

ISSUE

The issue is whether OWCP properly denied appellant's request for an oral hearing as untimely.

FACTUAL HISTORY

OWCP accepted that on May 1, 2005 appellant, then a 48-year-old casual clerk, sustained a sprain/strain of the right shoulder and neck while sweeping a machine at work.

On October 2, 2007 and March 24, 2008 OWCP requested that the employing establishment offer appellant a permanent position within the permanent physical restrictions set forth on October 16, 2007 by Dr. Jeffrey E. Budoff, an attending Board-certified orthopedic surgeon.

OWCP referred appellant to a vocational rehabilitation counselor on July 3, 2008 as the employing establishment could not provide her with suitable employment. On July 24, 2008 a vocational rehabilitation counselor advised OWCP that she experienced difficulty in contacting appellant to schedule an initial appointment.

By letter dated August 15, 2008, OWCP advised appellant that it had received information that she had impeded the rehabilitation efforts of her assigned vocational rehabilitation counselor. It noted that she failed to return telephone messages left with her husband and to claim certified letters sent to her at two different addresses. OWCP informed appellant that, under section 8113(b) of FECA (5 U.S.C. § 8113(b)), if an individual without good cause failed to apply for and undergo vocational rehabilitation when so directed, OWCP may reduce compensation based on what probably would have been the individual's wage-earning capacity had he or she not failed to apply for and undergo vocational rehabilitation. Its regulations further provided that, if an individual without good cause failed or refused to participate in the essential preparatory efforts of rehabilitation, OWCP would assume, in the absence of evidence to the contrary, that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity and compensation would be reduced accordingly. OWCP directed appellant to make a good faith effort to participate in the rehabilitation effort within 30 days or, if she believed that she had good cause for not participating in the effort, to provide reasons and supporting evidence of such good cause within 30 days. It stated that, if these instructions were not followed within 30 days, action would be taken to reduce her compensation. The letter was sent to appellant's address of record as of August 15, 2008. Appellant did not respond within the allotted time period.

In a September 16, 2008 decision, OWCP reduced appellant's compensation to zero effective August 31, 2008 under 5 U.S.C. § 8113(b) to reflect her loss of wage-earning capacity had she continued to participate in vocational rehabilitation efforts. It found that she did not show good cause for failing to undergo vocational rehabilitation as directed. OWCP found that appellant had not fully participated in the essential preparatory effort of vocational testing and stated that, under the provisions of section 10.519(c) of its regulations (20 C.F.R. § 10.519(c)), it was assumed, in the absence of evidence to the contrary, that the vocational rehabilitation effort

would have resulted in her return to work at the same or higher wages than for the position she held when injured. The decision was mailed to appellant's address of record at that time.

On November 10, 2010 OWCP mailed travel forms to appellant's new address. On November 15, 2010 appellant requested that OWCP upgrade her claim based on her August 9, 2006 right shoulder surgery. OWCP explained to her that it had not received any medical evidence and it had issued a decision sanctioning her failing to participate in vocational rehabilitation. Appellant provided her new address to OWCP. OWCP advised her that it could not change her address in its system until she submitted a change of address in writing, but stated that it would send her copies of its August 15, 2008 notice of proposed reduction of her compensation and September 16, 2008 decision.

On November 18, 2010 appellant advised OWCP that she did not receive the August 15, 2008 notice or September 16, 2008 decision. In a November 19, 2010 letter, she contended that she made every effort to participate in vocational rehabilitation. Appellant stated that she was willing to participate again in the rehabilitation program.

In an appeal request form dated November 19, 2010 and postmarked November 23, 2010, appellant requested an oral hearing regarding the September 16, 2008 decision.

In a December 16, 2010 decision, OWCP's Branch of Hearings and Review denied appellant's request for an oral hearing on the grounds that it was not timely filed. It considered the matter in relation to the issue involved and further denied the request for the reason that the issue in the case could equally well be addressed by requesting reconsideration and submitting evidence not previously considered which established that she did cooperate with the vocational rehabilitation process.

LEGAL PRECEDENT

Section 8124(b)(1) of FECA⁴ provides that a claimant not satisfied with a decision of OWCP is entitled to a hearing before an Office hearing representative when the request is made within 30 days after issuance of an OWCP decision.⁵ Under the implementing regulations, a claimant who has received a final adverse decision by OWCP is entitled to a hearing by writing to the address specified in the decision 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.⁶ If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.⁷ However, when the request is

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Id.* at § 8124(b)(1).

⁶ *Id.*; 20 C.F.R. § 10.616(a).

⁷ *Teresa M. Valle*, 57 ECAB 542 (2006).

not timely filed or when reconsideration has previously been requested, OWCP may within its discretion, grant a hearing or review of the written record and must exercise this discretion.⁸

ANALYSIS

On September 16, 2008 OWCP reduced appellant's compensation to zero on the grounds that she refused to participate in vocational rehabilitation efforts. Appellant's November 19, 2010 request for a hearing was made more than 30 days after the September 16, 2008 decision. She contended that she never received OWCP's August 15, 2008 notice about the proposed reduction of her compensation and September 16, 2008 decision reducing her compensation to zero. Under the mailbox rule it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.⁹ The record shows that OWCP properly mailed the notice and decision to appellant's address of record as of August 15 and September 16, 2008, respectively. Appellant did not submit any rebutting evidence. Moreover, she did not advise OWCP about her change of address until after the September 16, 2008 decision was issued. Under these circumstances, the Board finds that appellant's request for an oral hearing was not timely and she was not entitled to an oral hearing as a matter of right.¹⁰

OWCP has the discretionary authority to grant a hearing even though a claimant is not entitled as a matter of right. In the December 16, 2010 decision, it properly exercised its discretion. OWCP considered whether to grant a discretionary hearing and denied appellant's request for an oral hearing for the reason that the issue of whether she cooperated with vocational rehabilitation efforts could be adequately addressed through the reconsideration process and the submission of additional evidence not previously considered. The Board has held that the only limitation on OWCP'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 deduction from established facts.¹¹ In the instant case, there is no evidence of record that OWCP abused its discretion in denying appellant's request for a hearing under these circumstances.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for an oral hearing as untimely.

⁸ *Martha A. McConnell*, 50 ECAB 129, 130 (1998).

⁹ *C.T.*, Docket No. 08-2160 (issued May 7, 2009); *Jeffrey M. Sagrecy*, 55 ECAB 724 (2004).

¹⁰ *See supra* note 6.

¹¹ *Teresa M. Valle*, *supra* note 7; *Daniel J. Perea*, 42 ECAB 214 (1990).

ORDER

IT IS HEREBY ORDERED THAT the December 16, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 26, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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