



## **FACTUAL HISTORY**

This case has previously been before the Board. In a decision dated December 1, 2010, the Board reversed September 16, 2009 and February 1, 2010 OWCP decisions reducing appellant's compensation benefits to zero based on a finding that his actual earnings as a modified machinist fairly and reasonably represented his wage-earning capacity.<sup>2</sup> The Board determined that he had not worked in the limited-duty position for more than 60 days prior to OWCP's loss of wage-earning capacity determination. The Board found, consequently, that OWCP improperly reduced appellant's compensation as it failed to follow its procedures. The facts and circumstances as set forth in the prior decision are hereby incorporated by reference.

By decision dated April 12, 2011, OWCP again reduced appellant's compensation to zero based on its finding that his actual earnings effective August 30, 2009 as a light-duty machinist fairly and reasonably represented his wage-earning capacity.

In a letter dated April 16, 2011, appellant questioned the meaning of the April 12, 2011 decision, noting that the Board had reversed the prior finding.<sup>3</sup>

In a telephone call dated April 3, 2014, OWCP informed appellant that it had issued a decision on April 12, 2011 reducing his compensation. Appellant responded that he had not received an April 12, 2011 decision. OWCP advised him that the decision was not returned after being mailed.

In a form received by OWCP on May 1, 2014, appellant requested a review of the written record on the April 12, 2011 decision.<sup>4</sup>

By decision dated May 21, 2014, OWCP denied appellant's request for a review of the written record as it was not made within 30 days of the last decision. It exercised its discretion and considered his request but found that the issue could be adequately addressed through the reconsideration process.

On appeal, appellant contends that appeal rights were not attached to OWCP's decision.<sup>5</sup> He notes that he told OWCP on April 16, 2011 that he did not understand its actions on April 12, 2011. Appellant asserts that the April 12, 2011 decision did not comply with the

---

<sup>2</sup> Docket No. 10-949 (issued December 1, 2010). OWCP accepted that on July 16, 2001 appellant, then a 51-year-old machinist, sustained lumbar strain, an aggravation of lumbar degenerative disc disease, other acquired deformities of the left ankle and foot and unequal leg length in the performance of duty. Appellant underwent back surgeries on September 24, 2001 and May 9, 2008. On August 24, 2009 he accepted a position as a light-duty machinist with no lifting over 20 pounds.

<sup>3</sup> On December 7, 2012 appellant filed recurrence of disability on July 3, 2006 due to his July 16, 2001 work injury. He did not claim medical treatment or lost wages. By letter dated April 18, 2013, OWCP advised appellant that as he was not claiming disability compensation or medical expenses, it would not adjudicate the notice of recurrence of disability.

<sup>4</sup> Appellant also indicated that he wanted to appeal to the Board.

<sup>5</sup> Appellant's April 9, 2014 letter addressed to the Board was also provided to OWCP on May 1, 2014.

Board's December 1, 2010 decision. He argues the merits of his claim and indicates that he wants to appeal the April 12, 2011 decision.

### LEGAL PRECEDENT

Section 8124(b) of FECA provides that a claimant for compensation not satisfied with a decision of the Secretary 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.<sup>6</sup> Section 10.615 of the federal regulations implementing this section of FECA provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.<sup>7</sup> The 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.<sup>8</sup> A claimant is entitled to a hearing or review of the written record as a matter of right if the request is filed within 30 days.<sup>9</sup>

While a claimant may not be entitled to a hearing or review of the written record as a matter of right if the request is untimely, OWCP has the discretionary authority to grant the request and must properly exercise such discretion.<sup>10</sup>

### ANALYSIS

By decision dated April 12, 2011, OWCP reduced appellant's compensation effective August 30, 2009 based on its finding that his actual earnings as a light-duty machinist beginning that date fairly and reasonably represented his wage-earning capacity. After contacting OWCP on April 3, 2014 to determine the status of his case, appellant sought a review of the written record on a form received by OWCP on May 1, 2014. As his request for a review of the written record was received May 1, 2014, more than 30 days after OWCP issued its April 12, 2011 decision, he was not entitled to a review of the written record as a matter of right.

OWCP has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing or review as a matter of right.<sup>11</sup> In its May 21, 2014 decision, it properly exercised discretion by stating that it had considered the matter in relation to the issue involve and denied appellant's request for a review of the written record on the basis that the case could be resolved by submitting additional evidence to OWCP with a reconsideration request. The Board has held that the only limitation on OWCP's discretionary authority is reasonableness. An 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

---

<sup>6</sup> 5 U.S.C. § 8124(b)(1).

<sup>7</sup> 20 C.F.R. § 10.615.

<sup>8</sup> *Id.* at § 10.616(a).

<sup>9</sup> See *Leona B. Jacobs*, 55 ECAB 753 (2004).

<sup>10</sup> 20 C.F.R. § 10.616(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011).

<sup>11</sup> See *Afegalai L. Boone*, 53 ECAB 533 (2002).

and probable deduction from established facts.<sup>12</sup> The evidence does not establish that OWCP committed any action in connection with its denial of appellant's request for a review of the written record which could be found to be an abuse of discretion. Accordingly, OWCP properly denied his request for a review of the written record as untimely under section 8124 of FECA.

On appeal, appellant maintains that he did not receive appeal rights with the April 12, 2011 decision. He asserts that he informed OWCP on April 16, 2011 that he did not understand the April 12, 2011 correspondence. The record, however, indicates that the April 12, 2011 decision was properly addressed to appellant and was accompanied by appeal rights. There is no evidence that it was returned to OWCP as undeliverable. Absent evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have been received. This is known as the mailbox rule.<sup>13</sup> The April 12, 2011 decision was sent to appellant's address of record with appeal rights and is presumed to have been received absent any notice of nondelivery.

Appellant further raises arguments relevant to the merits of his case. The only issue before the Board, however, is whether OWCP properly denied his request for a review of the written record as untimely. The Board lacks jurisdiction to review the underlying merits of the case.<sup>14</sup>

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for a review of the written record as untimely under section 8124(b)(1).

---

<sup>12</sup> See *L.W.*, 59 ECAB 471 (2008); *André Thyratron*, 54 ECAB 257 (2002).

<sup>13</sup> See *James A. Gray*, 54 ECAB 277 (2002).

<sup>14</sup> See 20 C.F.R. § 501.3(e).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 21, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 10, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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