



ECAB changes appeal time limits

The Department of Labor (DOL) published in the *Federal Register*, dated October 20, its final rule updating the rules and guidance to all federal employees who seek to appeal decisions of the Office of Workers' Compensation Programs (OWCP) to the Employee Compensation Appeals Board (ECAB).^{*} The regulation changes were effective November 19.

Change in ECAB appeal time limits—For all appeals of OWCP decisions issued on or after November 19, the time limit will be 180 days. Previously, the time limit was 90 days, but ECAB routinely accepted appeals up to one year. This change essentially cuts the appeal time in half. ECAB maintains discretion to extend the time period for filing an appeal if an applicant demonstrates “compelling circumstances.” Compelling circumstances means circumstances that are beyond the appellant’s control that prevent the timely filing of an appeal and does not include any delay caused by the failure of an individual to exercise due diligence in submitting a notice of appeal.

The 180-day time period begins to run the day following the date of the OWCP decision that is being appealed. If day No. 180 of the appeal period falls on Saturday, Sunday or a federal holiday, the period runs to the close of the next business day.

The new 180-day time period should appear on all applicable notices of decision from OWCP. 20 CFR 10.126 requires OWCP to include information about the claimant’s appeals rights in each notice of decision.

Oral argument before ECAB—Oral argument may be held at the discretion of ECAB, on its own determination or on application by the appellant or the director. The application must specify the issue(s) to be argued and provide a statement supporting the need for oral argument. The request for oral argument must be made no later than 60 days after the filing of the appeal. Previously, either party could request an oral argument and ECAB would schedule the appeal for argument.

Whether by oral argument or by written pleadings, ECAB will consider the position of the claimant and the

position of OWCP, if submitted, and the facts of the case file as of the date of the decision being appealed. No new information will be considered by ECAB. The decisions of ECAB are regulated by 20 CFR Sec. 501.6:

Decisions (a) The decision of the Board shall contain a written opinion setting forth the reasons for the action taken and an appropriate order. The decision may consist of affirmance, reversal, remand for further development of the evidence, or other appropriate action. A copy of the decision shall be sent by the Board to all parties in interest. The case record shall be returned to the Director with a copy of the decision. (b) A decision of not less than two members shall be the decision of the Board. (c) The decision of the Board shall be final as to the subject matter appealed and such decision shall not be subject to review, except by the Board. (d) The decision of the Board shall be final upon the expiration of 30 days from the date of the filing of the order, unless the Board shall in its order fix a different period of time or reconsideration by the Board is granted.

Decisions by ECAB are also final and conclusive. The *FECA Federal Procedure Manual - PT2* states in section 2-1600-2 e:

Finality of Review. Section 5 U.S.C. 8128 provides that the action of the OWCP in allowing or denying a payment under the FECA is:

- (1) Final and conclusive for all purposes and with respect to questions of law and fact; and
- (2) Not subject to review by another official of the United States or by a court of mandamus or otherwise.

Special thanks to Ron Watson, former head of the Compensation Department, for his leadership and training. Ron truly has a heart for letter carriers and he remains a tremendous asset to this union.

The Compensation Department wishes you and your family a very happy and healthy new year! ✉

^{*} The ECAB is an appellant body in the DOL separate and apart from OWCP. ECAB decisions are issued by a three-member panel—each member appointed by the Secretary of Labor. ECAB has jurisdiction over appeals arising under the Federal Employees' Compensation Act (FECA) 5 U.S.C. 8149.



Physician vs. nurse practitioner

What difference does it make if I am treated by a physician or by a nurse practitioner? Good question, and with the recent changes in the medical field, that is a very rational question. Some might argue that they would trust a nurse practitioner more than they would trust a physician. Many people might also subscribe to the false notion that since their health benefit plan will accept a certain health care professional, OWCP will also accept them.

When it comes to on-the-job injuries or work-related illnesses, it matters who makes the diagnosis, it matters who orders the treatment, it matters who completes the medical reports, and it matters how the medical report is completed.

The Federal Employees' Compensation Act (FECA) says that there is a difference between a physician and a nurse practitioner when it comes to adjudicating compensation claims. The FECA draws very clear distinctions when defining a "physician." The FECA states that physicians include surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners acting within the scope of their practice as defined by state law.¹

As you can see, chiropractors are included in the list of physicians, *but* they are limited to a certain type of treatment for a specific diagnosis. Chiropractors are considered physicians for purposes of the FECA *only* to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist and subject to regulation by OWCP.

If you are receiving treatment from an individual whose main diagnosis involves waving a chicken foot over an injured part of your body, you may want to find a real physician before you submit a compensation claim. That is because the FECA has specifically identified certain individuals who are *not* considered physicians. It states that naturopaths, faith healers and other practitioners of the healing arts are not recognized as physicians within the meaning of the FECA. The Employee Compensation Appeals Board (ECAB) has also found that the following list of professionals do not fall within the definition of a physician under the FECA: audiologists, physical thera-


pists, physicians assistants, social workers, nurses, counselors or toxicologists.

The law gives the employee the right to select a physician to provide medical services.² Choosing a good physician who has experience with OWCP claims can be the difference between a claim's acceptance or denial. In all OWCP claims, the claimant has the burden of proof and that proof must consist of medical evidence, which must be prepared by a physician.

The proof needed to support a claim is also referred to as rationalized medical opinion evidence. Simply put, it is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The physician's opinion must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. In one case, ECAB ruled that the medical evidence was not probative because a physician did not sign it.³

A claimant's reliance upon a medical report or opinion prepared by a person who does not meet the definition of a physician under the FECA can be fatal to their claim. The ECAB has consistently held that such opinions are not competent, probative medical evidence. A medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a physician as defined in 5 USC 8101 (2).⁴

In another case, ECAB held that, when a physician's opinion on causal relationship consists only of checking "yes" on a form question, without explanation or rationale, that opinion is of diminished probative value and is insufficient to establish a claim.⁵

Your choice of physician matters. 

1. FECA 5USC Section 8101(2).
2. 5 USC 8103 (a)(3), *ELM* 543.3.
3. G.R. and Department of Veterans Affairs, 107 LRP 27730 (ECAB 2007).
4. K.P. and Department of Veterans Affairs, 107 LRP 20461 (ECAB 2007).
5. D.F. and Department of the Army, 107 LRP 34654 (ECAB 2007).



Vocational rehabilitation

The purpose of the OWCP vocational rehabilitation program is to assist disabled employees who are covered under the Federal Employees' Compensation Act (FECA) to minimize their disabilities and return to gainful employment.

Vocational rehabilitation is controlled completely by the Office of Workers' Compensation. OWCP may, at its discretion, provide vocational rehabilitation services to injured carriers.¹ When OWCP decides to implement vocational rehabilitation, it generally refers the case to a nurse or rehabilitation specialist, who may be employed by a contracted agency.

OWCP's referral to vocational rehabilitation usually happens if a claimant has stable, well-defined work limitations that allow eight hours of work per day and has not been rated for loss of wage-earning capacity. The nurses or rehabilitation specialists do not evaluate medical evidence; OWCP claims staff performs this function.

Once a claimant is referred, a rehabilitation plan is developed by OWCP. That rehabilitation plan may include medical rehabilitation, guidance and counseling, vocational testing and work evaluations, vocational training, placement with a new employer and follow-up service.

The OWCP vocational rehabilitation programs may use many of the tests, evaluations and restorative services, but the job skill requirements under this category are less well defined. The goal in most cases is to maximize potential job options rather than prepare for a specific job. However, sometimes the goal is to document the claimant's job potential, and/or measure ability to improve physical tolerance, productivity and work behavior. The specialist's goal is to identify jobs which can be successfully obtained by the injured worker using present skills and education, or with on-the-job training or short training programs, and which significantly reduce the loss of wage-earning capacity.

While receiving OWCP vocational rehabilitation services, employees generally get the same benefits as any other employee drawing compensation for total disability. Necessary medical services related to the accepted condition are paid by OWCP. Health benefits and life insurance premiums are continued, with the employee's portion deducted from compensation payments. Compensation is paid at the rate of total disability. However, claimants may receive an additional \$200 per month while receiving vocational rehabilitation services.²

Following vocational rehabilitation services, employees generally continue receiving the same benefits, except that wage-loss compensation benefits are reduced. The FECA³ provides that if a disability is partial, compensation is paid based on the difference between monthly pay and monthly wage-earning capacity. A disability is partial when an employee is unable to do their date-of-injury job but is capable of doing other work. OWCP will determine the loss of wage-earning capacity by applying the Shadrick Formula (*see August 2001 column*) to a fair and reasonable determination of wage-earning capacity.

Normally, if an employee is placed in new employment for more than 60 days, the actual wages of the new employment will be deemed to fairly and reasonably represent the employee's wage-earning capacity. However, if not placed in new employment, OWCP may determine wage-earning capacity based on a constructed position not actually held.

If the new job or constructed position pays less than the letter carrier position, there will be continuing compensation payments from OWCP. In these cases, OWCP will continue to pay health benefits and life insurance premiums and subtract the employee's portion of the premiums from the compensation checks. If that compensation payment has been reduced to the extent that it does not cover the full cost of the employee's portion of the premiums, OWCP will bill the claimant for the difference on a quarterly basis. If wage-loss compensation benefits are discontinued, and the claimant has been administratively separated⁴ from the USPS, the entitlement to federal health benefits and life insurance will end.

Failure to participate in OWCP's rehabilitation efforts can result in the application of sanctions, which could result in the suspension or reduction of compensation until the claimant cooperates.⁵

Section 546.142 of the ELM requires management to make every effort toward assigning the employee to limited duty. Branch representatives should continue to investigate and file needed grievances when limited duty is withheld or withdrawn from injured letter carriers.⁶ ✉

1. Authorized by 5 U.S.C. 8104 (<http://www.dol.gov/esa/owcp/dfec/regs/statutes/8104.htm>).

2. 5 USC 8111.

3. 5 USC 8106(a).

4. ELM 545.92.

5. 5 USC 8113.b.

6. See the *NALC Guide to NRP* (<http://nalc.org/depart/owcp/PDF/Guide%20to%20NRP.pdf>).



Wage earning capacity

Wage-earning capacity (WEC) is a gauge of the claimant's ability to earn wages in the labor market under normal employment conditions. OWCP, in a WEC determination, will consider that the employee is only partially disabled and may make a determination on how much the employee is able to earn. OWCP has the authority to make a WEC determination at any time, but a WEC is usually made after vocational rehabilitation is completed. A WEC is sometimes referred to as loss of wage-earning capacity (LWEC).

Compensation under a WEC determination is based on 66-2/3 percent (75 percent with dependents) of the difference between the claimant's adjusted earning capacity established by OWCP and the claimant's former earnings at the time of injury (date disability first begins or date of recurrence of disability, whichever is higher). A formula was created to make these calculations.¹

For a claimant who is working a limited-duty job offer with the Postal Service or has taken a job with another employer, his or her actual earnings in that position will in all probability be used by OWCP when making a WEC determination, if such earnings fairly and reasonably represent their current earning capacity. The nature of the claimant's injury and degree of physical impairment, the claimant's usual employment, the claimant's age and vocational qualifications, and the availability of suitable employment are all factors that will be considered by OWCP in making a WEC determination.

For a claimant who is *not* working, OWCP will, in some cases, decide a claimant's WEC by making a medical determination of partial disability, of the specific work restrictions and of the compatible work in the commuting area. These cases are referred to an OWCP wage-earning capacity specialist for selection of a compatible position. The selected compatible position is usually available in the open labor market and fits the claimant's capabilities in light of his or her physical limitations, education, age and prior experience. Once this selection of a compatible position is made, a determination of wage rate and availability in the open labor market will be made and is usually

accomplished through contact with the state employment service or other applicable service.

The claimant's WEC can be modified if the claimant can prove that a material change to his or her condition has occurred. The OWCP can modify a WEC if it shows the claimant has been retrained or otherwise vocationally rehabilitated.² Once OWCP determines that a claimant is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction in compensation.³

Under the Postal Service's National Reassessment Process (NRP), many carriers' limited-duty positions have been withdrawn. The affected carriers should request compensation for the recurrence of disability by submitting a Form CA-2a (Notice of Recurrence).

However, some of the affected carriers' CA-2a's are being denied by OWCP because WEC determinations have been made on them. If this happens, the claimant bears the burden of proving to OWCP that the WEC determination was erroneous or prove that their condition has worsened to a degree that precludes continuation of the limited-duty job. The claimant should provide the OWCP claims examiner with a detailed explanation and copies of all pertinent documents that prove that the WEC determination was incorrect.

In many cases, the WEC determination is flawed because it was based on a "permanent job offer" that, under NRP, turned out to be less than "permanent." Along with the CA-2a, the injured worker should submit a copy of the written notice from management withdrawing the limited duty. If management does not give written notice of the limited duty withdrawal, the carrier should fill out a Form 3971 requesting LWOP, and clearly state the reason for the requested leave is management's withdrawal of limited duty.

The evidence presented to OWCP must prove that management caused the recurrence of disability and that it was not the carrier's choice. The claimant should also contact their shop steward and request an investigation into possible violations of 546 of the *ELM*. ☒

1. See August 2001 column for the Shadrick Formula.

2. FECA FPM 2-0814-11.

3. Ellen G. Trimmer, 32 ECAB 1878 (1981).



Disability retirement or wage-loss compensation?

The previous two Compensation Department articles focused on vocational rehabilitation and wage-earning capacity. As a result of those articles, some questions have been raised about disability retirement as an option for carriers who may be affected by management's NRP.

First, we will look at who may be qualified for disability retirement. If you are disabled during the course of your federal career, and as a Civil Service Retirement System (CSRS) employee you have completed at least five years of federal civilian service, or as a Federal Employees Retirement System (FERS) employee you have completed at least 18 months of federal civilian service, you may be entitled to a disability annuity. You must have become disabled for "useful and efficient service" in both your current position and any other vacant position at the same grade or pay level for which you are qualified for reassignment. To qualify for disability retirement, the disability does *not* have to be caused or related to an on-the-job injury. On the other hand, having an accepted OWCP claim does *not* automatically make you eligible for a disability retirement.

There are time limits for requesting a disability retirement. The Office of Personnel Management (OPM) requires that you, your guardian or other interested person must apply before your separation from service or within one year of your separation. The application must be received by OPM within one year from the date of your separation. This time limit can be waived only in instances involving incompetency.

An individual cannot receive both OWCP and OPM benefits simultaneously. When a claimant is entitled to disability benefits under the Federal Employees' Compensation Act (FECA) and annuity benefits from OPM under CSRS or FERS, the employee must make an election between OWCP benefits and OPM benefits. The employee has the

right to elect the monetary benefit that is the more advantageous. This policy also applies to re-employed annuitants. If any payments have been received from OPM, however, those payments must be repaid in full either directly by the employee or by OWCP from the FECA payments due, before the employee may begin receiving OWCP benefits. If OPM benefits are elected, the employee is entitled to have medical expenses for treatment of the accepted condition(s) paid by OWCP. There is no prohibition against receiving OWCP benefits concurrently with benefits from the Thrift Savings Plan, but early withdrawal penalties may apply.

Because of the NRP, more and more carriers are being told that there is no work available within their medical restrictions. While the NALC continues to grieve possible violations of 546 of the *ELM* based on the facts of each case, we may not prevail in every single one of those grievances. Therefore, some of the carriers directly affected by NRP may soon be facing possible vocational rehabilitation and potentially a wage-earning capacity (WEC) determination by OWCP. As discussed in last month's article, a WEC determination can, in some cases, cause a reduction in wage-loss compensation benefits. So, if a carrier has been given a WEC determination and is unable to find compatible work in their commuting area, a disability retirement may be a better option.

This article is only a brief overview of disability retire-ment. Each case is different and each carrier must weigh all of their own personal circumstances before making any decisions about retirement. The NALC Retirement Department is available to help members with any specific retirement questions. You may also find these websites a useful source of information: nalc.org/depart/retire/index.html and opm.gov/retire/index.aspx. ☒

The NALC's Compensation Department is unable to respond to inquiries from individual letter carriers. NALC members with questions about workers' compensation must contact their local branch representatives, who, in turn, can seek needed assistance from their National Business Agent's office.



Suitable limited-duty job offers

The nature and severity of the employee's injury or condition and the medical evidence presented by the employee's treating physician will determine when and how an employee will return to work in a suitable limited-duty job. Management must make every effort toward assigning the employee to limited-duty work that will allow the employee to work within his/her physical limitations.¹

Elements of the job offer—A suitable limited-duty job offer must include a description of the duties of the position, the physical requirements of those duties, the pay rate information, and the organizational and geographical location of the job. The job offer must also include the date on which the job will first be available, and the date by which the employee is either to return to work or notify the employer of the employee's decision to accept or refuse the job offer. The job offer must be in writing and management must send a complete copy of any job offer to OWCP when it is sent to the employee.²

Duty to return to work—If a carrier cannot return to the job held at the time of injury due to partial disability from the work-related injury, but has recovered enough to perform some type of work, the carrier must accept suitable work. This work may be with the Postal Service or with another employer through job placement efforts made by or on behalf of the OWCP.³

Suitability determination—OWCP will only rule on the suitability of a job offer once it has been made to a claimant in writing. OWCP's suitability determination of a job offer will consider the claimant's medical restrictions and the geographic location of the job offer.

OWCP's suitability determination of a limited-duty job offer only affects a claimant's future wage-loss compensation. If OWCP determines that a job offer is *not* suitable, compensation benefits will continue for the claimant. If OWCP finds the offered position is suitable, the carrier runs the risk of losing their benefits if he/she refuses to accept the job offer. The Federal Employees' Compensation Act provides for certain penalties against workers who refuse offers of suitable work or who abandon suitable work without good cause. A claimant who unreasonably refuses an offer of suitable employment is not

entitled to any further compensation benefits but may receive medical expenses related to treatment of the accepted condition.⁴

Before OWCP terminates an injured worker's compensation, it must provide the employee notice that it is proposing to terminate the benefits and must then give the worker an opportunity to respond within 30 days.

Suitable does not equal contractual—A carrier could be offered a limited-duty assignment that meets OWCP's suitability requirements, but fails to meet the contractual requirements of the National Agreement and the *ELM*. *ELM* 546.14 specifies the steps that must be taken by management in seeking limited-duty work for injured carriers. Those provisions also require management to minimize any adverse or disruptive impact on the employee.

Unless medically prohibited by their treating physician, carriers should accept and work the limited-duty job offer, even if it is under protest. The national parties have agreed to a memorandum that allows a partially recovered employee to accept a limited-duty job offer "under protest" and still pursue a grievance concerning the assignment.⁵ Again, carriers who refuse to work such disputed assignments risk termination of compensation benefits for refusing a job offer that OWCP deems suitable.⁶

Retirees may also be given a job offer—Limited-duty job offers are not exclusive to current employees. Retirees who are still drawing wage-loss compensation may also receive a limited-duty job offer from the Postal Service. They should be advised that they should *not* ignore such job offers because it could result in the termination of their OWCP compensation benefits.

The NALC is carefully monitoring and addressing management's attempts to revise the way it makes limited-duty job offers to injured carriers. Each limited-duty job offer, or lack thereof, however, is fact-based and must be grieved on an individual basis. ☒

1. *ELM* 546.142.
2. 20 CFR 10.507 (d); *FECA Procedure Manual* 2-0814.
3. 20 CFR 10.515.b
4. 5 USC 8106.
5. M-01120
6. *JCAM*, page 13-11



Settlement reached on national NRP grievance

The NALC and Postal Service have settled a national-level grievance filed on the Postal Service's application of its National Reassessment Process (NRP). NRP is a management program that was devised to reassess all current limited-duty job offers and to reassess how future limited-duty job offers are made. The NALC, from the very outset of this dispute, has maintained that NRP cannot compromise injured employees' rights under 546 of the *ELM*.

As a result of many months of tough negotiations between your national officers and postal management, the parties' three-part settlement addresses all of the NALC's contentions in this grievance and solidifies the contractual rights of affected letter carriers.

The NALC contended that management, through NRP, was attempting to redefine the provisions of 546 of the *ELM*. The parties agreed that NRP does not change management's obligation to provide limited duty to injured employees and it does not change the provisions of *ELM* 546. In this regard, the resolution contained the following language:

1. The NRP has not redefined or changed the Postal Service's obligation to provide limited duty or rehabilitation assignments for injured employees. The *ELM* 546 has not been amended and remains applicable to all pending grievances.

The NALC also contended that management was applying new criteria for selecting employees who received limited duty. The parties also agreed that NRP does not create new criteria for assigning limited duty. In this regard, the resolution contained the following language:

2. The Postal Service has not developed new criteria for assigning limited duty. Injured employees will continue to be assigned limited duty, in accordance with the requirements of *ELM* 546 and 5 C.F.R., Part 353.

The last part of the resolution addresses how light-duty employees may have been impacted by NRP. The settlement states that light-duty carriers will not normally be displaced solely to make new limited-duty or rehabilitation assignments unless required by law. In this regard, the resolution contained the following language:

3. Employees on existing non-workers' compensation light duty assignments made pursuant to Article 13 of the National Agreement will not normally be displaced

solely to make new limited duty or rehabilitation assignments unless required by law or regulation. The foregoing sentence does not establish any guarantee of daily work hours for employees in a light duty assignment.

The resolution of these issues has cleared away many obstacles that impeded the NALC's ability to move forward with grievances on the local and regional levels. The settlement will now allow for the continued processing of those grievances that have been held in abeyance pending the outcome of this national case. For more information, contact your National Business Agent.

The resolution of this national grievance does *not* put an end to NRP, and because of this, the NALC will continue to monitor this process and will continue to require contractual compliance as management moves forward. Local representatives are encouraged to diligently monitor NRP in their area and report as needed to their NBA. A copy of the settlement is available at nalc.org on the Contract Administration page.

Claimant Query System (CQS) is now available

The Affiliated Computer Services (ACS) Web Bill Processing Portal website has been expanded in a major way with a new feature called Claimant Query System (CQS) for FECA claimants and their representatives.

The new CQS provides much more information for injured workers, with 24-hour Internet access to their case file status, accepted conditions, address of record, and compensation payments and tracking. CQS offers essentially the same information that was previously only available on a very limited basis to injury compensation specialists. The ACS web portal also provides claimants and their representatives with access to other claim-related information, which includes medical bill status and medical authorizations.

The ACS web address is <http://owcp.dol.acs-inc.com/portal/main.do>. To access claimant information, you must have a claim number, date of injury and claimant's date of birth. Once logged in, the CQS link is on the left side of the page.

The Compensation Department would like to extend best wishes to President Young for a happy and healthy retirement. ✉



Restoration rights after a compensable injury

A letter carrier who recovers from a compensable injury has restoration rights under 5 CFR 353 and has additional contractual rights under the provisions of *ELM* 546, which include the limited duty pecking order. The exact nature of the restoration rights under 5 CFR 353 is dependent on the time it takes the carrier to recover and the extent of recovery.

To be entitled to restoration rights, the carrier must have been separated or not provided work because of a compensable injury. To exercise restoration rights, an application for restoration should be made in writing to the postmaster to protect applicable time limits.

The restoration rights found in 5 CFR 353 are divided into four categories: 1) full recovery within one year; 2) full recovery after one year; 3) physically disqualified; and 4) partially recovered.

Full recovery within one year—A federal employee who fully recovers from a compensable injury within one year from the start of eligibility for compensation (or from the time a compensable disability recurred after full-time federal employment was resumed) must be “immediately and unconditionally” restored by the agency to his/her former position or to “an equivalent one.” These restoration rights are agency-wide. A fully recovered employee is expected to return to work immediately upon the termination of compensation.¹

Fully recovered after one year—A federal employee who fully recovers from a compensable injury more than one year from the start of eligibility for compensation (or from the time a compensable disability recurred after full-time federal employment was resumed) is entitled to agency-wide priority consideration for his/her former position or equivalent, with preference for the former local commuting area. To be eligible for these rights, the employee must apply for reappointment within 30 days after the termination of compensation.²

Physically disqualified—Employees who are physically disqualified from their former positions or equivalents are entitled to appointment to positions for which they are qualified that will provide them “with the same status, and pay, or the nearest approximation thereof, consistent with the circumstances in each case.” This right is agency-wide and applies for one year after the start of compensation eli-

gibility. After one year, employees are entitled to the rights of those who fully or partially recover, as applicable.³

Partially recovered—When employees partially recover and are able to return to limited duty, agencies must make every effort to restore them to duty in the local commuting area. At a minimum, this means they must be treated substantially the same as other individuals with disabilities under the Rehabilitation Act. Partially recovered employees are expected to seek re-employment as soon as they are able.⁴

The Merit Systems Protection Board recently ruled that an agency must make reasonable accommodation of an employee’s disability through means such as modifying or adjusting the duties of the position at issue, or reassigning the employee to a vacant position for which they are qualified. If the employee does not qualify for any vacant positions, the agency still is obliged to attempt to modify or adjust the duties of a position where accommodation is reasonable.⁵

Appeal rights—Federal employees covered by these regulations may appeal to the MSPB any agency’s “failure to restore, improper restoration, or failure to return an employee following a leave of absence.” A partially recovered employee may appeal to the MSPB “for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration.” Once re-employed, a partially recovered employee may appeal “the agency’s failure to credit time spent on compensation for purposes of rights and benefits based upon length of service.”⁶ An injured worker may want to consult with an attorney when making an appeal to MSPB. The NALC does not provide representation before the MSPB.

Violations of the contractual provisions found in *ELM* 546 should be grieved when management fails to make every effort toward assigning limited duty.⁷ ✉

1. 5 CFR 353.301(a), *ELM* 546.121

2. 5 CFR 353.301(b), *ELM* 546.13

3. 5 CFR 353.301(c)

4. 5 CFR 353.301(d), *ELM* 546.14

5. *Taylor v. Dept. of Homeland Security*, 107MSPR306

6. 5 CFR 353.304

7. Part 2—*NALC Guide to NRP*



Infectious diseases

Claims for injuries or illnesses due to exposure to infectious diseases can be filed either as traumatic injury claims or as occupational disease claims. A traumatic injury claim involves a specific event or series of events within a single workday or shift. Traumatic injuries are caused by external force, including stress or strain, which is identifiable as to the time and place of occurrence and member or function of the body affected. For example, a carrier may claim that he was stuck with a needle in the course of pulling a collection box and contracted hepatitis as the result of the needle-stick injury. An occupational disease or illness, on the other hand, refers to a condition produced by the work environment over a period longer than a single workday or shift.

Mere exposure to an infectious disease will not generate compensation, nor is the employee's fear of contracting the disease compensable. ECAB has ruled that exposure to a disease does not fall within the definition of an injury as set forth in the FECA.¹ ECAB has also ruled that the FECA does not provide for the payment of medical treatment after exposure to hazardous material or diseases where an employee does not contract the disease to which he was exposed.²

Routine examinations due to exposure to an infectious disease are also not covered by the FECA. The OWCP procedures state that the law does not provide for a routine examination of an employee who has been exposed to a co-worker with an infectious disease or to hazards of the workplace.

In order to establish that an infectious disease injury or illness is sustained in the performance of duty, a claimant must submit the following: 1) medical evidence establishing the presence or existence of the disease or condition

for which compensation is claimed; 2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and 3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The claimant's physician must explain the nature of the relationship between the diagnosed infectious disease and the specific employment factors identified by the claimant and support his opinion with medical rationale.

In the case of an infectious disease, it is not sufficient for the claimant to show that he/she was healthy prior to

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undertaking employment or that the disease developed in the course of employment. He/she must produce proof of a reliable and probative character showing that his/her disease resulted from exposure to the disease in an active state as a result of employment or evidence establishing a logical chain of events from which such exposure may reasonably be inferred.³

The claimant's burden of proof in claims involving infectious diseases can be difficult to substantiate, and that is especially true if influenza is the diagnosis. However, that does not mean that the carrier diagnosed with influenza should not file a claim. If a carrier contracts the flu at work, the evidence clearly identifies the contributing employment factors, and it is supported by medical evidence, then an OWCP claim should be filed. ☒

1. C.M. & National Park Service 06-2174 (2007)

2. Richard A. Weiss, 47 ECAB 182 (1995)

3. George H. Blayzor, 6 ECAB 707 (1954)



Rationalized medical opinions

How important are rationalized medical opinions to an on-the-job injury claim? Rationalized medical opinions are vitally important to every OWCP claim. In fact, the lack of rationalized medical opinion is probably the single most prevalent reason for the denial of claims.

A rationalized medical opinion is a physician's written (and signed) reasoning that supports his/her medical opinion. It is the physician's explanation of how he/she arrived at the conclusions that a claimant suffered a work-related illness or injury. The physician's medical rationale must also explain the causal relationship between the diagnosis and the employment factor or activity.

A medical report might read, "The patient has a sprained right ankle. The patient also reported that she fell while entering her LLV." Would that be considered a rationalized medical opinion? Probably not, because the physician did not provide a causal relation between the diagnosis and an employment factor. Did the sprained ankle cause the claimant to fall? Or was the sprained ankle a result of the fall? Medical reports that do not contain rationalized opinions on causal relation are given little weight and are generally insufficient to meet a claimant's burden of proof.

Medical opinions cannot be based on speculation or probabilities and cannot merely be a conclusion without an explanation. The Employees' Compensation Appeals Board (ECAB) has ruled, "The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant."¹ Surmise, conjecture, speculation or the carrier's belief that their injuries are causally related to their job does not qualify as medical opinion.

The standard of proof placed on medical rationale is not set at an unattainable level. According to ECAB, "It is not necessary that the evidence be so conclusive as to sug-

gest causal connection beyond all possible doubt in the mind of the medical scientist. The evidence required is only that necessary to convince the adjudicator that the conclusion drawn is rational, sound and logical."²

A causal relation is not always necessary in every medical opinion when the case involves an obvious traumatic injury. This might be the case if a carrier suffered a broken arm in an on-the-job vehicle accident. In such an instance, it would probably be obvious that the causal relation of the fractured arm was the result of the vehicle accident. However, even if the injury appears to have an obvious causal relation to the accident, a claims examiner may still request a rationalized medical opinion. If such a request is made, the claimant should comply by asking their physician to provide the medical rationale. It is much easier for a claimant to get the medical rationale from a physician during the early stages of a claim than it is to wait for a reversal on appeal.

A rationalized medical opinion must also appropriately address any pre-existing condition related to the diagnosis. Going back to the first example, let's say the carrier had a pre-existing condition in her right ankle. Would that pre-existing condition preclude her from ever having an on-the-job injury claim accepted for her right ankle? The answer is no. If a pre-existing condition involving the same part of the body is present and the issue of causal relationship therefore involves aggravation or precipitation, the attending physician must provide a rationalized medical opinion that differentiates between the effects of the employment-related injury or disease and the pre-existing condition. It is not necessary for an on-the-job injury, by itself, to have caused an employee's condition in order for it to be compensable. If the medical evidence reveals that an employment factor contributes in any way to the employee's condition, the condition is considered employment related.

A rationalized medical opinion, signed by a physician, is a linchpin of a successful injury claim. ☒

1. Kathy Marshall 45 ECAB 827 (1994)
2. Robert P. Bourgeois, 45 ECAB 745 (1994)



USPS contact with a treating physician

Management's contact with the treating physician of an injured worker is limited to monitoring the medical progress and duty status for the sole purpose of providing limited duty. The Code of Federal Regulations (CFR) explicitly limits the employing agency's contact with the physician of an injured worker. 20 CFR 10.506 says that the employer may monitor the employee's medical progress and duty status by obtaining periodic medical reports, which is usually accomplished via the OWCP Form CA-17 (Duty Status Report). These regulations are also promulgated in USPS handbooks and manuals.¹

Management's contact with the injured worker's physician must also be a written communication. 20 CFR 10.506 states that the employer shall not contact the physician by telephone or through a personal visit. The same regulations require that copies of all written correspondences from management to a treating physician must be provided to both the injured worker and OWCP.²

The parties at the national level have also agreed to a "standard letter" that management is required to use when writing to a physician. The letter informs the physician that limited duty is available and requests that the physician complete the Form CA-17. The referenced "standard letter" complies with 20 CFR 10.506 because it only requests information that relates to the injured worker's ability to return to work.³


Management does not have a right to copies of all medical reports, all clinical notes, and all treatment information in the possession of an injured worker's treating physician. Management is also *not* an active participant in the claim's adjudication process.⁴ However, management is considered a party to the claim and therefore can receive information from the OWCP file. Such information may include medical reports, but the use of that information must be consistent with the reason it was collected. This means that management may not use information collected from a claimant's file in connection with EEO complaints, disciplinary actions or other administrative actions without the claimant's consent.⁵

In some districts, management specialists have issued letters to injured workers that indicate the injured worker "needs" to complete a PS Form 2488 (Authorization for Medical Report). If such practices are discovered, they should be grieved because management should in *no* way infer that the completion of the PS Form 2488 is a requirement for the successful adjudication of an on-the-job injury claim. The PS Form 2488 is not required by OWCP and its completion is *voluntary*.⁶ As advised in the November Contract Talk article, "do not patronize PS Form 2488."

For more information on this subject, see the March 2008 *Activist* article "Protecting Medical Privacy," which can be found at nalc.org/depart/owcp/index.html.

Guard your rights and guard your medical records.

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1. ELM 545.52, EL-505 6.3
2. M-01385, M-01428
3. M-01091
4. 20 CFR 10.118.c
5. CA-810 9.2
6. M-01441



The Compensation Department would like to wish you and your family a happy and healthy holiday season.