United States Department of Labor
Employees' Compensation Appeals Board

R.E., Appellant	)	
and	)	**Docket No. 24-0806**
	)	**Issued: December 4, 2024**
U.S. POSTAL SERVICE, PORTLAND AIR CARGO CENTER, Portland, OR, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 22, 2024 appellant filed a timely appeal from a January 22, 2024[1] merit decision and an April 12, 2024 nonmerit decision of the Office of Workers' Compensation Programs

[1] The Board's review authority over final adverse decisions of OWCP issued on or after November 19, 2008 is limited to appeals which are filed within 180 days from the date of issuance of OWCP's decision. 20 C.F.R. § 501.3(e). The 180th day following the January 22, 2024 decision was July 21, 2024. As this fell on a Sunday, appellant had until the next business day, Monday, July 22, 2024, to file the appeal. 20 C.F.R. § 501.3(f)(2). *See also Order Dismissing Appeal, G.B.*, Docket No. 20-1530 (issued April 8, 2021); *John B. Montoya*, 43 ECAB 1148 (1992).

(OWCP).[2] Pursuant to the Federal Employees' Compensation Act (FECA)[3] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[4]

ISSUES

The issues are: (1) whether OWCP properly reduced appellant's wage-loss compensation to zero, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, effective January 22, 2024, due to his failure to cooperate with vocational rehabilitation, without good cause; and (2) whether OWCP properly denied appellant's request for a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On October 23, 2015 appellant, then a 60-year-old casual mail handler, filed a traumatic injury claim (Form CA-1) alleging that on that day, he injured his left foot when he pushed heavy equipment while in the performance of duty. He stopped work on October 24, 2015. On December 16, 2015 OWCP accepted the claim for sprain of unspecified ligament of the right ankle. It subsequently expanded the acceptance of appellant's claim to include sprain of unspecified ligament of the left ankle and partial rupture of left tibial tendon. OWCP paid appellant wage-loss compensation on the supplemental rolls, effective December 22, 2015, and on the periodic rolls effective May 1, 2016.

On June 27, 2016 appellant underwent left foot double hindfoot arthrodesis, gastrocnemius lengthening, first tarsometatarsal joint arthrodesis, and simple bunionectomy. He remained off work.

On August 8, 2022 OWCP referred appellant, the medical record, a statement of accepted facts (SOAF), and a series of questions to Dr. Nicole Behnke, a Board-certified orthopedic

[2] Appellant submitted a timely request for oral argument before the Board, explaining his disagreement with OWCP's April 12, 2024 nonmerit decision. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). Appellant contended that he was unable to timely file a request for an oral hearing as he was out of the country. The Board, in exercising its discretion, denies appellant's request for oral argument because arguments on appeal can be adequately addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied, and this decision is based on the case record as submitted to the Board.

[3] 5 U.S.C. § 8101 *et seq*.

[4] The Board notes that appellant submitted additional evidence following the April 12, 2024 decision and on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id*.

surgeon, for a second opinion examination regarding the nature and extent of the accepted employment conditions and appellant's work capacity.

In a September 14, 2022 report, Dr. Behnke noted her review of the medical record and the SOAF. She reported findings on examination of a significant rigid calcaneovalgus deformity of the left hindfoot with total arch collapse. Dr. Behnke diagnosed a left ankle sprain, left posterior tibialis tendon tear, left foot severe planovalgus deformity with hallux valgus and lesser toe hammertoes, status post significant foot/ankle surgery with residual deformity, and complex regional pain syndrome (CRPS) possibly related to direct tibial nerve injury *versus* postsurgical sequela. She characterized appellant's CRPS as severe enough to warrant a below-the-knee amputation of the left lower extremity as he had "essentially a nonfunctional left lower extremity below the level of the knee." Dr. Behnke found that appellant had reached maximum medical improvement (MMI) if he did not wish to pursue further surgery or authorization of a spinal cord stimulator. She completed a work capacity evaluation (Form OWCP-5c), finding appellant able to perform full-time sedentary work with no walking or standing, and pushing, pulling, and lifting limited to five pounds and only while seated. Appellant could drive to and from work using a vehicle with automatic transmission.

OWCP requested that the employing establishment provide appellant a job offer within the restrictions set forth by Dr. Behnke; however, it responded that it did not have a suitable position available within Dr. Behnke's restrictions.

On March 23, 2023 OWCP referred appellant to a vocational rehabilitation counselor for vocational rehabilitation.

In an April 18, 2023 letter, OWCP requested that appellant obtain and submit updated medical evidence from his attending physician addressing his current condition and work limitations.

In an April 28, 2023 report, the vocational rehabilitation counselor advised that she met appellant for a vocational interview on April 18, 2023. He had received a college degree in business management in his native country, the Philippines, but had no computer training. Appellant previously worked as a delivery driver, assembly worker, and mail handler. The counselor noted that he experienced significant discomfort and dysfunction of the left lower extremity. She referred him for vocational testing.

In a June 8, 2023 report, the vocational rehabilitation counselor noted that she had contacted appellant that day to ascertain whether he had finished the vocational testing packet sent to him. Appellant advised her that he had been in the Philippines commencing June 5, 2023 and would remain there until later August 2023 due to a death in his family.

In an August 9, 2023 letter, OWCP notified appellant that he had refused to participate in rehabilitation efforts as he had not responded to the vocational rehabilitation counselor's letters and telephone calls regarding mandatory vocational testing. It informed him that if he refused to cooperate without good cause, his compensation would be reduced to zero. OWCP afforded

appellant 15 days to make a good faith effort to participate with vocational rehabilitation or to submit additional evidence or argument justifying failure to participate.

On August 24, 2023 OWCP placed appellant's vocational rehabilitation plan in interrupted status until he returned to the United States.

In a September 12, 2023 report, the vocational rehabilitation counselor noted that appellant had telephoned on September 11, 2023, to advise that he had returned to the United States. She directed the vocational testing consultant to contact appellant regarding vocational testing.

In a September 29, 2023 report, the vocational rehabilitation counselor noted that she had explained to appellant that he must complete the vocational testing packet sent to him and to expect contact from the vocational testing consultant.

In a November 30, 2023 report, the vocational rehabilitation counselor noted that the vocational testing packet sent to appellant had been returned as undeliverable due to an error in the address. The packet had since been resent. The vocational rehabilitation counselor and vocational testing consultant subsequently tried telephoning appellant without success.

In a December 28, 2023 letter, the vocational rehabilitation counselor advised appellant that she and the vocational testing consultant had tried contacting appellant without success. She emphasized the importance of getting vocational services moving forward. The counselor scheduled a telephone appointment on Tuesday, January 9, 2024 at 3:00 p.m.

In a January 9, 2024 rehabilitation action report (Form OWCP-44), the vocational rehabilitation counselor indicated that appellant had obstructed the vocational rehabilitation effort as he did not appear at scheduled meetings and failed to carry out agreed-upon actions. She noted that while appellant had signed and returned the certified mail receipt from the vocational testing packet, the testing consultant had been unable to establish contact with appellant. Additionally, appellant did not call to confirm a scheduled appointment or appear for that meeting.

On January 10, 2024 OWCP closed the vocational rehabilitation effort due to appellant's obstruction.

On January 12, 2024 appellant advised OWCP that he was leaving the United States on January 15, 2024 to return to the Philippines.

By decision dated January 22, 2024, OWCP reduced appellant's compensation to zero for failure to participate in vocational rehabilitation. It found that he had failed to participate in the essential preparatory effort of vocational rehabilitation when he failed to participate in vocational testing or establish contact with his vocational rehabilitation counselor. OWCP thus found that it was unable to determine what appellant's wage-earning capacity would have been had he undergone testing and vocational rehabilitation. It consequently reduced his compensation to zero pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.

On April 1, 2024 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated April 12, 2024, OWCP denied appellant's request for a review of the written record, finding that it was untimely filed. It further exercised its discretion and determined that the issue in the 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.[5] Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.[6]

Section 8113(b) provides that, "[i]f an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under 8104, the Secretary, on review under section 8128 and 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 of the Secretary."[7]

OWCP's regulations provide:

> "(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, 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."[8]

OWCP's procedures provide that specific instances of noncooperation include a failure to appear for the initial interview, counseling sessions, a functional capacity evaluation, other

[5] *S.B.*, Docket No. 19-0781 (issued February 2, 2022); *S.C.*, Docket No. 19-1680 (issued May 27, 2020); *Betty F. Wade*, 37 ECAB 556 (1986).

[6] 5 U.S.C. § 8104(a); *see also A.L.*, Docket No. 22-0316 (issued January 10, 2023); *J.E.*, 59 ECAB 606 (2008).

[7] *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).

[8] 20 C.F.R. § 10.519(b) and (c).

interviews conducted by the vocational rehabilitation counselor, vocational testing sessions, and work evaluations, as well as lack of response or inappropriate response to directions in a testing session after several attempts at instruction.[9]

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly reduced appellant's wage-loss compensation to zero, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, effective January 22, 2024, due to his failure to cooperate with vocational rehabilitation, without good cause.

When determining whether OWCP properly reduced appellant's wage-loss compensation benefits based on his failure to participate in vocational rehabilitation, the Board must first analyze whether OWCP properly determined his work restrictions.[10] OWCP referred him to vocational rehabilitation based on the September 14, 2022 second opinion report of Dr. Behnke. Dr. Behnke determined that appellant could work full time at the sedentary physical demand level, with no walking or standing, and pushing, pulling, and lifting limited to five pounds. The Board finds that OWCP properly referred appellant for vocational rehabilitation based on Dr. Behnke's report, which established that appellant was no longer totally disabled due to residuals of his employment injury.[11]

In a vocational rehabilitation report dated April 28, 2023, the vocational rehabilitation counselor discussed appellant's employment and educational background. She arranged for him to undergo vocational testing. The vocational rehabilitation counselor subsequently advised that appellant had returned the certified mail receipt from the vocational testing packet, but had not returned a completed test packet, had not responded to telephone calls or messages; and failed to appear for a scheduled meeting. OWCP's procedures provide that failure to participate in vocational efforts constitutes noncooperation with vocational rehabilitation.[12]

OWCP issued an August 9, 2023 letter requesting that appellant either participate in vocational rehabilitation efforts or provide good cause for not doing so. It also notified him of the actions that could be taken under section 8113(b) of FECA (5 U.S.C. § 8113(b)) if he failed to cooperate with vocational rehabilitation without good cause. Appellant did not, however, either participate in the vocational rehabilitation effort by undergoing testing or provide good cause for not doing so.

The Board finds that the evidence of record establishes that appellant failed to participate in vocational rehabilitation without good cause. Appellant's failure to participate in preliminary

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.17b (February 2011); *M.D.*, Docket No. 23-0377 (issued June 5, 2023); *see E.W.*, Docket No. 19-0963 (issued January 2, 2020); *Sam S. Wright*, 56 ECAB 358 (2005).

[10] *See J.S.*, *supra* note 7; *F.N.*, Docket No. 20-0435 (issued February 26, 2021); *L.C.*, Docket No. 12-972 (issued November 9, 2012).

[11] *R.D.*, Docket No. 19-0752 (issued August 20, 2019); *C.M.*, Docket No. 18-0688 (issued November 15, 2018).

[12] *See supra* note 10.

testing constituted a failure to participate in the "early but necessary stages of a vocational rehabilitation effort."[13] 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.[14]

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 due to his failure to cooperate with vocational rehabilitation without good cause. The reduction will remain in effect until such time as appellant acts in good faith to comply with the direction of OWCP.[15]

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."[16] 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.[17] A claimant is entitled to an oral 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, or the date received in the Employees' Compensation and Management Portal (ECOMP), and before the claimant has requested reconsideration.[18] Although there is no right to a review of the written record or an oral hearing, if not requested

[13] *See* 20 C.F.R. § 10.519(b); *see also C.H.*, Docket No. 16-1731 (issued September 5, 2017); *C.P.*, Docket No. 15-0781 (issued April 5, 2016).

[14] *Id.* at § 10.519(c); *M.D.*, *supra* note 9; *A.L.*, *supra* note 6.

[15] *Id.* at § 10.519(c); *see B.D.*, Docket No. 21-1301 (issued October 17, 2022); *R.H.*, 58 ECAB 654 (2007).

[16] *Supra* note 3 at § 8124(b)(1).

[17] 20 C.F.R. §§ 10.616, 10.617.

[18] *Id.* at § 10.616(a); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4a (February 2024).

within the 30-day time period, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.[19]

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly found that appellant's request for a review of the written record before an OWCP hearing representative was untimely filed, pursuant to 5 U.S.C. § 8124(b).

OWCP's regulations provide that a request for an oral hearing or a review of the written record must be made within 30 days of the date of the decision for which a review is sought. Because appellant's request for a review of the written record was postmarked April 1, 2024, it postdated OWCP's January 22, 2024 decision by more than 30 days, and accordingly, was untimely. He was, therefore, not entitled to a review of the written record as a matter of right.[20]

OWCP, however, has the discretionary authority to grant the request, and it must exercise such discretion.[21] 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 deductions from established facts.[22] In this case, the Board finds that OWCP did not abuse its discretion in its denial of appellant's request for a review of the written record.

Accordingly, the Board finds that OWCP properly denied appellant's request for a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124(b).

CONCLUSION

The Board finds that OWCP properly reduced appellant's wage-loss compensation to zero, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, effective January 22, 2024, due to his failure to cooperate with vocational rehabilitation without good cause. The Board further finds that OWCP properly determined that appellant's request for a review of the written record was untimely filed, pursuant to 5 U.S.C. § 8124(b).

[19] *See G.W.*, Docket No. 24-0834 (issued October 30, 2024); *see also P.G.*, Docket No. 24-0447 (issued August 12, 2024); *W.H.*, Docket No. 20-0562 (issued August 6, 2020); *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

[20] *See K.B.*, Docket No. 21-1038 (issued February 28, 2022); *M.F.*, Docket No. 21-0878 (issued January 6, 2022); *see also P.C.*, Docket No. 19-1003 (issued December 4, 2019).

[21] *Id.*

[22] *Id.*; *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

ORDER

IT IS HEREBY ORDERED THAT the January 22 and April 12, 2024 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 4, 2024
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