right upper extremity and continuing back pain with radiculopathy. Dr. DeMeo did not provide a detailed statement explaining how appellant's current condition was due to his employment or his accepted 1989 employment injury, accepted for lumbosacral strain and an L5-S1 disc. These reports are not sufficiently detailed and well rationalized to establish that appellant was disabled for the periods claimed due to his back and arm injuries.

Appellant also submitted evidence supporting that his periods of disability were due to an emotional condition. In a note dated March 2, 2006, Dr. O'Lear, a Board-certified psychiatrist, stated that appellant experienced an event at work on February 15, 2006 exacerbating his symptoms of anxiety and depression. He opined that appellant's emotional condition which resulted in the February 15, 2006 altercation as well as his continuing emotional condition after the February 15, 2006 altercation was the result of the employing establishment's failure to provide him with appropriate work duties or environment. Dr. O'Lear indicated that appellant's recent work duties and environment contributed to and aggravated his accepted emotional conditions such that the February 15, 2006 altercation was inevitable.

The Board finds that Dr. O'Lear's reports are not sufficiently detailed and rationalized to establish that appellant's disability on or after February 15, 2006 was due to his accepted employment injuries. Dr. O'Lear alleged that appellant's employment duties forced him to interact with employees, answer the telephone and deal with customer problems. He stated that this work environment was not appropriate for appellant's psychological condition. The Board notes that appellant's 1985 claim was accepted for an adjustment reaction, neurotic disorder and anxiety. Appellant returned to work on August 28, 2000. Dr. O'Lear did not clearly explain why appellant was able to successfully work from November 2, 2000 through February 15, 2006 without a change in his injury-related condition given this inappropriate work environment. He failed to explain how performing these job duties worsened appellant's accepted conditions of adjustment reaction, neurotic disorder and anxiety rather than the implicated conditions of major depression, post-traumatic stress disorder and general anxiety disorder. Dr. O'Lear also failed to provide specific dates and periods of disability which he felt were due to appellant's accepted emotional conditions. Due to the defects, his reports are not sufficient to meet appellant's burden of proof. The Office properly denied his claim for disability attributed to his accepted emotional condition.

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

A claimant who has received a final adverse decision by the Office may obtain a hearing by writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.<sup>2</sup> Unless otherwise directed in writing by the claimant, the Office hearing representative will mail a notice of the time and place of the hearing to the claimant and

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<sup>2</sup> 20 C.F.R. § 10.616(a).

any representative at least 30 days before the scheduled date.<sup>3</sup> The Office has the burden of proving that it mailed to appellant and his representative a notice of a scheduled hearing.<sup>4</sup>

The authority governing abandonment of hearings rests with the Office's procedure manual. Chapter 2.1601.6(e) of the procedure manual, dated January 1999, provides as follows:

*“e. Abandonment of Hearing Requests.*

(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

Under these circumstances, H&R [Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the DO [district office]. In cases involving precoupment hearings, H&R will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.

(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, H&R should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.

This course of action is correct even if H&R can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend.”<sup>5</sup>

**ANALYSIS -- ISSUE 2**

The Office issued a decision on June 28 2006 denying appellant's claim for compensation due to disability beginning February 15, 2006. Appellant requested a hearing with an Office hearing representative regarding this matter on August 1, 2006 and indicated with a checkmark that he was open to the option of a teleconference. The teleconference was scheduled for October 26, 2006 by letter dated September 27, 2006.

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<sup>3</sup> *Id.* at 10.617(b). Office procedure also provides that notice of a hearing should be mailed to the claimant and the claimant's authorized representative at least 30 days prior to the scheduled hearing. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(a) (January 1999).

<sup>4</sup> See *Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999).

The Office scheduled an oral hearing before an Office hearing representative at a specific time and place on October 26, 2006. The record shows that the Office mailed appropriate notice to the claimant at his last known address. The record also supports that appellant did not request postponement, that he failed to appear at the scheduled hearing and that he failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment specified in the Office procedure manual, the Board finds that the Office properly found that appellant abandoned his request for an oral hearing before an Office hearing representative.

**CONCLUSION**

The Board finds that appellant failed to submit the necessary medical evidence to establish that he was totally disabled from work from February 15 to July 29, 2006, causally related to his accepted employment injuries. The Board further finds that appellant abandoned his request for an oral hearing.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 15, September 19 and June 28, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 21, 2007  
Washington, DC

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

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

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