

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

M.C., Appellant)	
)	
and)	Docket No. 17-0966
)	Issued: August 4, 2017
DEPARTMENT OF DEFENSE, DEFENSE)	
COMMISSARY AGENCY, San Diego, CA,)	
Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 3, 2017 appellant filed a timely appeal from a January 11, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP) and a March 14, 2017 nonmerit decision. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 established that he was totally disabled from October 19 to 26, 2010 causally related to his accepted employment injury; and (2) whether OWCP properly denied appellant's request for a review of the written record under 5 U.S.C. § 8124 as untimely.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 14, 2010 appellant, then a 62-year-old grocery department manager, filed an occupational disease claim (Form CA-2) alleging that he sustained stress, anxiety, and depression due to harassment and a hostile work environment.

The employing establishment, in a memorandum dated October 25, 2010, issued appellant a return to work order.² It noted that he had been absent without leave (AWOL) after October 19, 2010 when he refused to follow an order of a supervisor.³

Appellant stopped work on March 5, 2011 and retired on April 1, 2011.

By decision dated March 9, 2011, OWCP denied appellant's emotional condition claim as he had not sufficiently supported his allegation of harassment. It further noted that the medical evidence submitted was insufficient to support causation.

Appellant requested an oral hearing before an OWCP hearing representative. A telephone hearing was held on July 16, 2012. In a decision dated October 12, 2012, an OWCP hearing representative vacated the March 9, 2011 decision. She reviewed a February 7, 2012 Merit Systems Protection Board (MSPB) decision finding that the employing establishment had reduced appellant's grade without due process in May 2010. The hearing representative found that the MSPB decision demonstrated error or abuse by the employing establishment in reducing his grade and thus constituted a compensable work factor. She remanded the case for OWCP to prepare a statement of accepted facts and refer appellant for a second opinion examination to determine whether he sustained a diagnosed condition causally related to the accepted work factor.

Following further development, on August 11, 2014 OWCP accepted appellant's claim for recurrent major depression. It paid him wage-loss compensation for total disability beginning April 1, 2011. Appellant remains on the periodic compensation rolls for total disability.

Appellant, on October 16, 2014, filed a claim for compensation (Form CA-7) requesting compensation for intermittent wage loss from October 19 to 26, 2010. On the form the employing establishment advised that he had used leave without pay intermittently from October 19 to 26, 2014. In a time analysis form, the employing establishment indicated that appellant worked two hours on October 19, 2010, three hours on October 21, 2010, and was AWOL for the remaining hours.

On August 30, 2016 appellant again filed a claim for compensation for lost time from October 19 to 26, 2010. By letter dated August 30, 2016, OWCP notified him that there was no medical evidence establishing that he was disabled from work for 43 hours from October 19

² In an October 13, 2010 statement, H.D., a coworker, related that on that date a manager ordered appellant into his office, but he refused. The manager called security.

³ Appellant provided an October 26, 2010 response to the memorandum.

to 26, 2010.⁴ It further noted that there was no evidence that the employing establishment erred in finding appellant AWOL during the claimed period. OWCP asked that he submit evidence supporting error by the employing establishment in categorizing him as AWOL and medical evidence supporting disability from employment.

Appellant submitted clinic notes regarding his treatment on October 19, 2010 for complaints of “depression about [appellant’s] work.” A nurse practitioner noted that management took his badge and escorted him from his office and that he wanted a work excuse for one week due to stress. She diagnosed depression with anxiety and gave him a one week work excuse. Appellant further provided a note from another nurse practitioner excusing him from work from October 19 to 26, 2010.

By decision dated January 11, 2017, OWCP denied appellant’s claim for compensation for intermittent disability from October 19 to 26, 2010. It found that he had not submitted factual evidence showing that the employing establishment erred in determining that he was AWOL from October 19 to 26, 2010. OWCP noted that the only compensable work factor was that the employing establishment erred in demoting him in 2010.

In correspondence dated February 14, 2017 and postmarked February 15, 2017, appellant requested a review of the written record. By decision dated March 14, 2017, OWCP denied his request for a review of the written record under section 8124 as it was not made within 30 days. It exercised its discretion and found that the matter could equally well be addressed through a request for reconsideration with supporting evidence establishing entitlement to disability compensation for the claimed period.

On appeal appellant contended that the employing establishment involuntarily removed him from work on October 19, 2010.

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, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁵ The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.⁶

Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the

⁴ OWCP indicated that the claimed date of disability was from October 19, 2010 to October 26, 2013 instead of October 26, 2010.

⁵ *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ 20 C.F.R. § 10.5(f); *see e.g.*, *Cheryl L. Decavitch*, 50 ECAB 397 (1999) (finding that the claimant had an injury, but no loss of wage-earning capacity).

reliable, probative, and substantial medical evidence.⁷ Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.⁸

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained recurrent major depression as a result of the compensable work factor, that the MSPB found the employing establishment erred in reducing his grade without due process in May 2010. It paid him compensation for total disability commencing April 1, 2011.

Appellant filed a claim for wage-loss compensation for the period October 19 to 26, 2010. OWCP noted that the employing establishment considered him AWOL during the claimed period. It denied appellant's claim for disability compensation from October 19 to 26, 2010 as he failed to demonstrate error by the employing establishment in finding him AWOL. The relevant issue, however, is whether appellant established disability from employment during that period causally related to the accepted compensable employment factor.

The Board finds that the medical evidence of record is insufficient to support that appellant was disabled from October 19 to 26, 2010 due to the accepted employment injury. Appellant submitted evidence addressing his ability to work during this period from nurse practitioners. A nurse or nurse practitioner, however, is not considered a "physician" under FECA and thus cannot render a medical opinion.⁹ Thus, this evidence is of no probative value in establishing appellant's claim.¹⁰ Appellant, consequently, has offered insufficient medical evidence to establish his claim for disability compensation from October 19 to 26, 2010.

On appeal appellant contended that the employing establishment involuntarily removed him from work on October 19, 2010. The Board's jurisdiction, however, is limited to reviewing final decisions of OWCP issued under FECA.¹¹

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.

⁷ See *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁸ *Id.*

⁹ 5 U.S.C. § 8101(2) (defining physicians as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic physicians within the scope of their practice as defined by State law); see also *R.E.*, Docket No. 16-1568 (issued February 9, 2017) (nurse practitioners are not considered physicians as defined by FECA).

¹⁰ See *A.B.*, Docket No. 17-0301 (issued May 19, 2017).

¹¹ 20 C.F.R. § 501.2(c).

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 his or her claim before a representative of the Secretary.¹² 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.¹³ 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.¹⁴ 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.¹⁵

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.¹⁶

ANALYSIS -- ISSUE 2

By decision dated January 11, 2017, OWCP denied appellant's claim for disability compensation from October 19 to 26, 2010. Appellant sought a review of the written record by letter dated February 14, 2017 and postmarked February 15, 2017. OWCP, in a decision dated March 14, 2017, denied his request for a review of the written record as untimely. As appellant's request for a hearing was postmarked February 15, 2017, more than 30 days after OWCP issued its January 11, 2017 decision, he was not entitled to a hearing as a matter of right.¹⁷

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.¹⁸ It properly exercised its discretion by noting that it had considered the matter in relation to the issue involved and denied appellant's request for an oral hearing as the case could be resolved by submitting additional evidence in 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.¹⁹ There is no evidence that OWCP committed any action in connection with its denial of appellant's request

¹² 5 U.S.C. § 8124(b)(1).

¹³ 20 C.F.R. § 10.615.

¹⁴ *Id.* at § 10.616(a).

¹⁵ See *Leona B. Jacobs*, 55 ECAB 753 (2004).

¹⁶ 20 C.F.R. § 10.616(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.2(a) (October 2011).

¹⁷ See *supra* note 15.

¹⁸ *Afegalai L. Boone*, 53 ECAB 533 (2002).

¹⁹ See *R.C.*, Docket No. 17-0280 (issued May 5, 2017).

for a review of the written record that constituted an abuse of discretion.²⁰ Accordingly, the Board finds that OWCP properly denied his request for a review of the written record as untimely.

CONCLUSION

The Board finds that appellant has not established that he was disabled from October 19 to 26, 2010 causally related to his accepted employment injury. The Board further finds that OWCP properly denied his request for a review of the written record under section 8124 as untimely.

ORDER

IT IS HEREBY ORDERED THAT the March 14 and January 11, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 4, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²⁰ See *B.H.*, Docket No. 16-1553 (issued March 27, 2017).