

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

M.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Charlotte, NC, Employer**

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**Docket No. 08-2311
Issued: June 9, 2009**

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 19, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated April 8, 2008 denying intermittent periods of compensation. His appeal is also timely filed from a June 30, 2008 nonmerit decision denying his request for review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether appellant was disabled for intermittent periods; and (2) whether the Office properly denied appellant's request for review of the written record as untimely filed.

FACTUAL HISTORY

On June 13, 2007 appellant, then a 54-year-old letter carrier, filed an occupational disease claim alleging that he sustained a right shoulder condition as a result of the duties of his federal employment. He noted that he cased about 400 flats and letters a day, repetitively lifted mail

trays and delivered mail. Appellant attributed his right shoulder condition to repetitive motions, weight of equipment, setting and releasing the hand brake while delivering mail and repetitive opening and closing the vehicle door. On August 24, 2007 the Office accepted appellant's claim for complete rotator cuff rupture and right bicipital tenosynovitis. On September 25, 2007 Dr. David A. Esposito, a Board-certified orthopedic surgeon, performed arthroscopic extensive debridement; arthroscopic synovectomy complete, (therapeutic) anterior-posterior; arthroscopic subacromial decompression; open rotator cuff repair; and insertion of a Marcaine pump. Appropriate compensation and medical benefits were paid. On December 27, 2007 appellant returned to limited-duty work.

On January 2003 appellant claimed compensation for 1.58 hours on January 18, 2008 for a doctor's visit and therapy. On February 5, 2008 he claimed compensation for 1.60 hours on January 22, 2008 for therapy visit and 1.0 hours on February 1, 2008 for therapy visit. On February 20, 2008 appellant claimed compensation for 1.27 hours on February 4, 2008 for "therapy visit justification." By letter dated February 13, 2008, appellant noted that physical therapy authorization ceased on January 28 2008. On January 18, 2008 he went to get a new physical therapy prescription from his physician but had not received any word of further authorizations. Appellant submitted a note from Dr. Esposito, indicating that on January 18, 2008 appellant came in to pick up a physical therapy prescription. The February 12, 2008 note from appellant's physical therapy office noted that he discussed authorization for treatment on January 18 and February 4, 2008.

By letter dated March 3, 2008, the Office informed appellant that further medical evidence was needed to support his claim for compensation. It further noted that he could not claim leave without pay for anything other than examination, testing or treatment. The Office gave appellant 30 days to submit additional documentation.

By decision dated April 8, 2008, the Office denied appellant's claims for compensation for the following times: January 18, 2008 for 1.58 hours; January 22, 2008 for 1.6 hours; February 1, 2008 for 1 hour; and February 4, 2008 for 1.27 hours. It noted that there was no evidence of medical treatment on these dates.

By letter dated April 24, 2008, appellant stated that, before he made a decision on which type of appeal to pursue, he was making no claim for January 22 or February 1, 2008. He indicated that he had previously sent evidence regarding his visits on January 18 and February 4, 2008.

By appeal request form dated May 28, 2008, postmarked May 29, 2008 and received by the Office on June 3, 2008, appellant requested review of the written record by an Office hearing representative.

By decision dated June 30, 2008, the Office's Branch of Hearings and Review denied appellant's request for review of the written record as it was untimely filed. The Branch of Hearings and Review reviewed the request under its discretionary authority and denied appellant's request for the reason that the issue could be equally well addressed by requesting reconsideration and submitting new evidence.

LEGAL PRECEDENT -- ISSUE 1

A claimant has the burden of proving by a preponderance of the evidence that he or she is disabled for work as a result of an accepted employment injury and must submit medical evidence for each period of disability claimed.¹ 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. The Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.²

The Office's procedure manual provides that wages lost for compensable medical examination may be reimbursed.³ It notes that a claimant who has returned to work following an accepted injury or illness may need to undergo examination, testing or treatment. An employee may be paid compensation for wage loss while obtaining medical services and for reasonable time spent traveling to and from the medical provider's location.⁴

ANALYSIS -- ISSUE 1

The Board finds that the Office properly denied appellant's request for compensation for January 18 and 22 and February 1 and 4, 2008. There was no supporting medical documentation submitted establishing that appellant received any treatment on January 22 or February 1, 2008. Appellant does not appear to contest the denial of compensation for these dates. However, he appealed from the Office's denial of 1.58 hours on January 18, 2008 and 1.27 hours on February 4, 2008. As the Office properly noted, the procedure manual provides for the payment of compensation for wages lost while undergoing examination, testing or treatment for a work-related injury.⁵ The evidence submitted by appellant indicates that on January 18, 2008 he went to Dr. Esposito's office to pick up a physical therapy prescription. A note from his physical therapist indicates that on January 18 and February 4, 2008 appellant came in to discuss his authorization. There is no evidence that appellant received any examination, testing or treatment on those dates due to the effects of the employment-related injury. Accordingly, the Board finds that the Office properly denied compensation for these dates.

¹ See *Fereidon Kharabi*, 52 ECAB 291 (2001).

² *Sandra D. Pruitt*, 57 ECAB 126 (2005); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

³ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.16 (December 1995).

⁴ See *Daniel Hollars*, 51 ECAB 355 (2000); *Jeffrey R. Davis*, 35 ECAB 950 (1984).

⁵ See *supra* note 3.

LEGAL PRECEDENT -- ISSUE 2

A claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record.⁶ A request for either an oral hearing or review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought.⁷ If the request is not made within 30 days, a claimant is not entitled to a hearing or review of the written record as a matter of right. Furthermore, Office regulations provide that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.⁸

Although a claimant may not be entitled to a hearing as a matter of right, the Office has discretionary authority with respect to granting a hearing and it must exercise such discretion.⁹

ANALYSIS -- ISSUE 2

Appellant's request for review of the written record was dated May 28, 2008 and postmarked May 29, 2008, which was more than 30 days after the April 8, 2008 decision. The implementing regulations provide that a 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 or review of the written record is sought.¹⁰ Appellant's request was therefore untimely and he was not entitled to a review of the written record as a matter of right. On appeal, he asserts that his April 24, 2008 letter qualified as a request for review of the written record. However, this letter did not request review of the written record. Rather, appellant advised that he had not decided which avenue of appeal to pursue at that time and that he was not contesting the Office's denial of January 18 or February 4, 2008.

The June 30, 2008 decision also denied appellant's request on the grounds that the pertinent issue could be addressed by requesting reconsideration and submitting additional evidence to the district Office. This was a proper exercise of the Office's discretionary authority.¹¹ There is no evidence to establish that the Branch of Hearings and Review abused its discretion in denying appellant's request. Accordingly, the Board finds that the Branch of Hearings and Review properly denied appellant's request for a review of the written record.

⁶ 20 C.F.R. § 10.615 (2008).

⁷ *Id.* at § 10.616(a).

⁸ *Id.*

⁹ See *Samuel R. Johnson*, 51 ECAB 612 (2000); *Eileen A. Nelson*, 46 ECAB 377 (1994); *Herbert C. Holley*, 35 ECAB 140 (1981).

¹⁰ 20 C.F.R. § 10.616(a).

¹¹ *Mary B. Moss*, 40 ECAB 640, 647 (1989).

CONCLUSION

The Board finds that appellant did not establish his claim for intermittent periods of disability. The Board further finds that the Office properly denied appellant's request for review of the written record as untimely filed.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 30 and April 8, 2008 are affirmed.

Issued: June 9, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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