

## OUTLINE OF REMARKS – ATTORNEY STEVEN E. BROWN - APWU SEMINAR, MIAMI, FL AUGUST 15, 2009

This outline provides some basic information about three options Postal employees frequently have when confronted with the NRP and a reduction of their hours: workers' compensation, disability retirement, and discrimination (EEO) complaints. Other options available to Postal workers are grievances, "regular" (non-disability) retirement, and MSPB restoration-to-duty appeals.

When considering the various options available, think about how you would answer the following questions:

- Do you want to continue working at the Postal Service or not?
- Do you have serious mental or physical health concerns?
- What do you think about the prospect of working outside the Postal Service?
- Do you feel the work you are doing is "productive" and therefore you want to challenge the reduction of your hours?

### 1. WORKERS' COMPENSATION

#### Basic benefits:

The Federal Employees' Compensation Act (FECA) provides benefits for Postal employees for the following types of injuries:

- **Accidental injuries** at the workplace may entitle the employee to continuation of regular pay and worker's compensation benefits (*including medical care*) while unable to work.
- **Chronic exposures and repetitive injuries** such as Carpal-Tunnel Syndrome, noise exposure, etc., may also entitle the employee to the same benefits.

The basic workers' compensation rights of injured workers are: to receive compensation for a percentage (2/3 or 3/4) of lost pay, to be afforded medical treatment and reimbursement for medical expenses, and (in some cases) to be vocationally rehabilitated after an industrial injury. In addition, FECA provides for a "scheduled award" benefit if the function of various named body parts (arms, legs, lungs etc.) is permanently impaired - see attached information sheet.

### Coverage:

The FECA covers federal civilian employees who work for U.S. government agencies, including the Postal Service. Also covered are certain volunteers, Peace Corps personnel, and state law enforcement officers injured while apprehending a federal criminal, and others. Temporary employees and probationary employees are covered.

### Time for applying:

A claim for workers' compensation benefits must be filed within three years of the date of injury for traumatic injuries, unless the employer was aware of the injury - in which case there is no time limit for filing the claim. A claim for an occupational disease similarly must be filed within three years of the first date you knew, or should have known, there was a connection between the disease and your Postal employment. To get COP, you must file a claim (traumatic injuries only) within 30 days of the injury date.

### Benefits:

Workers' compensation while you are recovering from an injury, or if your disability is serious enough even after all treatment has concluded, is 66-2/3% of your date-of-injury pay if you have no dependents, and 75% of your date-of-injury pay if you have at least one dependent (such as a spouse with whom you live, etc.). There is no time limit or dollar limit on FECA benefits, and all FECA benefits are tax-free.

### Relationship to NRP:

If your work limitations were caused by an industrial injury, you are probably entitled to receive FECA (workers' compensation) benefits from OWCP for the time you spend at home when the Postal Service does not offer you any work. If you have received recent medical treatment for your industrial injury, of which OWCP is aware, we recommend NOT filing a CA-2a (recurrence of disability) form, but rather filing forms CA-7 (claim for compensation) and CA-7A instead. It is usually more difficult to obtain payment of FECA benefits from OWCP when filing a recurrence claim using a form CA-2a, as opposed to just filing for benefits using a form CA-7. Make sure to attach, to your CA-7, a copy of the NRP letter you received from the Postal Service.

Under the workers' compensation law, when you are working limited duty due to an accepted industrial injury and the employer reduces or eliminates your work hours, you are by definition "totally disabled" for those hours/days and entitled to FECA benefits to cover the wage loss. In the relatively rare situation that OWCP has made a formal Loss of Wage-Earning Capacity (LWEC) determination, your FECA benefits may be limited or nonexistent if you are sent home due to "no work available" and you cannot show a change in your medical condition (for the worse) since the original LWEC determination was made.

Our office has represented and counseled thousands of Postal employees in OWCP claims and can assist you in making sure you receive all the benefits to which you are entitled.

## **2. DISABILITY RETIREMENT**

### General provisions:

Postal employees who become disabled from performing the full duties of their regular job, whether or not due to on-the-job injuries, may be eligible for disability retirement. This "early-out" for disability is a program administered by the U.S. Office of Personnel Management, and is available under both retirement systems (CSRS and FERS) set up for Postal and other federal employees. Federal regulations set out the requirements for a successful disability retirement application, but each case depends on its specific facts and the evidence presented.

### Time for applying:

With certain exceptions, an application for disability retirement must be received by OPM while the employee is still working for the federal government or within one year after employment ends. Specific medical information must be provided to OPM by the applicant. If the applicant is mentally incompetent, the time for filing may be extended, but there are no other exceptions to this deadline - even if you are unaware of it, are on workers' compensation, etc. If the employee stops working but remains on the payroll, for example receiving administrative leave, sick leave, annual leave, or leave without pay, the time for filing does not begin to run.

### Benefits:

Disability retirement benefits differ depending on which retirement system you fall under. The benefits, for FERS employees, are 60% of the high-three-years' average pay for the first year of eligibility, then 40% of the same high-three-years' pay thereafter, plus yearly COLAs. For CSRS employees, the benefits percentage is set according to years of service, and for some long-term employees can be greater than FERS benefits. The retirement benefit, once won, lasts a lifetime and can only be terminated if either (1) the employee fully recovers, *i.e.* becomes able once again to perform the full-time, full-duty requirements of the last Postal position held, or (2) the employee earns, in any one calendar year, 80% or more of the current pay of the last Postal/federal position held. You should apply for disability retirement even if you have an approved FECA claim - the two benefits can be coordinated to your advantage (see separate sheet provided).

### Relationship to NRP:

Assuming your disability is permanent - namely, it is expected to last for at least another year - you are entitled to apply for early retirement under FERS or CSRS based on disability. This is true whether or not your hours are reduced or eliminated by the Postal Service. Unlike workers' compensation, disability retirement is designed as a permanent, lifetime benefit. If disability retirement is approved, you will be able to keep your federal group health and life insurance permanently, and pay the low federal group premium. This benefit allows you to work in the private sector (not Postal Service or other federal employee work) and still be considered "disabled" under the retirement system and therefore entitled to benefits. The limitation is that you can earn any amount up to, but less than, 80% of the then-current pay rate of your last Postal/federal job.

We have found over the years that many deserving disability retirement applications are denied due to error by OPM and/or due to improper documentation, which we can usually remedy either informally, at the hearing stage, or at MSPB. Even though many applications for disability retirement are denied by OPM, we have filed and obtained such benefits for over a thousand Postal and other federal employees and have not lost any of these cases in the last several years.

### **3. DISABILITY (AND OTHER) DISCRIMINATION COMPLAINTS**

Federal law prohibits discrimination against Postal employees on the basis of disability, race/color, sex, age, religion, national origin, or retaliation for prior protected EEO activity.

#### Time for filing:

A complaint for discrimination must be filed within 45 days of the event you feel was discriminatory. There are certain exceptions to this rule, discussion of which is beyond the scope of this handout.

#### Benefits:

A successful discrimination complaint can lead to award of compensatory damages (including emotional upset damages, lost wages, medical costs, consequential losses, etc.), attorney fees, and other non-monetary remedies such as reinstatement to a job.

#### Relationship to NRP:

The targeting of disabled employees for reduced hours under NRP appears, on its face, to be a form of disability discrimination. Due to the Postal Service's current dire financial straits, however, it can argue and has argued that its actions are based on economic

necessity rather than illegal discrimination, and that it can no longer afford reasonable accommodations that it has provided in the past.

There are class actions pending on this issue. See separate sheet regarding the *Walker* class action. If you feel you are being treated unfairly on the basis of your disability, file an individual EEO complaint. In the process of that complaint it will be determined whether or not you fall into the definition of “class” in any of the class actions against the Postal Service currently pending at EEOC. Unfortunately, if you are part of one of these class actions you cannot “opt out” of it and pursue your own individual EEO complaint. The EEOC judge, however, may find that you do not fall into the relevant definition of “class” and thus allow you to pursue your individual complaint.

#### Relationship between workers’ compensation claims and discrimination cases:

Employees who have suffered discrimination typically interact with the workers’ compensation system in two ways: (1) they have a work-related disability and are being discriminated against because of it, or (2) they become emotionally disabled because of illegal discrimination and lose the ability to work. In addition, employees with ongoing discrimination cases who file workers’ compensation claims may feel their FECA claims are interfered with in some way, in retaliation for their protected EEO activity.

Unlike EEO complaints, FECA does not provide for damages (such as emotional distress damages) for illegal discrimination; FECA provides disability benefits for those unable to work due to work-related injuries or diseases. This disability may stem from emotional reaction to events at work, whether or not those events constitute illegal discrimination. While FECA generally does not provide benefits for labor-management disputes, it will provide wage-loss benefits if the employer is shown to have acted “erroneously or abusively”. OWCP may find such erroneous or abusive action even if there has been no finding of discrimination. If there has been a finding of discrimination, OWCP will usually accept that determination as evidence of facts that may prove up a claim. EEO settlements, however, do not qualify as “findings” of discrimination.

Note that ultimately, the FECA claim could be worth far more than any discrimination complaint. A successful FECA claim will provide the employee with certain restoration rights once (or if) the disability is overcome. Also, some FECA benefits are payable even while the employee is working or otherwise not losing pay.

#### Relationship between disability retirement and discrimination cases:

Employees who have suffered discrimination typically consider disability retirement programs in two situations: (1) they are being discriminated against, either because of a disability or for some other reason, suffer a work stoppage and must replace lost income, and/or (2) they become emotionally disabled on a long-term basis because of illegal discrimination and lose the ability to work.

