

OWCP properly denied appellant's request for a review of the written record before an OWCP hearing representative.

On appeal appellant argues that she was totally disabled from work for the period in question as her physician had instructed her not to work.

FACTUAL HISTORY

On March 11, 2011 appellant, then a 46-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on March 8, 2011 she strained her lower back while providing emergency support to a patient who was about to fall. OWCP accepted the claim for lumbar/low back sprain and lumbosacral ligament/joint sprain.³ Appellant stopped work on March 10, 2011 and returned to light-duty work on March 11, 2011.

On September 7, 2013 appellant filed a claim for wage-loss compensation for the period August 22 to September 5, 2013.

In duty status reports (Form CA-17) dated July 19 and August 22, 2013, Dr. Glenn Kerr, a treating Board-certified orthopedic surgeon, diagnosed degenerative disc disease and herniated disc which was causing radicular hip pain, which he attributed to the March 8, 2011 employment injury. He first released appellant to return to full-time work on July 13, 2013 in his July 19, 2013 Form CA-17 but in his later August 22, 2013 Form CA-17 he released appellant to full-time work on September 5, 2013 in the August 22, 2013 Form CA-17. On both forms, Dr. Kerr mentioned referring appellant to Dr. Peyman Nazmi, a treating Board-certified anesthesiologist and pain management specialist.

In a September 5, 2013 report, Dr. Nazmi diagnosed lumbar radiculopathy and lumbar degenerative disc disease. Appellant was seen for complaints of right leg and gluteal pain. Dr. Nazmi noted that appellant has had right leg pain since her March 8, 2011 employment injury. He recommended that appellant return to light-duty work with a lifting restriction of 25 pounds.

In a letter dated September 30, 2013, OWCP advised appellant that the evidence of record was insufficient to establish her claim for wage-loss compensation as the record contained no medical evidence documenting that she was totally disabled for the period in question due to the accepted March 8, 2011 employment injury. Appellant was advised as to the type of medical evidence required and was afforded 30 days to provide this information.

In an October 3, 2013 report, Dr. Nazmi diagnosed lumbar radiculopathy and lumbar degenerative disc disease and noted that appellant "has made significant progress" and opined that she should continue permanently with light-duty work.

³ The record reveals that on December 29, 2011 appellant also filed a claim for a recurrence of disability of her accepted March 8, 2011 employment injury. OWCP has not issued a final decision on the issue of whether she sustained a recurrence of disability due to her accepted March 8, 2011 employment injury. Therefore, the Board lacks jurisdiction to address this issue on appeal. 20 C.F.R. § 501.2(c). See *E.L.*, 59 ECAB 405 (2008); *Linda Beale*, 57 ECAB 429 (2006) (the Board's jurisdiction extends only to the review of final decisions by OWCP).

On November 1 and December 2, 2013 and January 7, 2014 Dr. Nazmi diagnosed lumbar radiculopathy and lumbar degenerative disc disease and noted appellant's pain complaints.

In CA-17 forms dated October 3, November 1, and December 2, 2013 and January 7, 2014, Dr. Nazmi noted that appellant was capable of performing light-duty work and provided work restrictions.

In a February 4, 2014 Form CA-17, Dr. Nazmi noted that appellant could return to full-duty work on February 5, 2014.

By decision dated February 24, 2015, OWCP denied appellant's claim for wage-loss compensation as the evidence failed to establish total disability for the period in question.

In a March 16, 2015 letter, Dr. Nazmi noted that appellant was under his care for leg and lower back pain for the period August 22 to September 5, 2013 and that he advised her not to work during that period.

On April 7, 2015 OWCP received appellant's undated request for a review of the written record by an OWCP hearing representative.

By decision dated May 6, 2015, the Branch of Hearings and Review denied appellant's request for review of the written record as being untimely filed.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.⁵ 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.⁶ 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.⁷

Under FECA the term "disability" means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁸ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.⁹ An employee who has a physical impairment causally related to his or her federal

⁴ 5 U.S.C. §§ 8101-8193

⁵ See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

⁶ See *Amelia S. Jefferson, id.*; see also *David H. Goss*, 32 ECAB 24 (1980).

⁷ See *Edward H. Horton*, 41 ECAB 301 (1989).

⁸ *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

⁹ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.¹⁰ When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in her employment, she is entitled to compensation for any loss of wages.

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 their disability and eligibility for compensation.¹¹

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for lumbar/low back sprain and lumbosacral ligament/joint sprain. Appellant stopped work on March 10, 2011 and returned to light-duty work on March 11, 2011. She filed a CA-7 form claiming wage-loss compensation for the period August 22 to September 5, 2013. OWCP denied appellant's claim for wage-loss compensation for the period in question as it found the record was devoid of any medical evidence finding appellant totally disabled for that period. The Board finds that appellant has failed to meet her burden of proof to establish wage-loss compensation for the claimed period.

The record is devoid of any medical evidence supporting appellant's contention that she was disabled from work for the period in question. OWCP advised her of the need to submit medical evidence supporting her disability. The relevant evidence submitted by appellant included reports dated September 5 through February 4, 2014 and CA-17 forms dated October 3, November 1, and December 2, 2013 and January 7 and February 4, 2014 from Dr. Nazmi. The CA-17 forms from Dr. Kerr released appellant to full-duty work at the earliest on July 13, 2013 and referred her to Dr. Nazmi. The CA-17 forms by Dr. Nazmi noted that appellant was capable of working light-duty work and provided work restrictions. In his reports for the period October 3, 2013 to February 4, 2014, Dr. Nazmi diagnosed lumbar radiculopathy and lumbar degenerative disease and noted that appellant was seen for right leg and gluteal pain complaints. He did not address disability in any of his reports. Neither the CA-17 forms from Drs. Kerr and Nazmi, nor the reports for the period October 3, 2013 to February 4, 2014 from Dr. Nazmi addressed the relevant issue of whether appellant was disabled from work for any period from August 22 to September 5, 2013 due to her accepted March 8, 2011 employment injury. Thus, the CA-17 forms from Dr. Kerr and reports from Dr. Nazmi are of little probative value and are insufficient to support appellant's contention that she was disabled from work during the claimed period.¹²

¹⁰ *Merle J. Marceau*, 53 ECAB 197 (2001).

¹¹ *See William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹² *W.W.*, Docket No. 09-1619 (issued June 2, 2010); *Carol A. Lyles*, 57 ECAB 265 (2005) (whether a particular injury caused an employee disability from employment is a medical issue which must be resolved by competent medical evidence).

The Board finds that appellant has not met her burden of proof to establish disability for the period August 22 to September 5, 2013 due to her accepted work injury. OWCP properly denied her claim for compensation.

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 is entitled to a hearing before an OWCP representative when a request is made within 30 days after issuance of an OWCP final decision.¹³ A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.¹⁴ OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.¹⁵ In such a case, it will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.¹⁶

ANALYSIS -- ISSUE 2

A request for a hearing must, as noted above, be made within 30 days after the date of the issuance of OWCP's final decision. Appellant requested a review of the written record by OWCP's Branch of Hearings and Review which was received April 7, 2015. As the request was submitted more than 30 days following issuance of the February 24, 2015 decision, it was untimely filed.

OWCP also has the discretionary power to grant a review of the written record when a claimant is not entitled to a review of the written record as a matter of right. The Board finds that the Branch of Hearings and Review, in its May 6, 2015 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for a review of the written record by an OWCP hearing representative because her claim could be addressed through a reconsideration application. The Board has held that as the only limitation on OWCP'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.¹⁷ In the present case, the Board finds that appellant's request for hearing was properly denied as untimely.

¹³ 5 U.S.C. § 8124(b)(1). See *A.B.*, 58 ECAB 546 (2007); *Gerard F. Workinger*, 56 ECAB 259 (2005).

¹⁴ 20 C.F.R. § 10.616(b).

¹⁵ *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

¹⁶ *Teresa M. Valle*, 57 ECAB 542 (2006).

¹⁷ *Id.*; *Daniel J. Perea*, 42 ECAB 214 (1990).

CONCLUSION

The Board finds that appellant failed to establish disability for the period August 22 to September 5, 2013 due to her accepted work injury. The Board further finds that appellant's request for review of the written record was properly denied as untimely filed.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 6 and February 24, 2015 are affirmed.

Issued: December 15, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board