

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL SCARITO and DEPARTMENT OF ENERGY,
ALBUQUERQUE OPERATIONS OFFICE, Albuquerque, NM

*Docket No. 03-1311; Submitted on the Record;
Issued September 2, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing before an Office hearing representative.

On October 22, 1984 appellant, then a 30-year-old firearms instructor, injured his back while setting up a target for a joint training exercise. The Office accepted the claim for lumbar strain and expanded this to include impingement syndrome of the right shoulder and authorized a discectomy.

In a notice dated January 4, 2000, appellant was referred for development of a vocational rehabilitation program.

In a letter dated March 2, 2000, the Office advised appellant that he had two weeks to contact his vocational rehabilitation counselor in order to initiate the rehabilitation process and that failure to actively cooperate in the vocational rehabilitation efforts might result in suspension of compensation benefits.

By letters dated March 13 and May 31, 2000, the Office notified appellant that it proposed to reduce his compensation to zero. The Office noted appellant's noncooperation in vocational rehabilitation and provided him 30 days within which he must "undergo the approved training program" or "show good cause for not undergoing the training program" or the rehabilitation effort would be terminated and action would be initiated to reduce appellant's compensation to reflect the probable wage-earning capacity had he completed the training program.

By decision dated June 30, 2000, the Office reduced appellant's compensation to zero pursuant to section 8113(b) of the Federal Employees' Compensation Act. The Office noted that appellant impeded the rehabilitation effort without good cause. The Office further advised him that it would reduce his compensation for wage loss to zero because the evidence established that

appellant failed to cooperate in the early stages of vocational rehabilitation, specifically with testing.

Thereafter, appellant attended vocational rehabilitation testing on July 20, 2000. In a letter dated July 25, 2000, the Office notified appellant that due to his cooperation with vocational rehabilitation his compensation would be restored.

In a report dated September 7, 2000, the vocational rehabilitation counselor noted that he attempted to reach appellant following receipt of the vocational report; however, appellant failed to respond to the telephone messages. Thereafter, he notified the counselor that he would not attend a training program, but had decided to retire from the Federal Government. The counselor recommended closing the vocational rehabilitation case.

By letter dated October 11, 2000, the Office notified appellant that it proposed to reduce his compensation. The Office noted that appellant's noncooperation in vocational rehabilitation and provided appellant 30 days within which he must: "undergo the approved training program;" or "show good cause for not undergoing the training program;" or the rehabilitation effort would be terminated and action would be initiated to reduce appellant's compensation to reflect the probable wage-earning capacity had he completed the training program.

By decision dated November 13, 2000, the Office reduced appellant's compensation to reflect his ability to perform the duties of a maintenance supervisor. The Office noted that appellant impeded the rehabilitation effort without good cause. The reduction of compensation became effective December 3, 2000.

By letter dated November 27, 2002, appellant requested a hearing before an Office hearing representative. He submitted additional medical evidence.

On December 31, 2002 the Office denied appellant's request for a hearing. The Office found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district Office and submitting evidence not previously considered with regard to good-faith participation in the Office-approved training program.¹

The Board finds that the Office properly denied appellant's request for a hearing in its decision dated December 31, 2002.

The only decision before the Board on this appeal is the Office decision December 31, 2002. Since more than one year elapsed from the date of issuance of the Office's November 13, 2000 merit decision, to the date of the filing of appellant's appeal, April 29, 2003, the Board lacks jurisdiction to review this decision.²

¹ In a letter dated February 24, 2003, appellant again requested an oral hearing. In a letter dated March 5, 2003, the Office attached a copy of the decision dated December 31, 2002 and advised appellant to follow the appeal rights enclosed in that decision.

² See 20 C.F.R § 501.3(d).

Section 8124(b) of the Act,³ concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this title 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."⁴

The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.⁵ Even where the hearing request is not timely filed, the Office may within its discretion, grant a hearing and must exercise this discretion.⁶

In the instant case, the Office properly determined appellant's request for a hearing postmarked November 27, 2002 was not timely filed, as it was made more than 30 days after the issuance of the Office's November 13, 2000 decision. The Office, therefore, properly denied appellant's hearing as a matter of right. The Office exercised its discretion, in accordance with Board precedent, to determine whether to grant a hearing in this case. The Office determined that a hearing was not necessary as the issue in the case could equally well be addressed through the reconsideration process.

Therefore, the Office properly denied appellant's request for a hearing as untimely and properly exercised its discretion in determining to deny appellant's request for a hearing as he had other review options available.⁷

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8124(b)(1).

⁵ *Tammy J. Kenow*, 44 ECAB 619 (1993).

⁶ *Id.*

⁷ With his untimely request for a hearing, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c). Should appellant wish to resume good-faith participation in an Office-approved training program, he should contact the branch of the Office, that service's his claim.

The December 31, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
September 2, 2003

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member