

FACTUAL HISTORY

On June 15, 1989 appellant, then a 38-year-old rigger, filed a claim for an injury to his lower back and right leg occurring on that date in the performance of duty. He stopped work and did not return.¹ The Office accepted the claim for lumbar sprain and degenerative disc disease at L5-S1.

On May 7, 2003 the Office referred appellant to Dr. Thomas D. Schmitz, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated May 27, 2003, Dr. Schmitz found that appellant could resume work with restrictions of not standing for more than 15 minutes at a time or walking more than 4 hours. On December 10, 2003 Dr. Schmitz clarified that appellant could work eight hours per day and “lift, push and pull up to 10 pounds without a problem.” He further found that appellant “definitely could do sedentary activity.”

The Office referred appellant to Allene Young, a rehabilitation counselor, for vocational rehabilitation. Ms. Young met with appellant on May 25, 2004. She requested that the Office reassign the case because she “was concerned about and uncomfortable with the claimant’s language and behavior.” The Office referred appellant to another rehabilitation counselor, Frank Diaz, on July 19, 2004. Mr. Diaz did not submit a report of his meeting with appellant even after repeated requests by the Office. He resigned on December 10, 2004. The Office next referred appellant to Jeff Malmuth for vocational rehabilitation, who met with him on March 24, 2005. Mr. Malmuth referred him to Jeia Africa for vocational testing. Appellant cancelled the vocational testing scheduled for May 31, 2005 due to illness. On August 9, 2005 Ms. Africa informed the Office that she had planned to evaluate appellant on May 31, 2005 but that the testing at his home “was broken into [three] separate occasions (lasting about an hour to an hour and [15] minutes). [Appellant] took numerous breaks throughout the testing until he felt that the pain was unbearable to which we would end testing.” Ms. Africa noted that she experienced difficulty rescheduling appointments with him. In a report dated August 17, 2005, she opined that, based on the testing, his physical restrictions and few interests, he had limited vocational opportunities. On August 8, 2005 the Office instructed Mr. Malmuth to cease vocational rehabilitation services due to his lack of progress in plan development.

On August 9, 2005 the Office referred appellant to James Graham for vocational rehabilitation services. He met with appellant at his home on August 24, 2005. The rehabilitation counselor provided him with an interest inventory to complete. Mr. Graham scheduled vocational testing for September 26 to 28, 2005. On September 28, 2005 he informed the Office that appellant had not appeared for the scheduled vocational testing or completed the interest inventory because his sister was in the hospital. In a report dated October 27, 2005, Mr. Graham related that he spoke with appellant on the telephone on October 4, 2005. He informed the rehabilitation counselor that he needed a “pain shot” prior to beginning his vocational evaluation. Appellant also indicated that he was “summoned to a court appearance as a witness for the time period October 6th through the 13th, 2005.” Mr. Graham rescheduled the vocational testing for October 24, 2005. On October 24, 2005 appellant appeared at the test site but left after 47 minutes because he needed pain medication. He informed Mr. Graham on

¹ Appellant unsuccessfully attempted to return to work on April 23, 1990.

October 26, 2005 that he could not get a “pain shot” until the end of the month. Appellant stated that he “could not participate until after November 1st, 2005, but then also stated that it may not be until after the first of the year, if he underwent surgery.” Mr. Graham concluded that appellant had not participated with vocational rehabilitation efforts. The rehabilitation counselor stated: “Issues such as doctor’s visits, pain shots, court summons, sister being in the hospital, have been the reasons [he] has provided, in regards to him not participating in the [v]ocational [r]ehabilitation process.”

By letter dated October 26, 2005, the Office advised appellant that he had impeded the efforts of the rehabilitation counselor. The Office informed him of the provisions of section 8113(b) of the Federal Employees’ Compensation Act² and directed appellant to make a good faith effort to participate in the rehabilitation effort within 30 days or, if he believed he had good cause for not participating in the effort, to provide reasons and supporting evidence of such good cause within 30 days. The Office advised appellant that if he failed to cooperate without good cause his monetary compensation benefits could be reduced on the assumption that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity.

In a December 21, 2005 report, Mr. Graham noted that appellant had telephoned him on November 23, 2005 and indicated that he would participate in vocational rehabilitation. The rehabilitation counselor rescheduled vocational testing for December 5 to 7, 2005. Appellant did not appear for the vocational testing on December 5, 2005. He informed Mr. Graham that his physician had provided him with a no work slip. The rehabilitation counselor concluded that appellant’s “participation has not improved, he is still not in compliance [and] continues to not participate in [v]ocational [r]ehabilitation.”

Appellant submitted April 27 and June 15, 2005 criminal minute orders from the Superior Court of California listing him as a defendant in a court case. Both orders indicated that the case had been continued to a later date. Appellant submitted an October 4, 2005 note from Dr. Haiden, an osteopath, who reported that he saw appellant on that date. On November 1, 2005 Dr. Haiden checked that appellant stated that he was unable to work from October 24 to November 1, 2005. A physician also saw appellant on October 19 and November 21, 2005.³ In a disability certificate dated December 5, 2005, a physician indicated that appellant was unable to work from December 5 to 26, 2005.

By decision dated February 1, 2006, the Office reduced appellant’s compensation to zero under section 8113(b) effective January 22, 2006 on the grounds that he failed to cooperate with vocational rehabilitation and failed to provide sufficient reasons for his failure to cooperate. The Office found that appellant had not participated in the early but necessary stages of vocational rehabilitation and thus it was unable to determine what his wage-earning capacity would have been had he participated. The Office further found that the medical evidence did not establish that he was unable to participate in vocational rehabilitation.

² 5 U.S.C. §§ 8101-8193.

³ The name of the physician is not legible.

On March 2, 2006 appellant requested an oral hearing. He provided his new address to the Office. On June 28, 2006 the Office notified appellant that a telephone hearing would be held on July 24, 2006 at 2:15 p.m. Eastern Time. The Office mailed the notice using an incorrect zip code.

On July 24, 2006 the rehabilitation counselor related that appellant had telephoned him about a notice of hearing that he received. He had previously attempted to reach Mr. Graham about the notice of hearing but the rehabilitation counselor was on vacation. Mr. Graham telephoned the Office about the hearing and notified appellant that it was regarding his participation in vocational rehabilitation. Appellant informed the rehabilitation counselor that he would telephone the Office on July 24, 2006 at the prescribed time.

In a decision dated October 17, 2006, an Office hearing representative affirmed the February 1, 2006 decision after finding that appellant did not cooperate with vocational rehabilitation or provide adequate reasons for his failure to cooperate. She stated: "On the day and time of the scheduled hearing (July 24, 2006 at 2:15 p.m. EST [Eastern Standard Time]), the [appellant] did not call into the teleconference. However, the [appellant] later advised that he called in at 2:15 p.m. PST [Pacific Standard Time]. [He] subsequently elected the review of the written record appeal option."

On February 19, 2007 appellant questioned the July 24, 2006 hearing after noting that he was not contacted as requested. He maintained that he fully cooperated with vocational rehabilitation "when his health would allow him to." Appellant sent the February 19, 2007 letter to the Office, the Office's Branch of Hearings and Review and the Board.

By decision dated April 6, 2007, the Branch of Hearings and Review adjudicated appellant's February 19, 2007 letter as a request for an oral hearing or a review of the written record. The Branch of Hearings and Review denied his request as he had previously received a review of the written record.

LEGAL PRECEDENT -- ISSUE 1

Section 8104(a) of the Act⁴ pertains to vocational rehabilitation and provides: "The Secretary of Labor may direct a permanently disabled individual whose disability is compensable under this subchapter to undergo vocational rehabilitation. The Secretary shall provide for furnishing the vocational rehabilitation services." Under this section of the Act, the Office has developed procedures which emphasize returning partially disabled employees to suitable employment and determining their wage-earning capacity.⁵ If it is determined that the injured

⁴ 5 U.S.C. § 8104(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813 (August 1995).

employee is prevented from returning to the date-of-injury job, vocational rehabilitation services may be provided to assist in returning the employee to suitable employment.⁶

Section 8113(b) of the Act further provides, “If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104” the Office, after finding that in the absence of such failure the wage-earning capacity of the individual would likely have increased substantially, “may reduce prospectively the monetary compensation of the individual in accordance with what would probably have been [his] wage-earning capacity in the absence of the failure, until the individual in good faith complies” with the directions of the Office⁷ whose procedures require that prior to reduction of compensation a claimant be notified of the provisions of section 8113(b) and provided an opportunity to either resume participation in vocational rehabilitation or provide reasons for not continuing participation.⁸ Under section 8104 of the Act, the employee’s failure to willingly cooperate with vocational rehabilitation may form the basis for terminating the rehabilitation program and the reduction of monetary compensation.⁹ The Office’s implementing regulations state:

“If an employee without good cause fails or refusing to apply for, undergo, participate in or continue to participate in a vocational rehabilitation effort when so directed, [the Office] will act as follows--

* * *

(b) Where a suitable job has not been identified, because the failure or refusal occurred in the early, but necessary stages of a vocational rehabilitation effort (that is, meetings with the [Office] nurse, interviews, testing, counseling, functional capacity evaluations and work evaluations), [the Office] cannot determine what would have been the employee’s wage-earning capacity.

(c) Under the circumstance identified in paragraph (b) of this section, in the absence of evidence to the contrary, [the Office] will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity and [the Office] will reduce the employee’s monetary compensation accordingly (that is, to zero). The

⁶ *Id.* The Office’s regulations provide: “In determining what constitutes ‘suitable work’ for a particular disabled employee, [the Office] considers the employee’s current physical limitations, whether the work is available within the employee’s demonstrated commuting area, the employee’s qualifications to perform such work and other relevant factors.” 20 C.F.R. § 10.500(b).

⁷ 5 U.S.C. § 8113(b).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11(b) (November 1996).

⁹ *See Wayne E. Boyd*, 49 ECAB 202 (1997) (the Board found that the Office properly reduced the claimant’s wage-loss compensation benefits as he failed to cooperate with the early and necessary stages of developing an appropriate training program).

reduction will remain in effect until such time as the employee acts in good faith to comply with the directions of [the Office].”¹⁰

ANALYSIS -- ISSUE 1

In reports dated May 27 and December 10, 2003, Dr. Schmitz opined that appellant could work full time in a sedentary capacity. Based on Dr. Schmitz’ findings, the Office properly referred appellant for vocational rehabilitation.

The Office initially referred appellant to Ms. Young for vocational rehabilitation. Ms. Young met once with appellant on May 25, 2004 and then requested that the case be reassigned. On July 19, 2004 the Office referred appellant to Mr. Diaz, who met with appellant but did not submit a report of his meeting. He resigned as rehabilitation counselor on December 10, 2004. The Office referred appellant to Mr. Malmuth, who met with him on March 24, 2005. Mr. Malmuth scheduled vocational testing with Ms. Africa, who told the Office that she experienced difficulty testing appellant due to his complaints of pain and thus broke the test into three parts. In a report dated August 17, 2005, Ms. Africa found that he had limited vocational opportunities. On August 8, 2005 the Office found that Mr. Malmuth had made insufficient progress in developing a rehabilitation plan.

On August 9, 2005 the Office referred appellant to Mr. Graham for vocational rehabilitation, who met with appellant on August 24, 2005 and requested that he complete an interest inventory. Mr. Graham also scheduled vocational testing for September 26 to 28, 2005. Appellant did not complete the interest inventory or show up for the vocational testing. He told Mr. Graham that his sister was in the hospital. The rehabilitation counselor rescheduled the test for October 24, 2005. Appellant went for the vocational testing on that date but left after 47 minutes because of pain. He notified Mr. Graham that he could not participate in testing until he received a pain shot at the end of the month or, if he underwent surgery, after the first of the year. Mr. Graham concluded that appellant had not cooperated with vocational rehabilitation.

The Office informed appellant on October 26, 2005 that his compensation would be reduced if he did not cooperate with vocational rehabilitation or provide adequate reasons for his refusal within 30 days. Appellant telephoned Mr. Graham and agreed to participate in vocational rehabilitation. The rehabilitation counselor rescheduled vocational testing for December 5 through 7, 2005. Appellant did not appear for the testing. He told Mr. Graham that he had a “no work slip.” Appellant submitted an October 4, 2005 note indicating that he received treatment on that date from Dr. Haiden. On November 1, 2005 Dr. Haiden indicated that appellant stated that he was unable to work from October 24 to November 1, 2005. A physician also noted that he received treatment on October 19 and November 21, 2005. In a disability certificate dated December 5, 2005, a physician indicated that appellant was unable to work from December 5 to 26, 2005. None of the medical evidence, however, addresses the relevant issue of whether he was able to participate in vocational rehabilitation. Additionally, findings on examination are needed to justify a physician’s opinion that an employee is disabled for work.¹¹ The medical

¹⁰ 20 C.F.R. § 10.519.

¹¹ *Laurie S. Swanson*, 53 ECAB 517 (2002).

evidence, consequently, is insufficient to establish that appellant was unable to participate in vocational rehabilitation.

Appellant submitted criminal minute orders dated April 27 and June 15, 2005 from the Superior Court of California listing him as a defendant in a court case. Both orders, however, indicated the case had been continued to a later date. This evidence is insufficient to show good cause for his failure to participate in vocational rehabilitation.

By decision dated February 1, 2006, the Office reduced appellant's compensation to zero under section 8113(b) after finding that he failed to cooperate with vocational rehabilitation or provide sufficient reasons for his failure to cooperate. In a decision dated October 17, 2006, a hearing representative affirmed the reduction of his compensation. The Board finds that appellant did not participate in the early and necessary stages of vocational rehabilitation as he failed to attend the vocational testing scheduled by Mr. Graham. The Act's implementing regulation provides that when an employee fails to participate in the early stages of vocational rehabilitation, it cannot be determined what his or her wage-earning capacity would have been had there been no failure to participate.¹² It is thus assumed, absent evidence to the contrary, that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity.¹³ Appellant did not submit any evidence to refute this assumption. The Office therefore properly found that he had no loss of wage-earning capacity and reduced his monetary compensation to zero.¹⁴

On appeal, appellant asserts that he did not receive notice of the hearing scheduled for July 24, 2006. The Office sent the June 28, 2006 notice of hearing to appellant's address, however, the zip code was incorrect. The record establishes, however, that appellant subsequently asked Mr. Graham to explain the telephone conference notice. He indicated that he had previously attempted to contact the rehabilitation counselor about the hearing. Mr. Graham informed appellant that it was a telephone hearing on the issue of his failure to cooperate with vocational rehabilitation. Appellant told the rehabilitation counselor that he would make the telephone call at the proper time on July 24, 2006. The record establishes that appellant received notice of the telephone hearing scheduled for July 24, 2006.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹⁵ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a

¹² 20 C.F.R. § 10.519(b).

¹³ *Id.* at § 10.519(c).

¹⁴ *See F.R.*, 58 ECAB ___ (Docket No. 05-15, issued July 10, 2007).

¹⁵ 5 U.S.C. § 8124(b)(1).

claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.¹⁶

Section 10.615 of Title 20 of the Code of Federal Regulations provides, “A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record.”¹⁷ Section 10.616(a) further provides, “A claimant injured on or after July 4, 1966, who had received a final adverse decision by the district Office may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by postmark or other carrier’s date marking) of the date of the decision for which a hearing is sought.”¹⁸

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing or when the request is for a second hearing on the same issue.¹⁹ Office’s procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.²⁰

ANALYSIS -- ISSUE 2

By decision dated February 1, 2006, the Office reduced appellant’s compensation to zero under section 8113(b) effective January 22, 2006 on the grounds that he failed to cooperate with vocational rehabilitation and failed to provide sufficient reasons for his failure to cooperate. Appellant requested an oral hearing but did not telephone the Office as requested on July 24, 2006. The hearing representative provided him with a review of the written record in lieu of an oral hearing. By decision dated October 17, 2006, the hearing representative affirmed the February 1, 2006 decision.

On February 19, 2007 appellant sent a letter to the Branch of Hearings and Review. He asserted that he was not contacted for the July 24, 2006 hearing.²¹ In a decision dated April 6, 2007, the Office denied appellant’s request for either an oral hearing or a review of the written record as he had previously received a review of the written record.

¹⁶ *Frederick D. Richardson*, 45 ECAB 454 (1994).

¹⁷ 20 C.F.R. § 10.615.

¹⁸ 20 C.F.R. § 10.616(a).

¹⁹ *See André Thyratron*, 54 ECAB 257 (2002).

²⁰ *Sandra F. Powell*, 45 ECAB 877 (1994).

²¹ As discussed previously, appellant’s telephone call to his rehabilitation counselor shows that he received the June 28, 2006 notice of hearing.

The Office properly determined that appellant was not entitled to a second hearing under section 8124 as a matter of right. A hearing takes the format of either an oral hearing or a review of the written record.²² As appellant previously received a review of the written record on the reduction of his compensation for failing to participate with vocational rehabilitation, he is not entitled to a subsequent oral hearing or review of the written record on that issue. The Board thus finds that the Office properly denied his request for an oral hearing or review of the written record as he had already received a hearing, in the form of a review of the written record, before the Office.²³

The Office also exercised its discretion in further considering appellant's request for an oral hearing or a review of the written record. The Office denied the hearing request on the basis that it would serve no useful purpose. As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts.²⁴ There is no evidence in the case record that the Office abused its discretion in refusing to grant appellant's request for an oral hearing or a review of the written record.

CONCLUSION

The Board finds the Office properly reduced appellant's compensation to zero effective January 11, 2006 under 5 U.S.C. § 8113(b) on the grounds that he failed to cooperate with vocational rehabilitation. The Board further finds that the Office properly denied his request for an oral hearing or a review of the written record under 5 U.S.C. § 8124.

²² 20 C.F.R. § 10.615.

²³ See *André Thyratron*, *supra* note 19.

²⁴ *Delmont L. Thompson*, 51 ECAB 155 (1999).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 6, 2007 and October 17, 2006 are affirmed.

Issued: October 22, 2007
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board