FECA Transmittal 26-2, Part 3:
The erosion of ECAB precedent

Regional Workers' Compensation Assistant Coby Jones

This month's column continues the discussion of the *Federal Employees' Compensation Act (FECA) Transmittal* 26-2[1] issued by the Department of Labor on April 24 that announced changes to the *FECA Procedure Manual (FECA PM),* including changes that will have an adverse effect on our injured members. Among several changes to *FECA PM* 2-803—the chapter that deals with fact of injury—the transmittal states the following:

> The chapter was also updated to remove ancillary language previously added emphasizing deferral to the injured worker's statements and instead emphasize DFEC's role as an independent arbiter.

The DOL goes on to explain that the change aligns "with DFEC's responsibilities to fairly assess and weigh all evidence received in a case and reach decisions independently, focusing on its duties to both the claimant and employing agency."

While this might appear to be a simple shift in emphasis on how the Office of Workers' Compensation Programs (OWCP) views evidence, the removal of the "ancillary language" represents a sea change in how OWCP views its role and authority under the new administration with deep and troubling implications for the injured worker and the injured letter carrier in particular.

The removed "ancillary language" represents, in fact, at least half a century of the Employees' Compensation Appeals Board (ECAB) precedent. Before April 4, it was found at *FECA PM* 2-0803.4. a.1(a):

> An employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence. See, D.B., Docket No. 20-0797 (issued Aug. 5, 2021).

While the citation comes from a 2021 ECAB decision, because the DOL routinely updates the *Procedure Manual* to include more recent citations, this exact language can be found word for word in earlier versions of the *Procedure Manual* going back decades. And in fact, this exact language can be found word for word in ECAB decisions at least as far back as 1979 (*Ruth M. Jackson,* 30 ECAB 917) with the precedent setting precept of giving great probative value to the injured employee's statement going back much further.

It is also one of the most widespread and commonplace of all ECAB precedents. It has appeared word for word in more than a thousand ECAB decisions just since 1998.

On a practical everyday level, the deliberate choice to ignore ECAB precedent has already had an adverse effect on letter carriers. Many letter carrier injuries occur on the street, beyond the view of postal managers and often without witnesses. In such traumatic injuries, the precedent of giving "great probative value" to the injured letter carrier's statement has been invaluable in obtaining prompt claim acceptance and necessary medical treatment.

In just the last few weeks, we have already seen accepted claims rescinded under the fig leaf of 5 U.S.C. 8128 and reopened for development based on late arriving Postal Service challenges that OWCP is now required to give equal weight to. And because the Postal Service currently challenges almost every claim—even straightforward traumatic injury cases and often frivolously—we anticipate claims processing traffic jams.

On a more global level, NALC is concerned that this initial disregarding of ECAB precedent will open the door to further dismissing of other ECAB precedents that provide important protections and benefits to the injured worker, and that protect the remedial intent of the FECA.

The ECAB's role in setting precedent (issuing "final decisions" in the wording of 5 U.S.C. 8149) is absolutely essential to the fairness of the claims process. The FECA is one of the few areas of federal administrative law that does not permit external judicial review. It is remedial legislation that represents a social compact between the injured federal worker and the government: The injured worker receives the benefits provided for by the FECA, and in doing so gives up any right of action (lawsuits) against the federal government.

This is known as "exclusivity of remedy," and is a fundamental rule in injury compensation law. It is found in the FECA itself at 5 U.S.C. § 8128(b):

> (b) The action of the Secretary or his designee in allowing or denying a payment under this subchapter is—

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1 *FECA Transmittal* 26-2 can be found at: dol.gov/agencies/owcp/FECA/regs/compliance/DFECfolio/FECATransmittals#FECAT2602.

FECA Transmittal 26-2 (continued)

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(1) final and conclusive for all purposes and with respect to all questions of law and fact; and

(2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

Because decisions by OWCP are not subject to any other court or judicial review, the ECAB plays a vital role in ensuring that the process is fair and not arbitrary and capricious through issuing final decisions and setting precedent.

The ECAB, six years after its creation, discusses in *Yingling 4 ECAB 529* (1952), the legislative history of the Reorganization Plan of 1946, which created the ECAB and its judicial function. In *Yingling,* the Board—through seven detailed pages of reviewing the history and legislative intent behind the enabling legislation—concluded:

> [T]he Board is of the opinion, and so holds, that the regulations governing both the Bureau [now OWCP] and the Board, enabling the Board to weigh the evidence and to make a final decision on the merits of the case, constitute a valid exercise by the promulgating officials of authority lawfully derived from Reorganization Plan No. 2 of 1946 and Plan No. 19 of 1950 (p. 537).

The ECAB has established in various decisions over the years its interpretation of 5 USC 8149 as providing the Board with final review authority, much as the U.S. Supreme Court established the principle of its own judicial review authority in its 1803 *Marbury v Madison* decision.

For example, in *Kuyoth 27 ECAB 498* (1976), the Board held:

> Government questioned the authority of the Board to make a de novo review of decisions of the adjudicating agency, including all questions of law and fact. This matter has been settled since the Board was established in 1946. The Rules of Procedure of the Board issued by the Secretary of Labor specifically provide that, in deciding appeals from a final decision, "The Board may review all relevant questions of law, fact, and discretion in such cases." A similar regulation has existed since the inception of the Board...
>
> ... **The Board has final authority to determine questions of law and fact. Its determinations are binding upon the Office and must, of necessity, be so accepted and acted upon by the Director. Otherwise, there could be no finality of decisions; the whole appeals procedure would be nullified, and the questions would remain moot.**
>
> These fundamental principles, regarding the authority of the Board to make a de novo review and make the final determination on questions of law and fact, have governed the Board without deviation from its inception to the present day. No basis has been found for changing these principles at this late date." pp. 498-499. (Emphasis added.)

The ECAB has also interpreted 5 U.S.C. § 8149 as granting final decision authority not subject to review by the Office:

> Section 8149 of the Federal Employees' Compensation Act provides that decisions of the Board on appeals taken from claims of employees are final. **The Office therefore does not have jurisdiction to review decisions by the Board**." Zerega 45 ECAB 860 (1994) p. 863. (Emphasis added.)

"The Office therefore does not have jurisdiction to review decisions by the Board."

Apparently, no longer.

Secretary-Treasurer

Frequently asked IRS questions (continued)

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funds for which documentation was not submitted.

In addition, IRS rules require an advance for expenses to be made within a reasonable time—generally no more than 30 days before the expenses are expected to be incurred. Under the LMRDA, an advance for expenses is considered a reportable loan unless the advance is provided within 30 days of travel and accounted for within 30 days following the trip (see page 4-21 of the guide). To avoid problems encountered when advances are not properly accounted for, it may be best to forgo advances and instead reimburse for actual expenses after receipts have been submitted or opt to provide per diem per the IRS guidelines.