

FECA appellate rights

Note: This article updates and replaces an article on the same subject in the December 1993 issue of *The Postal Record*.

An employee or survivor dissatisfied with a decision of the Office of Workers' Compensation Programs has the right to challenge that decision through the appellate process specified in the Federal Employees' Compensation Act. This process consists of three different options:

- *Oral hearing before or review of the written record* by an OWCP hearing representative. The request must be made within 30 days of an initial OWCP decision.
- *Reconsideration* by OWCP based on submission of new evidence. The request must be made within one year of the latest decision.
- *Appeal* to the Employees' Compensation Appeals Board. The request must be made within 90 days of the latest OWCP decision, although the ECAB will consider a request made within one year if good cause is shown for the delay.

There are two basic requirements which must be met by an employee or survivor before any step in the appellate process can begin: a formal claim must be filed on Form CA-5, CA-5b or CA-7; and OWCP must issue a final (appealable) decision.

Adverse OWCP decisions are usually in the form of a formal "Compensation Order" providing a brief summary of the claim and the reason for the rejection. Sometimes a narrative letter is sent in place of the Compensation Order. In all instances of an adverse decision, and in instances where

OWCP arrives at a decision allowing a schedule award,¹ OWCP advises the employee or survivor of the appellate rights associated with the decision. These rights are usually summarized in an attachment to the Compensation Order or letter decision.

Neither OWCP nor ECAB decisions are appealable to the courts; and an ECAB decision is final—except that an employee may again ask OWCP for reconsideration.²

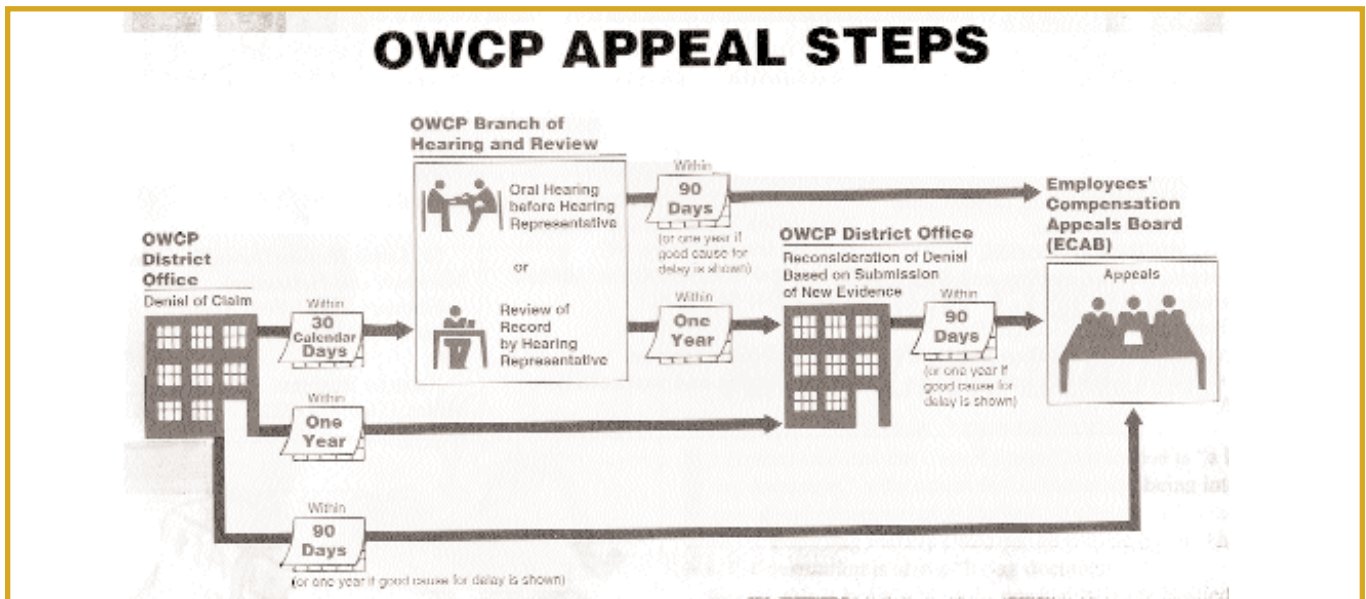
Upon receipt of an appealable OWCP decision an employee or survivor should in most cases ask for an *oral hearing or review of the written record* by an OWCP hearing representative. New factual and medical evidence can be submitted to the hearing representative in either instance.

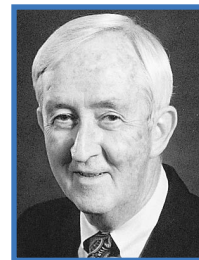
Reconsideration should generally be reserved for use should the decision following the oral hearing or review of the written record be adverse. *New evidence must accompany a request for reconsideration.*

Appeal before the ECAB should not be requested until one or more of the other options have been utilized and/or there is no possibility of providing new evidence—as the ECAB will only consider evidence already contained in the case record. *No new evidence will be accepted.*

A chart showing all three appellate steps is provided below. Next month's article will be on the subject of oral hearings and reviews of the written record. Subsequent articles will be devoted to reconsiderations and appeals. ✉

1. See the February and March 1995 issues of *The Postal Record* for a discussion of schedule awards.
2. The request for reconsideration must be made within one year of the ECAB's decision. New evidence must accompany the request.





Oral hearings and reviews of the written record, part 1

Note: This article and articles to be published in the next two issues update and replace articles in the January, February and March 1994 issues of The Postal Record. This article should also be read in conjunction with an article in the January 2000 Postal Record on the subject of FECA appellate rights.

The oral hearings provision of the FECA is contained in 5 USC 8124(b), which states in part: “Before review [i.e., reconsideration] under Section 8128(a) of this title a claimant for compensation not satisfied with a decision of the Secretary [of Labor]...is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.”

Oral hearings are held before OWCP hearing representatives and, as an alternative, OWCP will permit an employee or survivor to obtain a “review of the written record.” A request for an oral hearing or review of the written record *must* be submitted in writing to OWCP’s Branch of Hearings and Review *within 30 days* after the date of the *initial* adverse OWCP decision, as determined by the postmark on the envelope.

An oral hearing or review of the written record is not permitted if the employee or survivor has previously been granted *reconsideration* (see January 2000 article). In other words, an oral hearing or review of the written record can precede, but cannot follow, reconsideration by OWCP.

The basic purpose of an oral hearing is to provide the employee or survivor with an opportunity to support his or her claim and clarify information in the record. The employee or survivor is not required to submit new evidence at the hearing—however, it is usually in the best interest of the employee or survivor to do so.

If the employee or survivor chooses to request a review of the written record, then the review will take the place of the oral hearing. New evidence can be submitted, preferably at the time of the request, to supplement the evidence already of record. A review of the written record is not the same as reconsideration (again, see January 2000 article).

An employee or survivor may be represented by any responsible individual before or at an OWCP hearing. This individual can be a friend, an attorney, an NALC branch officer or an NALC national business agent. Only one representative is permitted—i.e., it is not possible for both a private attorney and an NALC representative to represent an employee or survivor at a hearing.

A representative should have a broad knowledge of the FECA, be fully familiar with the employee’s or survivor’s claim, and (if possible) have prior experience involving FECA hearings.

The 30-day requirement referenced above is a must—there will be no other opportunity to obtain an oral hearing or review of the written record after the 30-day period. Should, however, OWCP subsequently release a new adverse decision (i.e., a *de novo* decision) in place of the initial decision, or release another initial decision *on a different issue*, the employee or survivor will again have an opportunity to obtain a hearing or review of the written record—provided the request is made within 30 days of the new decision.

A request for an oral hearing need only state that a hearing is requested—and provide the date of the initial OWCP decision. If review of the written record is desired in place of an oral hearing, then the request should so state.

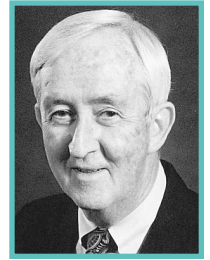
It is also necessary that the request be properly addressed to: Office of Workers’ Compensation Programs, Branch of Hearings and Review, P.O. Box 37117, Washington, DC 20013-7117.

If the employee or survivor chooses to have someone act as his or her representative at an oral hearing, the employee should advise OWCP’s Branch of Hearings and Review of the name of the designated representative as soon as possible.

Upon receipt of a request for an oral hearing, an OWCP hearing representative will obtain and review the case file to ascertain whether the dispute can be resolved without a hearing.

A hearing may not be necessary if the hearing representative determines that the record shows that the initial OWCP decision is not supported by evidence in the case file or that established OWCP procedures were not followed. In such instances, the hearing representative will recommend that the initial decision be reversed or modified. If the Chief of the Branch of Hearings and Review agrees with the recommendation, the employee or survivor is notified. In all other instances, the case file will be placed in line for a hearing.

Next month’s article will provide additional information on oral hearings and reviews of the written record. ☐



Oral hearings and reviews of the written record, part 2

Note: This article should be read in conjunction with articles in the January and February 2000 issues of The Postal Record.

Oral hearings are scheduled not more than 100 miles from an employee's or survivor's place of residence except in unusual circumstances. If the medical evidence shows that the employee or survivor is not able to travel for a period of six months or more, OWCP will consider scheduling the hearing at the employee's or survivor's home, hospital or extended care facility.

The employee or survivor and the employing agency will be informed of the time and location of the hearing at least 30 days in advance.

OWCP does not pay for any expenses incurred by the employee or survivor in connection with attendance at a hearing.

OWCP's regulations permit an oral hearing to be conducted by telephone or teleconference—at the discretion of the hearing representative assigned to the case.

An employee or survivor may withdraw a hearing request at any time up to and including the day of the hearing. Note, however, that withdrawing a request for a hearing means that no further request for a hearing on the underlying decision will be considered.

A request for postponement of a scheduled hearing will be granted if the hearing representative can reschedule the hearing during the hearing representative's same hearing trip. Otherwise a request for postponement will not be granted except where the employee or survivor is hospitalized for a reason which is not elective or where the death of the employee's or survivor's parent, spouse, or child prevents attendance.

No further opportunity for a hearing will be provided where the request to postpone a scheduled hearing does not meet the above criteria. Instead the hearing representative will conduct a review of the written record and issue a decision accordingly. In the alternative, an oral hearing may be conducted by telephone or teleconference at the sole discretion of the hearing representative.

Hearing proceedings: An OWCP hearing is an informal, non-adversarial proceeding not governed by formal legal rules of evidence or procedures. The hearing will, however, be recorded verbatim and anyone giving testimony will be requested to take an oath.

The hearing representative determines the conduct of the

oral hearing and may terminate the hearing at any time he or she determines that all relevant evidence has been obtained.

While the employing agency cannot request a hearing, it may have an agency representative at the hearing as an observer. The agency representative may not give testimony at or otherwise participate in the hearing in the absence of a specific request from the employee or survivor.

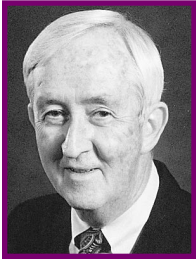
The hearing representative will furnish a transcript of the hearing to the employee or survivor and the employing agency, each having 20 days from the date it is sent to comment. Any comments received from the employing agency will be sent to the employee or survivor—who will be given an additional 20 days to comment on the employing agency's comments.

OWCP's regulations also provide that the hearing will remain open for submission of additional evidence until 30 days after the hearing is held, unless the hearing representative, in his or her sole discretion, grants an extension. Only one such extension may be granted. A copy of the decision will be mailed to the employee's or survivor's last known address, to any representative of the employee or survivor, and to the employing agency.

Reviews of the written record: When requested by the employee or survivor in lieu of an oral hearing (see January 2000 article), the hearing representative will review the case record and any additional evidence submitted by the employee or survivor and by the employing agency. The hearing representative may also conduct whatever investigation he or she deems necessary. New evidence and arguments can be submitted at any time up to the time specified by the hearing representative, but they should be submitted as soon as possible to avoid delaying the process.

In this respect, the employee or survivor should submit, with the request for review of the written record, all evidence or argument that he or she wants to present to the hearing representative. The hearing representative will send a copy of all pertinent material to the employing agency, which will have 20 days from the date it is sent to comment. Any comments from the employing agency will be sent to the employee or survivor, who will have 20 days to comment on the employing agency's comments.

Next month's article will provide further information on oral hearings and reviews of the written record. ☒



Oral hearings and reviews of the written record, part 3

Note: This article should be read in conjunction with articles in the January through March issues of The Postal Record.

Subpoenas: Upon the request of the employee or survivor, or on the hearing representative's own motion, the hearing representative may issue subpoenas for attendance and testimony of witnesses and for the production of documents.

Requests for subpoenas ideally should be made at the time the hearing is requested and must be made in writing no later than 60 days after the date the hearing is requested; must designate the witnesses or documents to be produced; must provide the full address where the witnesses or documents may be found; and must state the pertinent facts which the employee or survivor expects to establish by such witnesses or documents—and whether such facts could be established by other evidence without the use of subpoenas.

The hearing representative has sole discretion concerning the issuance of subpoenas, but no subpoena will be issued for attendance of employees of OWCP acting in their official capacities as decision-makers or policy administrators.

The hearing representative issues the subpoena under his or her own name. It may be served in person or by certified mail, return receipt requested, addressed to the person to be served at his or her last known principal place of business or residence. A decision to deny a subpoena can

only be appealed as part of an appeal of any adverse decision which results from the hearing process.

Witnesses who are not employees or former employees of the federal government shall be paid the same fees and mileage as are paid for like services in the District Court of the United States where the subpoena is returnable. The fee for an expert witness shall not exceed the local customary fee for such services.

OWCP will pay fees and mileage of witnesses subpoenaed on the hearing representative's own motion. The employee or survivor must pay the fees and mileage of witnesses subpoenaed at the request of the employee or survivor.

Hearing decision: The hearing representative will review all evidence and testimony, prepare a written decision and submit it to OWCP's Chief, Branch of Hearings and Review, for final review.

This final review, usually made on or immediately after the date the hearing representative signs the written decision, constitutes the closing of the hearing.

A notice of formal decision will be sent to the employee or survivor and the employing agency following the final review. This notice will outline the employee's or survivor's right to appeal to the Employees' Compensation Appeals Board or request reconsideration from OWCP if he or she is dissatisfied with the hearing representative's decision. ✉

◆ Upon notification that the case has been received in OWCP's Branch of Hearings and Review, request copies of any pertinent documents from the case record that are not already available (e.g., if OWCP relied on a medical report from an OWCP-selected second opinion specialist to deny the claim, ask for a copy of the medical report as well as any instructions and "Statement of Accepted Facts" sent to the specialist by OWCP).

◆ Make a written description of the issues involved in the denied claim and prepare a written strategy for presentation of information (including any new evidence) at the hearing. As part of the strategy decide who, if anyone other than the employee or survivor, will testify (e.g., witnesses to a disputed incident that is the basis of the claim).

◆ If the claim involves medical issues (most do) carefully examine the medical evidence that has been submitted and obtain new rationalized medical evidence for submission at the hearing if the previously submitted medical evidence is weak (see article in the July 1998 issue of *The Postal Record* for the right type of medical evidence).

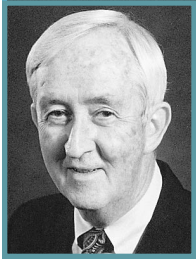
Preparing for an OWCP oral hearing

◆ If OWCP's denial of the claim is based on the medical opinion of an OWCP-selected impartial medical specialist (referee physician), then any new medical evidence is best provided by a physician not previously involved in the case (preferably a physician board-certified in the same specialty as the impartial medical specialist). Any such new medical evidence

must be very strong and persuasive inasmuch as OWCP gives great weight to the medical opinion of an impartial medical specialist.

◆ Be sure to retain copies of all requests and evidence sent to the Branch of Hearings and Review or presented to the hearing representative.

◆ If the employee or survivor chooses to request a review of the written record as opposed to an oral hearing and the claim involves medical issues, then the same consideration should be given to the submission of new medical evidence that is described above.



Reconsiderations

*Note: This article updates and replaces an article in the April 1994 issue of *The Postal Record*. It should be read in conjunction with an article in the January 2000 issue concerning the entire FECA appellate process.*

Reconsiderations should not be confused with oral hearings and reviews of the written record (see articles in the February through April, 2000 issues of *The Postal Record*) or with appeals filed with the Employees' Compensation Appeals Board (to be discussed in the June issue).

OWCP's authority to grant reconsiderations is contained in the FECA at 5 USC 8128(a), which provides: "The Secretary of Labor [OWCP] may review an award for or against payment of compensation at any time on his own motion or on application...."

A reconsideration (sometimes referred to by OWCP as a "review") is designed to set forth arguments and provide evidence that:

- Shows that OWCP erroneously applied or interpreted a specific point of law;
- Advances a relevant legal argument not previously considered by OWCP; or
- Constitutes relevant and pertinent new evidence not previously considered by OWCP.

Some examples of relevant and pertinent new evidence are:

- A statement of a reliable witness not previously submitted which supports the employee's claim that an accident occurred during the performance of duty.
- A new medical report which provides medical rationale that is not contained in a previous medical report.

Reconsideration is not, however, an absolute right; rather, OWCP has the *discretionary authority* to deny a request for reconsideration if OWCP concludes that none of the above three criteria are met.

OWCP also has the authority to reopen a case for reconsideration on its own motion (e.g., OWCP receives new evidence relating to a change in an employee's physical condition and, hence, earning capacity).

A request for reconsideration must be made in writing within one year of the last merit decision of record.¹

OWCP will consider an untimely request for reconsideration only if the request demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The request must establish, on its face, that OWCP's decision was erroneous.

Any merit decision (i.e., a decision establishing, denying or terminating a benefit) entitles the employee or survivor to request reconsideration—including:

- The initial decision by an OWCP district office.
- A decision by an OWCP hearing representative following an oral hearing or a review of the written record.
- A decision by an OWCP district office denying modification of a prior decision.
- A decision by the ECAB.
- A merit decision issued by OWCP following an ECAB decision.

To request reconsideration based on new evidence, the employee or survivor must submit a letter to the OWCP district office having jurisdiction of the compensation case file. The letter must contain:

- A statement that "reconsideration" is being requested.
- The OWCP case file number and date of the decision to be reconsidered.
- The reasons why the earlier decision should be reconsidered with a brief description of the new evidence being submitted.

If the new evidence is a medical report, the medical report must be of the type and quality discussed in earlier NALC Compensation Department articles.²

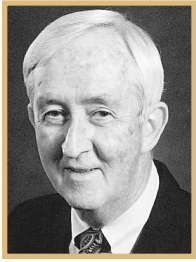
If OWCP decides that the evidence submitted with the request is insufficient to warrant reconsideration, the request will be denied and the employee or survivor will be advised of his or her rights to again request reconsideration or appeal to the ECAB. Note, however, that a denial of a request for reconsideration is not a merit decision; and any new request for reconsideration must be made within one year of the last merit decision of record.

If OWCP decides the evidence is sufficient to warrant reconsideration, a re-examination is made of all of the evidence in the case file, including the new evidence, and a new merit decision is made. If the new decision is adverse, the employee or survivor will be advised of his or her rights to again request reconsideration or appeal to the ECAB.

Next month's article will be devoted to appeals before the ECAB (see January 2000 article for brief description). ✉

1. The one-year time limitation applies to all decisions made on or after June 1, 1987. There is no time limit if the last OWCP or ECAB decision was issued prior to that date.

2. See particularly the article in the July 1998 issue of *The Postal Record*.



Appeals before the ECAB

*Note: This article should be read in conjunction with an article in the January 2000 issue of *The Postal Record* concerning the entire FECA appellate process.*

Appeals before the ECAB should not be confused with oral hearings and reviews of the written record by OWCP's Branch of Hearings and Review (see articles in the February, March and April issues of *The Postal Record*) or with reconsiderations by OWCP's district offices (described in the May issue).

The ECAB is an appellate body in the Department of Labor separate and apart from OWCP. Decisions are issued by a three-member panel—each member appointed by the Secretary of Labor.

The ECAB will consider only evidence which was in the case record at the time of the OWCP decision being appealed. An appeal should be requested within 90 days of the OWCP decision; however, the ECAB will consider requests received within one year if good cause is shown for the delay. No appeals are accepted after one year.

The 90 days/one year runs from the date of the OWCP decision being appealed—either OWCP's initial decision, the decision of an OWCP hearing representative, and/or an OWCP decision based on a request for reconsideration.

An employee or survivor may be represented before the ECAB by any responsible individual. The ECAB limits employees and survivors to a single representative—i.e., it is not possible for both a private attorney and an NALC representative to represent an employee or survivor before the ECAB.¹

A request for an appeal must be in writing and sent to: Employees' Compensation Appeals Board, 200 Constitution Ave. NW, Room N-2609, Washington, DC 20210—and must include the following:

- OWCP case file number;
- date of OWCP decision being appealed; and
- name and address of designated representative, if any.

After receiving a request for an appeal, the ECAB will inform the employee or survivor of the appeal docket number.² This number represents the order in which the appeal will be processed by the ECAB.

The ECAB will then send a copy of the appeal to OWCP. OWCP has 60 days to send the case file to the ECAB and to respond to the appeal. The response, prepared by attorneys

for the OWCP,³ frequently is a brief statement indicating that OWCP elects to forgo a response. However, it may be a "Memorandum in Justification" of OWCP's decision, or in some cases a "Motion to Remand" the case back to OWCP for further action and a new decision.

Whatever response is made, the ECAB will send a copy of the response to the employee or survivor (or to the employee's or survivor's representative, if any). The employee or survivor may then submit:

- written argument (an informal brief or "pleading") showing why he or she believes OWCP's decision is in error; or
- a request for oral argument (note that the ECAB will not hear oral argument other than in Washington, DC).⁴

Most appeals involve written argument—with oral argument reserved for unique, highly complicated cases where a written argument will not suffice.

"The ECAB will consider only evidence which was in the case record at the time of the OWCP decision being appealed."

After reviewing the evidence in the compensation case file, the ECAB will make its decision and send a copy of the decision to OWCP and to the employee or survivor (or to the employee's or survivor's representative, if any).

This concludes a series of articles on FECA appellate rights that began in January 2000. The three appellate options—hearings and reviews of the written record, reconsiderations, and appeals before the ECAB—are quite different and members should be guided by the information provided.

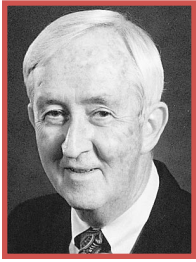
Further information can also be obtained from NALC National Business Agents and knowledgeable branch officers. ☒

1. NALC members can designate the Director of the NALC Compensation Department as their representative in an appeal to the ECAB. Copies of the appeal letter must be sent to the Compensation Department and to the applicable NALC National Business Agent.

2. If a representative has been designated, all ECAB communications will be sent directly to the representative. It is then up to the representative to keep the employee or survivor informed.

3. Attorneys for the OWCP are located in the Department of Labor's Office of the Solicitor (OSOL).

4. The employee or survivor must bear the cost of the trip to Washington, DC.



Carpal tunnel syndrome

Note: This article updates and replaces an article on the same subject that appeared in the December 1997 issue of The Postal Record.

The carpal tunnel is formed by the bones of the wrist (the carpals) and the carpal ligaments. The nerves and tendons controlling the hand pass through the carpal tunnel; and an increasing number of claims are being filed with the Office of Workers' Compensation Programs for *carpal tunnel syndrome* (CTS), a condition involving the compression or irritation of the median nerve that runs longitudinally through the carpal tunnel.

Symptoms resulting from this compression or irritation include pain, numbness, tingling and weakness of the affected hand (usually the dominant one, although both hands are sometimes involved). The symptoms may affect the fingers and/or the palm of the hand—and may appear while working, at night after the hands have been at rest, or in the morning when awakening.

CTS can be work-related—or may be due to other causes. Causes which may be work-related include constant exertion and/or repetitive motion with the wrist flexed or extended against resistance; acute trauma such as a fracture; and tenosynovitis. Other causes include gout, arthritis, hypothyroidism and diabetes.

Assemblers, meat processors, textile workers, typists and waiters/waitresses are prone to CTS—so are postal workers, particularly machine operators in automated duty assignments. Letter carriers are also reporting CTS in increasing numbers.

More often than not, CTS claims are based on constant execution and/or repetitive motion of the hand or hands. This requires the employee's completion of OWCP's Form CA-2, "Federal Employees' Notice of Occupational Disease and Claim for Compensation."^{*}

In addition to the Form CA-2, the employee must prepare a detailed signed statement describing the factual conditions of employment believed to be the cause of the CTS. The statement should describe the job tasks and the postures and positions used in performing each task; and show the amount of time spent in performing each task. Detail—accurate detail—of each work step and activity believed to be the cause of the CTS is very important.

A medical report *based on the employee's statement* is also necessary—the report covering all of the following items:

1. A written statement by the physician reflecting knowledge of the employee's conditions of employment believed to be the cause of the CTS. The physician should ideally include or attach a copy of the employee's factual statement, referencing it with remarks such as, "I have read the statement dated _____ prepared by _____ regarding the conditions of employment at _____ during the period from _____ to _____."
2. Results of the following clinical and laboratory tests:
 - a. Phalen's sign
 - b. Tinel's sign.
 - c. Nerve conduction or electromyography (EMG) studies.
3. Definitive (i.e., conclusive) diagnosis (*no impressions*).
4. Opinion in definitive (i.e., conclusive) terms (*no speculation*): Is the CTS causally related to the conditions of employment described by the employee?
5. Medical reasons for opinion (i.e., how did the physician, from a medical point of view, arrive at the opinion?). This is *very important* and should be as specific as possible—and include how it has been determined that other medical conditions (e.g., diabetes) and other ac-

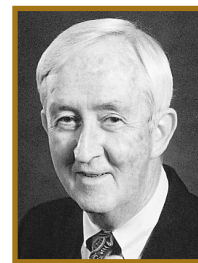
“Letter carriers are...reporting CTS in increasing numbers.”

tivities requiring use of the hand (e.g., known recreational activities) have been considered and excluded as causes.

6. Period(s) of disability and the extent of disability during the period(s). This should specify whether the disability is total or partial, and if partial (as opposed to total disability for work as a letter carrier), the work limitations involved in working while partially disabled.

While many physicians can prepare such a medical report, the required clinical and laboratory tests are very detailed and may require the services of a specialist who is board-certified in neurology.

^{*} If CTS is believed due to a single event or series of events within one day or shift, then Form CA-1, "Federal Employees' Notice of Traumatic Injury and Claim for Continuation of Pay/Compensation" is used (see article in the August 1998 issue of *The Postal Record* for detailed information regarding the distinction between traumatic injury and occupational disease).



OWCP nurse intervention program

Note: This article updates and replaces an article on the same subject in the October 1993 issue of The Postal Record.

Following a successful pilot program some years ago, OWCP fully implemented and expanded its nurse intervention program—and now utilizes private registered nurses in all catastrophic and many non-catastrophic cases.

The use of nurses is intended to facilitate OWCP's medical management through contact, either telephonically or in person, with the injured employee, treating physician, employing agency, and the OWCP claims examiner assigned to the case, and to enhance the injured employee's recovery and return to a more productive and functional life.

The nurses are under contract with OWCP and are provided training in Federal Employees' Compensation Act benefits, procedures, forms and OWCP's guidelines for intervention in individual compensation cases.

“OWCP has requested the Postal Service to ensure that Postal Service nurses cease their involvement...when OWCP assigns a nurse to the case.”

Catastrophic cases are defined by OWCP to include cases involving head trauma, spinal cord injuries, strokes, multiple trauma/fractures, severe burns, amputations and other conditions involving prolonged hospitalization and significant physical impairment.

Non-catastrophic cases likely to involve nurse intervention include but are not limited to back sprain/strain, neck or shoulder sprain/strain, knee injuries, dislocations (except fingers and toes), carpal tunnel syndrome, some fractures, certain contusions and disfiguring injuries.

According to OWCP, the nurses have seven basic tasks:

1. Establish a supportive relationship with the injured employee and family either telephonically or through face-to-face contact. Instill confidence that the nurse

intervention effort can be effective and beneficial, and that it can lead to a more productive and functional life.

2. Secure sufficient information about the injured employee's condition and medical treatment to recommend and coordinate appropriate medical services which will expedite recovery.

3. Assist the treating physician and the injured employee to establish the best choice of and timing for medical services and treatments for the work-related condition.

4. Monitor the injured employee's medical condition and the treatment provided.

5. Assist the injured employee in completing forms and securing information about medical services available for the job-related disability.

6. If necessary, assist the injured employee in obtaining authorizations or other services from OWCP personnel, and provide information to OWCP about non-work-related conditions that may affect recovery.

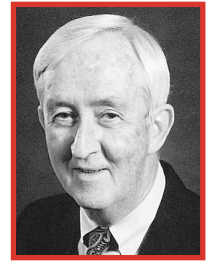
7. Encourage the injured employee to cooperate with medical treatment and other efforts to prepare for return to a higher level of activity and, as feasible, a return to work.

OWCP nurses begin intervention during the continuation of pay (COP) period in those cases where the employee has stopped work for 15 days and the medical evidence shows no return-to-work date.

OWCP nurses are normally introduced to the injured employee by way of a letter or telephone call to the injured employee from the OWCP district office.

All OWCP nurses carry identification showing that they are under contract with OWCP. Injured employees are expected to fully cooperate with the nurses—who essentially are agents of OWCP. By all reports OWCP's use of nurses has been very well received by those NALC members who have been participants.

OWCP nurses should not be confused with Postal Service nurses who may also contact injured employees. OWCP has no direct control over Postal Service nurses; however, OWCP has requested the Postal Service to ensure that Postal Service nurses cease their involvement with injured employees and treating physicians when OWCP assigns a nurse to the case. ☒



Five deadly mistakes

Note: This article is based on presentations made during part of the “OWCP Workshop” held on August 1 and again on August 4 at the NALC’s Biennial Convention in Chicago.

There are, broadly speaking, five serious, indeed deadly, mistakes that employees make in regard to on-the-job injuries and occupational diseases or illnesses:

1. Not knowing employee rights and obligations plus basic OWCP rules and procedures.
2. Not knowing the role of OWCP and that the Postal Service is paying the cost of benefits.
3. Failure to recognize that the burden of proof is upon the employee—with respect to the submission of both factual and medical evidence.
4. Failure to recognize that medical evidence must be

“There are, broadly speaking, five serious, indeed deadly, mistakes that employees make in regard to on-the-job injuries and occupational diseases or illnesses.”

rationalized in all but the most obvious cases (initially and on a continuing basis).

5. Believing that the FECA is a retirement program—and not recognizing the obligation to return to work if able to do so.

There are many, many other mistakes that an employee can make—such as failure to promptly respond to an OWCP request, failure to report earnings while in receipt of compensation benefits, and failure to take prompt and appropriate appellate action when benefits are denied.

Numerous Compensation Department articles have been


published regarding the rights and obligations involved with respect to filing claims under the FECA—including the employee’s right to initial choice of treating physician and the right to continuation of pay (COP) in traumatic injury cases; and members are urged to consult a knowledgeable NALC branch officer or their national business agent as soon as possible following a work-related traumatic injury or an occupational disease or illness. *Do not rely on a Postal Service supervisor or injury compensation specialist.*

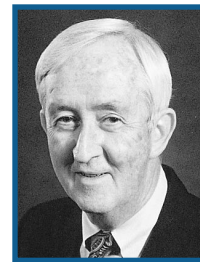
Many employees do not realize that OWCP is an arbiter between the employing agency and the employee. OWCP must serve and protect the rights of both—and it sends a “bill” to each employing agency on an annual basis for the cost of compensation and medical benefits.

The most recent bill sent to the Postal Service (for chargeback year 2000) totaled \$666,310,291—and does not include COP or the cost of medical care provided by Postal Service physicians or contract physicians. This is a sizeable cost which the Postal Service tries to reduce by the prevention of injuries and returning partially disabled employees to limited duty—and by *contesting claims.*

Burden of proof is a given—the employee must take the initiative in filing a claim under the FECA—and must provide both factual and medical evidence in support of the claim. *This is part and parcel of all workers’ compensation laws* and members should seek help from a knowledgeable branch officer or their national business agent when needed.

Rationalized medical evidence is essential in all but the most obvious cases. Numerous Compensation Department articles have been written on the need for medical rationale (i.e., medical reasoning)—most recently in the July 1998 issue (see also articles in the May and June 1996 and May 1998 issues).

An employee’s belief that he or she will “retire on compensation” can also be fatal—the FECA is not a retirement program inasmuch as *the great majority of employment injuries and illnesses do not prevent an employee from returning to some kind of work* (see article in the December 1999 issue for more details). 



Reporting employment to OWCP

Note: This article updates and replaces an article on the same subject in the October 1994 issue of The Postal Record.

General: The regulations of the Office of Workers' Compensation Programs provide that an employee receiving compensation for partial or total disability must advise OWCP immediately of any return to work, either part-time or full-time.¹

In addition, an employee receiving compensation for partial or total disability will periodically be required to submit a report of earnings from any employment or self-employment.

OWCP's regulations also provide that this report, which normally covers the prior 15-month period, requires the employee to include "any work, or activity indicating the ability to work."

If an employee who is required to file such a report fails to do so within 30 days of the date of the request, his or her right to compensation for wage loss is suspended until OWCP receives the requested report.

♦ **Earnings:** OWCP's regulations define "earnings from employment or self-employment" to mean:

- (1) Gross earnings or wages before any deductions and includes the value of subsistence, quarters, reimbursed expenses and any other goods or services received in kind as remuneration; or
- (2) A reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration. Neither lack of profits, nor the characterization of the duties as a hobby, removes an unremunerated individual's responsibility to report the estimated cost to have someone else perform his or her duties.²

In this respect, the employee must report even those earnings which do not seem likely to affect his or her level of benefits. Many kinds of income, though not all, will result in reduction of compensation benefits. While earning income will not necessarily result in a reduction of compensation, failure to report income may result in forfeiture of all benefits paid during the reporting period (more on this below).

♦ **Employment:** OWCP considers "employment" to mean any and all activities which can be considered as work. Military service including service with the National Guard, reserve components or other affiliates must be reported along with volunteer work, including work for fraternal, charitable, or labor organizations.

Self-employment or involvement in business enterprises must be reported, including but not limited to: farming, sales work, operating a business such as a store or restaurant; and providing services in exchange for money, goods or other services (e.g., carpentry, mechanical work, painting, contracting, child care, odd jobs, etc.). Keeping books or records and managing and/or overseeing a business of any kind, including a family business, must be reported—even if the work activities were part-time or intermittent and/or no remuneration was received.

♦ **Verification:** OWCP may verify the earnings reported by an employee through a variety of means, including but not limited to computer matches with the Postal Service, the Office of Personnel Management, and state agencies—and via inquiries to the Social Security Administration.

♦ **Penalty:** OWCP's regulations specifically provide that:

- (a) If an employee knowingly omits or understates any earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any

“When in doubt, report with a full explanation.”

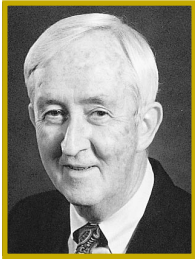
period for which the report was required. A false or evasive statement, omission, concealment, or misrepresentation with respect to employment activity or earnings in a report may also subject an employee to criminal prosecution.

(b) Where the right to compensation is forfeited, OWCP shall recover any compensation already paid for the period of forfeiture pursuant to [applicable] statutes.

This means, for example, that failure to report one month's earnings on a report covering a 15-month period *subjects the employee to forfeiture of compensation for the entire 15-month period.*

♦ **Conclusion:** Report any and all activity that can be considered to be employment—or activity indicating the ability to work. When in doubt, report with a full explanation. ☒

1. 20 CFR 10.525. See also 20 CFR 10.526-529.
2. 20 CFR 10.5 (g).



Limitations on chiropractic treatment/opinions

Note: This article updates and replaces an article on the same subject in the November 1994 issue of The Postal Record.

The Federal Employees' Compensation Act provides that reimbursable medical services can only be provided by a qualified physician and defines the word "physician" to include, in addition to a medical doctor (M.D.) or an osteopath (D.O.), a podiatrist, dentist, clinical psychologist, optometrist, or chiropractor—with specific definitive limitations on the reimbursable services provided by chiropractors.

Chiropractors are included in the definition of physician "...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 [the Office of Workers' Compensation Programs]."¹

OWCP's regulations define "subluxation" to mean:

...an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.²

Many employees know that the services of a chiropractor can be the ideal medical treatment; however, an employee with a medical condition that is related to an on-the-job injury or occupational disease must clearly understand that the FECA imposes strict limitations on the reimbursable services provided by chiropractors.

OWCP will not, actually cannot, reimburse employees for services provided by a chiropractor unless the chiropractor (1) has taken or reviewed an x-ray of the spine and (2) has certified that the x-ray shows that a "subluxation" exists.

Numerous cases have been appealed to the Department of Labor's Employees' Compensation Appeals Board on this issue—and the Board has consistently held that employees are not entitled to reimbursement for chiropractic services unless *both* of these specific limitations are met.

In addition, the Board has held that the opinions of chiropractors providing a diagnosis other than a subluxation of the

spine "do not constitute competent medical evidence to support a claim for compensation."³

Further, if an x-ray is not taken or reviewed, there can be no diagnosis of "subluxation as demonstrated by x-ray to exist," and the Board has held that an opinion of a chiropractor who did not take or review an x-ray cannot be considered medical evidence under the FECA.⁴

The bottom line is that if an employee relies on the written report and stated opinion of a chiropractor who has not taken or reviewed an x-ray upon which the specific diagnosis of "subluxation of the spine" exists, or takes or reviews an x-ray and provides another diagnosis (e.g., radiculitis, sciatica, lumbar strain), the employee is not entitled to benefits of the FECA—including both the payment of the chiropractor's bill and monetary benefits for any loss of time from work (i.e., continuation-of-pay and/or compensable benefits).

This article does not suggest that employees avoid chiropractors—rather, employees should clearly understand that

“Employees should clearly understand that the FECA contains specific limitations regarding the reimbursable services provided by chiropractors.”

the FECA contains specific limitations regarding the reimbursable services provided by chiropractors (and the effect that this has on the opinions of chiropractors) and should be guided accordingly.

Note: The limitations on chiropractors do not apply in instances where a chiropractor provides services in the nature of "physical therapy" *under the direction of an employee's qualified treating physician.*⁵

1. 5 USC 8101 (2).

2. 20 CFR 10.5 (bb).

3. Theresa K. McKenna, 30 ECAB 702, 1979.

4. Robert H. St. Onge, 43 ECAB 1169, 1992; Loris C. Digmann, 34 ECAB 1049, 1963 cited.

5. 20 CFR 10.311 (d).