

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

D.D., Appellant	)	
	)	
and	)	<b>Docket No. 23-0053</b>
	)	<b>Issued: July 10, 2023</b>
U.S. POSTAL SERVICE, PITTSFORD POST	)	
OFFICE, Pittsford, NY, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On October 18, 2022 appellant filed a timely appeal from a July 14, 2022 merit decision and a September 19, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant has met her burden of proof to establish disability from work for the periods May 7 through June 7, 2022 and commencing June 10, 2022 causally related to her accepted September 3, 2021 employment injury; and (2) whether OWCP properly

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that following the September 19, 2022 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

denied appellant's request for a review of the written record before an OWCP hearing representative as untimely filed, pursuant to 5 U.S.C. § 8124(b).

### **FACTUAL HISTORY**

On September 15, 2021 appellant, then a 35-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 3, 2021 she sustained a contusion and bruise to her right knee when a loose brick caused her to lose her balance and fall down on the sidewalk while in the performance of duty. She stopped work on September 3, 2021. OWCP accepted appellant's claim for right knee contusion. On March 17, 2022 it expanded the acceptance of her claim to include right knee unspecified internal derangement. OWCP paid appellant wage-loss compensation on the supplemental rolls for the period October 19, 2021 through May 6, 2022.

On May 29, 2022 appellant filed a claim for compensation (Form CA-7) for disability from work for the period May 7 through 20, 2022. On the reverse side of the claim form, the employing establishment noted that she was in a leave without pay (LWOP) status from May 7 through 20, 2022. In an attached time analysis form (Form CA-7a), appellant claimed 80 hours of LWOP from May 7 through 20, 2022. She indicated that her reason for leave use was "work injury."

In a letter dated June 8, 2022, Dr. Rami M. Elshaar, a Board-certified orthopedic surgeon, indicated that appellant was seen for a medical examination on June 8, 2022. He opined that she should remain out of work and was 100 percent disabled.

In a development letter dated June 10, 2022, OWCP informed appellant of the deficiencies of her claim for compensation. It advised her of the type of factual and medical evidence needed and afforded her 30 days to provide the necessary evidence.

In a letter dated June 14, 2022, Dr. Elshaar indicated that appellant had a medical examination on June 8, 2022 and remained out of work because she had undergone a right knee injection. He reported that she was 50 percent disabled and advised restrictions of no lifting, carrying, or pushing more than 25 pounds, and walking up to .5 miles.

Appellant filed additional Form CA-7 claims for compensation for disability from work for the period May 21 through June 17, 2022.

Appellant submitted a duty status report (Form CA-17) dated June 24, 2022 by Dr. Elshaar, who noted a September 3, 2021 employment injury and diagnosis of patellar tendinitis. Dr. Elshaar opined that appellant was unable to work.

In a Form CA-17 dated July 6, 2022, Dr. Elshaar diagnosed right knee contusion. He indicated that appellant could return to part-time, modified-duty work for four hours per day on July 6, 2022. Dr. Elshaar noted restrictions of walking up to four hours per day.

By decision dated July 14, 2022, OWCP authorized payment for disability on June 8 and 9, 2022. However, it denied appellant's wage-loss compensation claim for the remaining periods of May 7 through June 7, 2022 and commencing June 10, 2022, finding that the medical

evidence of record was insufficient to establish that she was totally disabled due to her accepted September 3, 2021 employment injury.

Appellant filed additional Form CA-7 claims for disability from work and submitted additional medical evidence.

On August 26, 2022 OWCP received an undated appeal request form indicating that appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated September 19, 2022, OWCP denied appellant's request for a review of the written record, finding that the request was untimely filed.

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

An employee seeking benefits under FECA<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.<sup>6</sup>

To establish causal relationship between the disability claimed and the employment injury, an employee must submit rationalized medical evidence.<sup>7</sup> The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the claimed disability and the accepted employment injury.<sup>8</sup>

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

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<sup>3</sup> *Supra* note 1.

<sup>4</sup> *D.S.*, Docket No. 20-0638 (issued November 17, 2020); *F.H.*, Docket No. 18-0160 (issued August 23, 2019); *C.R.*, Docket No. 18-1805 (issued May 10, 2019); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>5</sup> 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

<sup>6</sup> *B.O.*, Docket No. 19-0392 (issued July 12, 2019); *D.G.*, Docket No. 18-0597 (issued October 3, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

<sup>7</sup> *L.O.*, Docket No. 20-0170 (issued August 13, 2021); *S.J.*, Docket No. 17-0828 (issued December 20, 2017); *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

<sup>8</sup> *V.A.*, Docket No. 19-1123 (issued October 29, 2019); *C.B.*, Docket No. 18-0633 (issued November 16, 2018).

claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.<sup>9</sup>

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

The Board finds that appellant has not met her burden of proof to establish disability from work for the period May 7 through June 7, 2022 and beginning June 10, 2022 causally related to her accepted September 3, 2021 employment injury.

Appellant provided a series of reports from Dr. Elshaar dated June 8 through July 6, 2022. In reports dated June 8 and 24, 2022, Dr. Elshaar continued to advise that appellant remain off work. However, none of the reports specifically address the claimed period of disability or offered an opinion on the cause of appellant's disability from work.<sup>10</sup> Accordingly, these reports are of no probative value and are insufficient to establish appellant's claim for compensation.<sup>11</sup>

In reports dated June 28 and July 6, 2022, Dr. Elshaar noted a diagnosis of right knee contusion. He indicated that appellant could work part-time, modified duty for four hours per day on July 6, 2022. Dr. Elshaar, however, did not provide an opinion on whether she was disabled from work during the claimed period due to her accepted employment injury. Accordingly, these reports are of no probative value and are insufficient to establish appellant's claim for compensation.<sup>12</sup>

As the medical evidence of record is insufficient to establish disability from work for the periods May 7 through June 7, 2022 and commencing June 10, 2022 causally related to the accepted September 3, 2021 employment injury, the Board finds that appellant has not met her burden of proof.

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)(1) 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

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<sup>9</sup> See *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>10</sup> *T.T.*, Docket No. 22-0632 (issued November 16, 2022); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

<sup>11</sup> See *M.M.*, Docket No. 18-0817 (issued May 17, 2019); *M.C.*, Docket No. 16-1238 (issued January 26, 2017). See also *F.S.*, Docket No. 23-0112 (issued April 26, 2023); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

<sup>12</sup> *Id.*

Secretary.”<sup>13</sup> Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.<sup>14</sup> A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier’s date marking and before the claimant has requested reconsideration.<sup>15</sup> Although there is no right to a review of the written record or an oral hearing, if not requested within the 30-day time period, OWCP may, within its discretionary powers, grant or deny appellant’s request and must exercise its discretion.<sup>16</sup>

### ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant’s request for a review of the written record before an OWCP hearing representative as untimely filed, pursuant to 5 U.S.C. § 8124.

OWCP’s regulations provide that the request for a hearing or review of the written record must be made within 30 days of the date of the decision for which a review is sought. Because appellant requested a review of the written record on August 26, 2022, more than 30 days after OWCP’s July 14, 2022 decision, the Board finds that it was untimely. Appellant was, therefore, not entitled to a review of the written record as a matter of right.<sup>17</sup>

OWCP has the discretionary authority to grant the request and it must exercise such discretion.<sup>18</sup> The Board has held that the only limitation on OWCP’s 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 deductions from established facts.<sup>19</sup> The Board finds that the evidence of record indicates that OWCP did not abuse its discretion in connection with its denial of appellant’s request for a review of the written record.

Accordingly, the Board finds that OWCP properly denied appellant’s request for a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).

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<sup>13</sup> 5 U.S.C. § 8124(b)(1).

<sup>14</sup> 20 C.F.R. §§ 10.616, 10.617.

<sup>15</sup> *Id.* at § 10.616(a).

<sup>16</sup> *W.H.*, Docket No. 20-0562 (issued August 6, 2020); *P.C.*, Docket No. 19-1003 (issued December 4, 2019); *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

<sup>17</sup> *See H.M.*, Docket No. 22-0053 (issued August 12, 2022); *see also P.C.*, Docket No. 19-1003 (issued December 4, 2019).

<sup>18</sup> *See M.F.*, Docket No. 21-0878 (issued January 6, 2022).

<sup>19</sup> *See K.B.*, Docket No. 21-1038 (issued February 28, 2022); *B.W.*, Docket No. 16-1860 (issued May 4, 2017); *Samuel R. Johnson*, 51 ECAB 612 (2000).

**CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish disability from work for the periods May 7 through June 7, 2022 and commencing June 10, 2022 causally related to her accepted September 3, 2021 employment injury. The Board further finds that OWCP properly denied appellant's request for a review of the written record before an OWCP hearing representative as untimely filed, pursuant to 5 U.S.C. § 8124.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 14 and September 19, 2022 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 10, 2023  
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board