

(FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish that she was disabled from February 6 to May 16, 2014 and May 19 to July 24, 2014 causally related to her accepted employment injury; and (2) whether OWCP properly denied appellant's request for an oral hearing as untimely under 5 U.S.C. § 8124(b).

FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances as outlined in the Board's prior decision are incorporated herein by reference. The facts relevant to the instant appeal are set forth below.

On February 6, 1997 appellant, then a 32-year-old rural mail carrier, filed a recurrence of disability (Form CA-2a) commencing that date causally related to a 1991 employment injury. OWCP adjudicated the alleged recurrence of disability as an occupational disease claim and accepted the claim for right shoulder strain and a cervical herniated disc. It paid appellant compensation for intermittent periods of disability.

By decision dated August 4, 2004, OWCP reduced appellant's compensation based on its finding that her actual earnings working 20 hours a week as a part-time modified mail processing clerk, effective November 7, 1998, fairly and reasonably represented her wage-earning capacity.

On December 19, 2009 the employing establishment reduced appellant's work hours from four to two hours per day under the National Reassessment Process. In a decision dated March 9, 2010, OWCP modified the August 4, 2004 decision after finding that its wage-earning capacity determination was erroneous as the position of modified mail processing clerk was makeshift in nature. In decisions dated July 13, 2010 and February 9, 2011, OWCP found that it had properly paid appellant compensation based on a recurrent pay rate. By decision dated August 1, 2012, the Board affirmed OWCP's pay rate determination.⁴

Appellant returned to full-time employment with restrictions on March 4, 2013.⁵

On February 5, 2014 Dr. Anjan K. Ghosh, a Board-certified anesthesiologist, diagnosed right supraspinatus tendinitis, right rotator cuff impingement syndrome, and subacromial bursitis. He discussed appellant's history of two prior shoulder surgeries and related that he would

³ Appellant filed a timely request for oral argument. After exercising its discretion, by order dated December 29, 2015, the Board denied her request as her arguments could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 15-1616 (issued December 29, 2015).

⁴ Docket No. 11-1889 (issued August 1, 2012).

⁵ On April 3 and May 21, 2013 OWCP requested that the employing establishment clarify whether appellant resumed work with or without restrictions.

perform a steroid injection if her pain had not decreased at a follow-up appointment in one month.

On March 21, 2014 appellant filed a claim for compensation (Form CA-7) for the period February 6 to March 21, 2014.⁶ On May 14, 2014 she filed a claim for compensation from March 24 to May 16, 2014.

By letter dated May 23, 2014, OWCP requested that appellant submit evidence supporting disability from employment for the claimed period of March 24 through May 16, 2014.

In an office visit note dated April 15, 2014, Dr. Ghosh discussed appellant's complaints of pain in her right shoulder and the right side of her neck. He provided a steroid injection.

In a report dated May 13, 2014, Dr. Ghosh evaluated appellant for multiple complaints, including "muscle aches, muscle weakness, arthralgia/joint pain, back pain, and swelling in the extremities." On examination he found impingement of the right shoulder at the rotator cuff, significant loss of right shoulder motion, and a positive Tinel's sign of the right wrist. Dr. Ghosh noted that appellant had pain relief for two weeks after her injection and prescribed medication for neck and upper trapezius muscle spasms.

By decision dated June 30, 2014, OWCP denied appellant's claim for compensation from February 6 to March 21, 2014 and March 24 to May 16, 2014. It found that she had not submitted sufficient medical evidence supporting disability for the claimed periods.

In a report dated June 15, 2014, received by OWCP on July 4, 2014, Dr. Ghosh related that on February 5, 2014 he treated appellant for increased right shoulder pain and reduced motion as a result of her employment injury. He diagnosed supraspinatus tendinitis and impingement syndrome of the right rotator cuff with bursitis. Dr. Ghosh recommended a shoulder injection if appellant's symptoms did not improve and advised her "to rest her shoulder until it was reevaluated on her next visit." He reevaluated appellant on March 12, 2014 for continued shoulder pain and loss of motion. Dr. Ghosh did not perform the shoulder injection until April 15, 2014 because of delays in authorization. He stated, "[Appellant] was told to rest the shoulder as much as possible and to return for reexamination in one month on May 13, 2014." On May 13, 2014 appellant reported that her pain improved for two weeks after the injection but then returned. Dr. Ghosh related "[Appellant] was instructed to progressively increase the range of motion of her right shoulder as per my directions. She may return to work in two weeks (approximately the first week in July) if everything continues to progress in the manner it was, however, she must restrict the amount of weight she lifts to 35 pounds"

⁶ In a decision dated May 7, 2013, OWCP determined that appellant received a \$247.41 overpayment of compensation because she returned to work on March 4, 2013 but received compensation until March 9, 2013. It further found that she was at fault in the creation of the overpayment.

On July 8, 2014 appellant requested a telephone hearing on the June 30, 2014 decision.⁷

In a duty status report dated July 19, 2014, Dr. Ghosh diagnosed status post cervical laminectomy and rotator cuff impingement syndrome. He found that appellant could resume her usual employment.

On July 25, 2014 appellant returned to her full-time employment position without restrictions.

On July 28, 2014 appellant filed a claim for compensation (Form CA-7) for the period May 19 to July 24, 2014. By letter dated August 4, 2014, OWCP requested that she submit a detailed medical report explaining why she was disabled from May 19 through July 24, 2014.

In a report dated April 15, 2014, received by OWCP on October 10, 2014 Dr. Ghosh diagnosed cervical postlaminectomy syndrome, degeneration of the cervical intervertebral disc, drug dependence, fibromyositis, inflammation and impingement of the rotator cuff tendon, rotator cuff syndrome, neck pain, and ulnar neuropathy.⁸ He performed a steroid injection on her shoulder.

By decision dated January 20, 2015, OWCP denied appellant's July 28, 2014 claim for compensation for the period May 19 to July 24, 2014.

By letter dated March 4, 2015 and postmarked March 5, 2015, appellant requested an oral hearing on the January 20, 2015 decision.

A hearing was held on February 24, 2015 regarding OWCP's June 30, 2014 decision denying appellant's claim for compensation from February 6 to May 16, 2014. At the hearing, she advised that Dr. Ghosh informed her not to work until after she received the steroid injection.

In a decision dated March 31, 2015, OWCP denied appellant's request for an oral hearing on the January 20, 2015 decision as untimely under section 8124. It considered the request within its discretion, but found that the matter could be equally well addressed by requesting reconsideration and submitting evidence supporting disability.

By decision dated May 11, 2015, the hearing representative affirmed the June 30, 2014 decision.

On appeal appellant argues that she would not have stopped work absent instructions from her physician. She contends that she did not receive approval for the injection because her physician was not authorized by OWCP.

⁷ On July 24, 2014 appellant requested reconsideration. In a response dated July 31, 2014, OWCP noted that she had requested a hearing on her case and advised her to withdraw her request if she wanted to pursue another appeal right.

⁸ The record contains reports dated October 2, 2014 and March 12, 2015 from Mandy Nehring, a nurse practitioner and an October 29, 2014 report from Dr. Steven Chun, a Board-certified anesthesiologist.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.⁹ For each period of disability claimed, the employee has the burden of establishing disability for work as a result of the accepted employment injury.¹⁰ 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.¹¹

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.¹² Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.¹³ An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages that 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.¹⁴ 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 his or her disability and entitlement to compensation.¹⁵

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained right shoulder strain and a herniated cervical disc as a result of her employment duties. After sustaining intermittent periods of total and partial disability, appellant returned to full-time employment on March 4, 2013. She filed claims for compensation from February 6 to May 16, 2014 and from May 19 to July 24, 2014 due to her accepted work injury. Appellant has the burden of establishing a causal relationship between her

⁹ See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel Milton*, 37 ECAB 712 (1986).

¹⁰ See *Amelia S. Jefferson*, *id.*

¹¹ See *Edward H. Horton*, 41 ECAB 301 (1989).

¹² *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); 20 C.F.R. § 10.5(f).

¹³ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

¹⁴ *Merle J. Marceau*, 53 ECAB 197 (2001).

¹⁵ See *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

claimed disability and the accepted conditions through the submission of substantial, reliable, and probative evidence.¹⁶

The Board finds that the medical evidence of record is insufficient to show that appellant was disabled from February 6 to May 16, 2014 and from May 19 to July 24, 2014 due to her accepted employment injury. On February 5, 2014 Dr. Ghosh diagnosed right supraspinatus tendinitis, right rotator cuff impingement syndrome, and subacromial bursitis. He indicated that if appellant's shoulder pain did not improve within a month he would perform a steroid injection of the shoulder. Dr. Ghosh did not address her ability to work and thus his report is of little probative value on the issue of whether she was disabled beginning February 6, 2014.¹⁷

In an April 15, 2014 report, Dr. Ghosh diagnosed cervical postlaminectomy syndrome, degeneration of the cervical intervertebral disc, drug dependence, fibromyositis, inflammation and impingement of the rotator cuff tendon, rotator cuff syndrome, neck pain, and ulnar neuropathy. In a chart note dated April 15, 2014, he reviewed appellant's complaints of right shoulder and neck pain. Dr. Ghosh administered a steroid injection. He did not, however, discuss causation or whether appellant was disabled from employment. Consequently, Dr. Ghosh's report is of little probative value.¹⁸

On May 13, 2014 Dr. Ghosh described appellant's symptoms of swelling of the extremities, and weakness and pain in her muscles, joints, and back. He found impingement of the right shoulder at the rotator cuff, significant loss of right shoulder motion, and a positive Tinel's sign of the right wrist. Dr. Ghosh noted that appellant had achieved pain relief for two weeks after her steroid injection. Again, however, he did not address the relevant issue of disability from employment and thus his report is of diminished probative value.¹⁹

In a report dated June 15, 2014, Dr. Ghosh discussed his treatment of appellant from February 5, 2014 to the present. He related that on February 5, 2014 he evaluated her for increased right shoulder pain and reduced motion as a result of her employment injury and diagnosed supraspinatus tendinitis and impingement syndrome of the right rotator cuff with bursitis. Dr. Ghosh recommended a shoulder injection if appellant's symptoms did not improve and advised her "to rest her shoulder until it was reevaluated on her next visit." He reevaluated her on March 12, 2014 for continued shoulder pain and loss of motion. Dr. Ghosh again told appellant to rest her shoulder pending reexamination in a month. On May 13, 2014 he instructed her to increase the use of her shoulder. Dr. Ghosh concluded that with continued improvement

¹⁶ See *Amelia S. Jefferson*, *supra* note 9.

¹⁷ See *M.R.*, Docket No. 15-0583 (issued December 9, 2015).

¹⁸ See *A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of little probative value on the issue of causal relationship); *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).

¹⁹ See *Sandra D. Pruitt*, 57 ECAB 126 (2005) (the issue of whether a claimant's disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning).

appellant could resume work with restrictions in early July 2014. While he indicated that he told her to rest her shoulder and that she could return to work in July 2014, he did not specifically address any period of disability or causation.²⁰ The issue of whether a claimant's disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.²¹

On appeal appellant contends that she stopped work on the advice of her physician and maintains that OWCP did not approve her steroid injection because her physician was not authorized. She has the burden, however, to support any claimed period of disability from employment with probative medical evidence directly addressing the specific dates of disability for which compensation is claimed.²² Appellant did not submit such evidence and thus did not meet her burden of proof. She further did not claim time lost due to medical appointments in requesting disability compensation or submit evidence sufficient to establish that she was obtaining authorized medical services.²³

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 and 20 C.F.R. §§ 10.605 through 10.607

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b) of FECA provides that 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.²⁴ Section 10.615 of the federal regulations implementing this section of FECA provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.²⁵ 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.²⁶ A claimant is entitled to a hearing or review of the written record as a matter of right if the request is filed within 30 days.²⁷

²⁰ See *supra* note 18.

²¹ *Sandra D. Pruitt*, *supra* note 19.

²² See *Fereidoon Kharabi*, *supra* note 15.

²³ An injured employee is entitled to compensation for lost wages incurred while obtaining authorized medical services; see 5 U.S.C. § 8103(a); *Gayle L. Jackson*, 57 ECAB 546 (2006).

²⁴ 5 U.S.C. § 8124(b)(1).

²⁵ 20 C.F.R. § 10.615.

²⁶ *Id.* at § 10.616(a).

²⁷ See *Leona B. Jacobs*, 55 ECAB 753 (2004).

While a claimant may not be entitled to a hearing or review of the written record as a matter of right if the request is untimely, OWCP has the discretionary authority to grant the request and must properly exercise such discretion.²⁸

ANALYSIS -- ISSUE 2

OWCP issued a decision on January 20, 2015 denying appellant's claim for compensation from May 19 to July 24, 2014. By letter dated March 4, 2015 and postmarked March 5, 2015, appellant requested an oral hearing on the January 20, 2015 decision. OWCP denied her hearing request as untimely in a March 31, 2015 decision. As appellant's request for a hearing was postmarked March 5, 2015, more than 30 days after OWCP issued its January 20, 2015 decision, she was not entitled to a hearing as a matter of right.

OWCP has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing or review as a matter of right.²⁹ It properly exercised its discretion by considering the matter in relation to the issue involved and denying appellant's request for an oral hearing on the basis that the case could be resolved by submitting additional evidence with a reconsideration request. The Board has held that the only limitation on OWCP's discretionary authority is reasonableness. An 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.³⁰ There is no evidence that OWCP committed any action in connection with its denial of appellant's request for an oral hearing which could be found to be an abuse of discretion. Consequently, it properly denied her request for an oral hearing as untimely under section 8124 of FECA.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she was disabled from February 6 to May 16, 2014 and May 19 to July 24, 2014 causally related to her accepted employment injury. The Board further finds that OWCP properly denied her request for an oral hearing as untimely under 5 U.S.C. § 8124(b).

²⁸ 20 C.F.R. § 10.616(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011).

²⁹ *Afegalai L. Boone*, 53 ECAB 533 (2002).

³⁰ *See M.G.*, Docket No. 15-1552 (issued December 8, 2015); *L.W.*, 59 ECAB 471 (2008).

ORDER

IT IS HEREBY ORDERED THAT the May 11, March 31, and January 20, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 6, 2016
Washington, DC

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

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

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