

OWCP properly denied appellant's request for an oral hearing as untimely filed, pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On April 2, 2020, appellant, then a 58-year-old garageman, filed a traumatic injury claim (Form CA-1) alleging that, on March 26, 2020, he cut his left hand when loading a steel liftgate cover into the bed of a truck while in the performance of duty. He stopped work on that date and underwent surgery. OWCP accepted the claim for laceration of the long flexor muscle, fascia, and tendon of the left thumb and the wrist and hand. It paid appellant wage-loss compensation on the supplemental rolls effective June 29, 2020, and on the periodic rolls effective December 19, 2020.

On November 10, 2021, OWCP referred appellant, a statement of accepted facts and series of questions to Dr. Peter P. Lee, a Board-certified neurologist, for a second opinion regarding the status of appellant's accepted employment-related conditions.

In a December 2, 2021 report, Dr. Lee found that appellant was experiencing left hand pain and weakness due to complex regional pain syndrome and injury of the median nerve. He determined that the work-related conditions had not resolved. Dr. Lee related that appellant could not return to his date-of-injury position but could perform light-duty work with restrictions on the use of his nondominant left hand. He completed a work capacity evaluation (Form OWCP-5c) and found that appellant was capable of performing only sedentary work. Dr. Lee restricted him from twisting, operating a motor vehicle at work, performing repetitive movements of the wrists and elbows, and pushing, pulling, lifting or climbing, with his left hand. He opined that appellant could work full time with these restrictions and that he could perform "any duty without left hand usage."

On January 24, 2022, OWCP referred appellant for vocational rehabilitation services. It advised him that participation in vocational rehabilitation was mandatory, and that failure to comply could adversely affect his benefits.

In a January 25, 2022 letter, the vocational rehabilitation counselor advised appellant that she had left several messages for him, but had not received a return call. She requested to schedule a telephone conference for February 7, 2022.

In a rehabilitation action report (Form OWCP-44) dated January 27, 2022, appellant's vocational rehabilitation counselor reported her attempts to contact appellant. She indicated that she had attempted to contact him on that date by telephone and had left several messages, but had not received a return call. The vocational rehabilitation counselor also noted that she had sent appellant a letter dated January 25, 2022 requesting a February 7, 2022 meeting by telephone. In a Form OWCP-44 dated February 7, 2022, she advised that he had not answered her call on February 7, 2022 for the telephone conference. The vocational rehabilitation counselor asserted that appellant was not cooperating with the vocational rehabilitation efforts.

In letter dated February 16, 2022, OWCP warned appellant of the penalties under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 for failing to cooperate with vocational rehabilitation without good cause. It provided him 30 days to make a good effort to participate in the rehabilitation effort.

On March 1, 2022, the vocational rehabilitation counselor reported that appellant had contacted her on February 28, 2022 and advised that he was in constant pain from his left hand injuries, but agreed to cooperate with rehabilitation services.

On May 4, 2022, the vocational rehabilitation counselor reported that she had telephoned appellant on that date to discuss vocational goals, and he had informed her very loudly that he was 100 percent disabled, requested that she refrain from telephoning him, and asked that she only communicate in writing. Appellant further reported that he was going to file for disability and would not allow her to ask him any questions.

In a letter dated May 5, 2022, OWCP again warned appellant of the penalties under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 for failing to cooperate with vocational rehabilitation without good cause. It afforded him 30 days to make a sufficient effort to participate in the rehabilitation effort. OWCP informed appellant that, if he believed that he had a good reason for not participating in the rehabilitation effort, he should respond within 30 days, provide the reason(s) for noncompliance, and submit evidence in support of his position. It noted that, if he did not comply with the instructions contained in the letter within 30 days, the rehabilitation effort would be terminated, and action would be taken to reduce his compensation under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.

On May 12, 2022, appellant telephoned the vocational rehabilitation counselor and agreed to cooperate.

In an August 11, 2022 rehabilitation progress report, the vocational rehabilitation counselor advised that on July 19, 2022 she had telephoned appellant and recommended computer training. Appellant responded that he could not type, did not have a computer, was not allowed to drive, and did not feel capable of taking a computer class. The vocational rehabilitation counselor noted that he did not appear motivated to return to work.

On September 2, 2022, the vocational rehabilitation counselor reported that appellant had asserted on that date that OWCP's vocational rehabilitation efforts needed to stop, as his physician had found that he was unable to work.

Appellant subsequently did not return the vocational rehabilitation counselor's telephone calls.

By decision dated December 5, 2022, OWCP reduced appellant's compensation to zero, effective that date, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, for his failure to cooperate with the early stages of vocational rehabilitation without good cause. It determined that he had failed to participate in the essential preparatory effort of vocational rehabilitation and thus it was unable to determine what his wage-earning capacity would have been had he undergone testing and vocational rehabilitation. OWCP consequently reduced appellant's compensation to zero under 20 C.F.R. § 10.519.

On January 13, 2023, appellant informed OWCP that he had not received the December 5, 2022 decision until January 5, 2023.

On January 13, 2023, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated February 9, 2023, OWCP denied appellant's request for an oral hearing as untimely filed since it was not made within 30 days of OWCP's December 5, 2022 decision. It further exercised its discretion and determined that the issue in this case could equally well be addressed by a request for reconsideration before OWCP along with the submission of new evidence.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proof to establish that the disability has ceased or lessened before it may terminate or modify compensation benefits.³ Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.⁴

Section 8113(b) of FECA⁵ provides that if an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of FECA, then OWCP "after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, may reduce prospectively the monetary compensation of the individual in accordance with what would probably have been his [or her] wage-earning capacity in the absence of the failure," until the individual in good faith complies with the direction OWCP.⁶

OWCP's regulations, at 20 C.F.R. § 10.519, provide in pertinent part:

"If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue to participate in a vocational rehabilitation effort when so directed, OWCP will act as follows --

(a) Where a suitable job has been identified, OWCP will reduce the employee's future monetary compensation based on the amount which would likely have been his or her wage-earning capacity had he or she undergone vocational rehabilitation. [It] will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with OWCP nurse and the [employing establishment]. The reduction will remain in effect until such

³ See *B.D.*, Docket No. 21-1301 (issued October 17, 2022); *E.W.*, Docket No. 19-0963 (issued January 2, 2020); *Betty F. Wade*, 37 ECAB 556, 565 (1986).

⁴ 5 U.S.C. § 8104(a); see also *A.L.*, Docket No. 22-0316 (issued January 10, 2023); *J.E.*, 59 ECAB 606 (2008).

⁵ *Supra* note 2.

⁶ *Id.* at § 8113(b); *J.S.*, Docket No. 22-0386 (issued October 19, 2022); *S.H.*, Docket No. 16-1827 (issued March 12, 2018); *R.M.*, Docket No. 16-0011 (issued February 11, 2016).

time as the employee acts in good faith to comply with the direction of OWCP.

(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 OWCP nurse, interviews, testing, counseling, functional capacity evaluations [(FCE)], and work evaluations) OWCP cannot determine what would have been the employee's wage-earning capacity.

(c) Under the circumstances identified in paragraph (b) of this section, in the absence of evidence to the contrary, OWCP will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity, and OWCP will reduce the employee's monetary compensation accordingly (that is, to zero). This reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP."⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP met its burden of proof to reduce appellant's compensation effective December 5, 2022, pursuant to 5 U.S.C. § 8113(b), for his failure to cooperate with vocational rehabilitation without good cause.

Upon receiving medical evidence that appellant was not totally disabled from all work, but could perform sedentary work with restrictions, OWCP properly referred him to vocational rehabilitation services on January 24, 2022. Initially, the vocational rehabilitation counselor reported her difficulty reaching him by telephone and his failure to respond to requests for meetings.

In a May 5, 2022 letter, OWCP advised appellant of the need to participate in vocational rehabilitation and the consequences of not participating under section 8113(b) of FECA and section 10.519 of its regulations. It afforded him 30 days to participate in vocational rehabilitation services or provide good cause for his noncompliance. While appellant agreed to cooperate on May 12 and July 19, 2022, when the vocational rehabilitation counselor recommended computer training, he responded that he could not type, that he did not have a computer, that he was not allowed to drive, and that he did not feel capable of taking a computer class. She noted that he did not appear motivated to return to work. On September 2, 2022 the vocational rehabilitation counselor telephoned appellant and he related that the telephone calls needed to stop as his physician found that he was unable to work and maintained that she was not authorized to contact him. Appellant did not return her calls after September 28, 2022.

Appellant's failure without good cause to participate in conversation with the rehabilitation counselor and to schedule recommended training constitutes a failure to participate in the early,

⁷ 20 C.F.R. § 10.519; *see B.D., supra* note 3; *R.H.*, 58 ECAB 654 (2007).

but necessary, stages of a vocational rehabilitation effort.⁸ OWCP's regulations provide that, in such a case, it cannot be determined what would have been the employee's wage-earning capacity had there been no failure to participate, and it is assumed 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.⁹

Appellant was given appropriate notification of the sanctions for continuing to refuse to cooperate with the rehabilitation program in the early stages, but failed, without good cause, to comply with these rehabilitation efforts. The Board finds, therefore, that OWCP properly reduced his compensation benefits to zero for his failure to cooperate with vocational rehabilitation without good cause. Accordingly, the reduction will remain in effect until such time as appellant acts in good faith to comply with the direction of OWCP.¹⁰

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) 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 or her claim before a representative of the Secretary.¹¹ Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.¹² A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration.¹³ Although there is no right to a review of the written record or an oral hearing, if not requested within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.¹⁴

⁸ *Id.* at § 10.519(b). *See also A.L.*, Docket No. 22-0316 (issued January 10, 2023); *E.W.*, Docket No. 19-0963 (issued January 2, 2020); *R.M.*, *supra* note 6; *Conard Hightower*, 54 ECAB 796 (2003).

⁹ *Id.* at § 10.519(c); *see M.D.*, Docket No. 23-0377 (issued June 5, 2023).

¹⁰ *Supra* note 7.

¹¹ 5 U.S.C. § 8124(b).

¹² 20 C.F.R. §§ 10.616, 10.617, and 10.618.

¹³ *Id.* at § 10.616(a).

¹⁴ *S.N.*, Docket No. 22-1048 (issued April 3, 2023); *G.H.*, Docket No. 22-0122 (issued May 20, 2022); *E.E.*, Docket No. 20-1290 (issued July 21, 2021); *J.T.*, Docket No. 18-0664 (issued August 12, 2019); *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for an oral hearing as untimely filed, pursuant to 5 U.S.C. § 8124(b).

On January 13, 2023 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review;¹⁵ however, this request was made more than 30 days after OWCP's December 5, 2022 decision. The Board notes that on January 13, 2023 he maintained that he had not received the December 5, 2022 decision until January 5, 2023. The Board has held, however, that 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 called the mailbox rule.¹⁶ The evidence of record establishes that the December 5, 2022 decision was properly mailed to appellant at his last known address of record and there is no evidence of nondelivery. Section 8124(b)(1) is unequivocal on the time limitation for filing a request for a hearing.¹⁷ As such, the request was untimely filed, and appellant was not entitled to an oral hearing as a matter of right.

The Board further finds that OWCP, in its February 9, 2023 decision, properly exercised its discretionary authority, finding that his claim could be equally-well addressed through a reconsideration request.

The Board has held that the only limitation on OWCP's 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 and probable deduction from established facts.¹⁸ The Board finds that the evidence of record does not establish that OWCP abused its discretion in denying appellant's request for an oral hearing before an OWCP hearing representative.¹⁹

CONCLUSION

The Board finds that OWCP met its burden of proof to reduce appellant's compensation effective December 5, 2022, pursuant to 5 U.S.C. § 8113(b), for his failure to cooperate with

¹⁵ Under OWCP's regulations and procedures, the timeliness of a request for a hearing is determined based on the postmark of the envelope containing the request, if available. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4a (October 2011). Otherwise, the date of the letter itself should be used. See *J.H.*, Docket No. 06-1565 (issued February 20, 2007); *James B. Moses*, 52 ECAB 465 (2001), citing *William J. Kapfhammer*, 42 ECAB 271 (1990); see also *Douglas McLean*, 42 ECAB 759 (1991).

¹⁶ See *Y.A.*, Docket No. 23-0160 (issued June 20, 2023); *J.W.*, Docket No. 21-0869 (issued January 14, 2022); *V.C.*, Docket No. 20-0798 (issued November 16, 2020).

¹⁷ See *S.N.*, Docket No. 22-1048 (issued April 3, 2023); *M.M.*, Docket No. 19-1171 (issued October 22, 2019); *William F. Osborne*, 46 ECAB 198 (1994).

¹⁸ *T.G.*, Docket No. 19-0904 (issued November 25, 2019); see *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

¹⁹ See *S.N.*, *supra* note 17; *J.G.*, Docket No. 19-0555 (issued March 14, 2019).

vocational rehabilitation without good cause. The Board further finds that OWCP properly denied his request for an oral hearing as untimely filed, pursuant to 5 U.S.C. § 8124(b).

ORDER

IT IS HEREBY ORDERED THAT the December 5, 2022 and February 9, 2023 decisions of Office of Workers' Compensation Programs are affirmed.

Issued: May 12, 2025
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board