

**United States Department of Labor
Employees' Compensation Appeals Board**

F.M., Appellant)

and)

DEPARTMENT OF LABOR, EARLE C.)
CLEMENTS JOB CORPS CENTER,)
Morganfield, KY, Employer)
-----)

**Docket No. 24-0673
Issued: October 18, 2024**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On June 10, 2024 appellant filed a timely appeal from a March 4, 2024 merit decision and a May 8, 2024 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to reduce appellant's compensation benefits, effective March 4, 2024, based on his capacity to earn wages in the

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the May 8, 2024 decision, OWCP received additional evidence. 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.*

constructed position of service clerk; and (2) whether 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 29, 1983 appellant, then a 17-year-old student enrollee, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his left knee when he fell in his dormitory while in the performance of duty. He stopped work on that date. OWCP accepted appellant's claim for contusion of the left knee, aggravation of osteochondritis dissecans on the left, and left knee osteoarthritis of the medial compartment.³ On May 14, 2013 appellant underwent an authorized left total knee arthroplasty followed by manipulation under anesthesia on September 20, 2013 by Dr. Robert Karsch, a Board-certified orthopedic surgeon. OWCP paid appellant wage-loss compensation for total disability on the supplemental rolls effective May 14, 2013 and on the periodic rolls effective June 2, 2013.

In a medical report dated July 28, 2016, Dr. Karsch noted that appellant related complaints of swelling and occasional stiffness and aching with prolonged walking. On physical examination of the left thigh, he observed point tenderness, reduced muscle strength, muscle atrophy, and full active range of motion (ROM) with no instability. Dr. Karsch obtained an x-ray, which revealed the arthroplasty in a stable position. He diagnosed traumatic arthropathy of the left knee and recommended that appellant follow a home therapy program and return in one year for an updated evaluation.

On September 9, 2019 OWCP referred appellant, the medical record, a statement of accepted facts (SOAF), and a series of questions, to Dr. Daniel R. Schlatterer, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of his employment-related conditions and disability.

In a September 23, 2019 report, Dr. Schlatterer noted a history of appellant's employment injury and his review of the medical record. On examination of the left knee, he documented that the knee was grossly stable with a well-healed surgical incision, no tenderness throughout the knee, full active extension and 90 degrees of flexion, and no focal neurovascular deficit in the left foot or ankle. Dr. Schlatterer obtained x-rays which revealed that the implant was well-aligned and in good position with no signs of subsidence or loosening and no osteolysis around the implant. He noted his review of the accepted diagnoses as set forth in the SOAF. Dr. Schlatterer opined that appellant's work-related condition had partially resolved as the osteochondritis dissecans was cut out and removed in the total knee replacement. He also noted ongoing intermittent pain and swelling which limited overall functional capabilities, which he indicated was not unusual 11 years after surgery. Dr. Schlatterer opined that appellant had reached maximum medical improvement (MMI) and did not recommend further treatment other than a revision total knee replacement 10

³ The record reflects that the claimant was medically terminated from the employing establishment on June 8, 1983. On July 28, 1983 he underwent surgery to the left knee including examination under anesthesia (EUA) and left arthritis diagnostic arthroscopy, arthrotomy, and open reduction and internal fixation (ORIF) of the medial femoral condyle, osteochondritis dissecans/osteochondral fracture. On March 19, 1984 appellant underwent a pin removal. The record reflects that he worked in several different positions in the private sector after his termination. On April 16, 2007 appellant stopped work again. On February 11, 2008 he underwent a left total knee arthroplasty with manipulation and remained off work until 2011. By decision dated February 18, 2011, OWCP reduced appellant's wage-loss compensation based on his ability to earn wages of \$360.00 per week in a constructed receptionist position. OWCP compensated him for his lost wages throughout this time period.

to 15 years after the initial implant. He opined that he was suitable for gainful employment and that vocational rehabilitation may be the best avenue to find proper placement. In a work capacity evaluation (Form OWCP-5c) of even date, Dr. Schlatterer released appellant to return to work in a sedentary to light-duty capacity on a full-time basis.

In a medical memorandum dated November 13, 2019, an OWCP claims examiner noted that appellant had not submitted nor provided any evidence that he had sought any treatment for his accepted conditions through any attending treating physician since July 28, 2016.

On November 14, 2019 OWCP referred appellant to a vocational rehabilitation counselor for vocational rehabilitation to identify an employment position within the restrictions set forth by Dr. Schlatterer on September 23, 2019.

Appellant participated in vocational rehabilitation from November 14, 2019 through April 20, 2021.

On March 8, 2020 the vocational rehabilitation counselor assigned a plan for permanent reemployment as a receptionist or service clerk, pursuant to the Department of Labor, *Dictionary of Occupational Titles* (DOT) #237.367-038 and #221.367-070, based upon appellant's age, experience, education, medical restrictions from Dr. Schlatterer, and a labor market survey. Both positions were listed as sedentary work. The vocational rehabilitation counselor conducted labor market research and documented that the positions of receptionist and service clerk were reasonably available within appellant's commuting area, and that the entry pay level for the receptionist position was \$350.40 per week, while the entry pay for the service clerk position was \$346.60 per week.

In a February 11, 2020 job classification (Form OWCP-66), appellant's vocational rehabilitation counselor identified the service clerk position, DOT No. 221.367-070, as within appellant's medical and vocational abilities.

The job description indicated that a service clerk receives, records, and distributes work orders to service crews upon customers' requests for service on articles or utilities purchases from wholesale or retail establishments or utility companies. The position requires recording information such as name, address, article to be repaired, or service to be rendered. It also involves preparing work orders to distribute to service crews, scheduling service calls, dispatching service crew, communicating with customers to ensure satisfactory performance, and keeping records of service calls and work orders. The physical requirements of the position include sedentary-level work with occasional lifting of no more than 10 pounds; no climbing, balancing, stooping, kneeling, crouching, or crawling; and frequent reaching, handling, and fingering. The vocational rehabilitation counselor indicated that appellant met the specific vocational preparation (SVP) as he was a high school graduate with a semiskilled to skilled past work history as a conveyor mechanic and forklift operator. She also indicated that the position was reasonably available in appellant's commuting area and had a weekly wage of \$360.00. The vocational rehabilitation counselor noted that the source of the wage data was the Bureau of Labor Statistics (BLS) labor market survey dated May 2019. She proposed a four to five months of online computer software training in preparation for the position.

In a February 17, 2020 individual placement plan, the vocational rehabilitation counselor recommended that appellant complete various online clerical/computer literacy training courses

beginning in March and ending in June followed by an immediate attempt at job placement. OWCP, on June 4, 2020, approved the vocational rehabilitation counselor's proposed direct placement plan. Appellant successfully completed the recommended training courses in keyboarding, computer skills for the workplace, customer service fundamentals, and introduction to Microsoft Word 2010 as of October 1, 2020.

In a letter dated October 20, 2020, OWCP advised appellant that the position of a receptionist, DOT #237.367-038, weekly wage of \$350.40 or service clerk, DOT #221.367-070, weekly wage of \$346.40, was suitable to his work restrictions. It informed him that he would receive 90 days of placement assistance to help him locate work in these positions provided that he cooperated with such effort.

Following the 90-day placement assistance period, vocational rehabilitation services were extended and concluded on March 30, 2021.

The vocational rehabilitation counselor provided updated wage-earning capacity data on April 19, 2021 for the positions of receptionist, DOT #237.367-038, and service clerk, DOT #221.367-070. The vocational rehabilitation counselor noted that these positions remained within appellant's accepted work restrictions, that he met the SVP through his semiskilled to skilled work history and online training courses in computer software and customer service fundamentals, and that the positions yielded weekly entry-level wages of \$360.40 for the receptionist position and \$360.00 for the service clerk position.

The vocational rehabilitation closure memorandum dated May 3, 2021 indicated that both selected positions remained vocationally suitable for appellant and were reasonably available within his commuting area but that appellant had failed to submit completed job search logs to support his job application activity. It further noted that during the placement assistance period, he had worked as an electric forklift operator from September 30 through December 2020.

On July 1, 2021 OWCP referred appellant to Dr. Schlatterer for an updated second opinion evaluation and provided him a copy of the job description for the service clerk position.

In a July 26, 2021 report, Dr. Schlatterer documented the same examination findings with the exception of improved knee flexion to 120 degrees. X-rays taken that day continued to show a well-positioned total knee replacement. Dr. Schlatterer reiterated his opinion that appellant had reached MMI and diagnosed left knee status post total knee replacement as connected to the employment injury. He reviewed the job description for customer service clerk and opined that appellant could perform the position. In a Form OWCP-5c of even date, Dr. Schlatterer released him to return to light-duty work with no driving a motor vehicle at work and no squatting, kneeling, or climbing.

OWCP, in a September 17, 2021 notice, proposed to reduce appellant's wage-loss compensation based on his capacity to earn wages in the constructed position of service clerk at the weekly pay rate of \$360.00. It noted that the physical requirements of the service clerk position did not exceed the restrictions provided by Dr. Schlatterer and that the selected position was medically suitable. OWCP further noted that the position was vocationally suitable based on the rehabilitation counselor's report and found 84 percent wage-earning capacity or 16 percent loss of

wage-earning capacity (LWEC), with a new gross compensation rate each four weeks of \$219.00.⁴ It attached the job classification for the service clerk position completed by the vocational rehabilitation counselor on April 19, 2021 and Dr. Schlatterer's July 26, 2021 work restrictions. OWCP afforded appellant 30 days to submit evidence and argument challenging the proposed action.

On October 5, 2021 OWCP received a letter from appellant who indicated that he felt he was capable of earning more than \$360.00 per week.

OWCP, by decision dated September 23, 2022, reduced appellant's wage-loss compensation, effective that date, based on his ability to earn wages of \$360.00 per week as a service clerk. Commencing September 23, 2022, it applied the formula in *Albert C. Shadrick*⁵ and thereafter paid appellant wage-loss compensation benefits at the new net compensation rate, each four weeks of \$251.00.⁶

On October 11, 2022 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

Following a preliminary review, by decision dated February 3, 2023, an OWCP hearing representative reversed the September 23, 2022 decision, noting that the April 19, 2021 job classifications form for the service clerk position was more than one year from the September 23, 2022 final reduction decision and therefore stale in accordance with OWCP procedure.⁷ The hearing representative remanded the case to OWCP to request an updated labor market survey from the vocational rehabilitation specialist for a service clerk position and issue a *de novo* decision as to whether the position of service clerk was medically and vocationally suitable for appellant and fairly and reasonably represented his wage-earning capacity.

On April 6, 2023 OWCP referred appellant, the medical record, a SOAF, and a series of questions, to Dr. Alexander Doman, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a May 4, 2023 report, Dr. Doman documented his history, subjective complaints, and examination findings including normal gait, a well-healed surgical scar, no knee effusion, intact collateral ligaments, no erythema, no specific areas of tenderness, normal strength and deep tendon reflexes, normal sensation, full extension, and flexion to 110 degrees. He opined that appellant could return to work without restrictions. Dr. Doman further reviewed the job description for the service clerk position and opined that he could perform the position.

On May 12, 2023 OWCP again referred appellant's record to a vocational rehabilitation counselor to obtain an updated labor market survey for the service clerk position.

In a Form OWCP-66 dated July 13, 2023, appellant's vocational rehabilitation counselor identified the service clerk position, DOT No. 221.367-070, as within appellant's medical and

⁴ As of September 17, 2021 the weekly pay rate for appellant's time of injury job was \$426.81.

⁵ 5 ECAB 376 (1953), codified at 20 C.F.R. § 10.403.

⁶ As of September 23, 2022 the weekly pay rate for appellant's time of injury job had increased to \$439.65.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.6a (June 2013).

vocational abilities. She provided the same job description for a service clerk as noted above and indicated that the position was reasonably available in his commuting area and had a weekly wage of \$431.73. The vocational rehabilitation counselor indicated that the source of the wage data was the BLS labor market survey dated 2022. She further found that appellant had the SVP for the position based on his prior work history and additional computer training.

OWCP, in a January 12, 2024 notice, proposed to reduce appellant's wage-loss compensation based on his capacity to earn wages in the constructed position of service clerk at the weekly pay rate of \$431.71. It noted that the physical requirements of the service position were consistent with the full-duty release by Dr. Doman and that the selected position was medically suitable. OWCP further found that the position was vocationally suitable based on the vocational rehabilitation counselor's report, and found 91 percent wage-earning capacity or 9 percent LWEC, with a new gross compensation rate each four weeks of \$138.00. It attached the job classification for the service clerk position completed by the vocational rehabilitation counselor on July 13, 2023 and Dr. Doman's May 4, 2023 report and full-duty release. OWCP afforded appellant 30 days to submit evidence and argument challenging the proposed action.

On January 31, 2024 OWCP received a letter from appellant, who indicated that he did not agree with Dr. Doman's findings, claiming that his examination was cursory. Appellant further noted that he continued to experience stiffness and swelling in his left knee with activities such as bending, standing, and sitting. He also requested computer additional training.

OWCP, by decision dated March 4, 2024, reduced appellant's wage-loss compensation, effective that date, based on his ability to earn wages of \$431.73 per week as a service clerk. Commencing March 4, 2024, it applied the formula utilized in *Albert C. Shadrick*⁸ and thereafter paid appellant wage-loss compensation benefits at the new net compensation rate, each four weeks of \$138.00.

On April 3, 2024 appellant maintained that OWCP had reduced his pay without explaining how it arrived at its decision.

In an appeal request form dated April 9, 2024 and postmarked April 24, 2024, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. In an attached letter, he acknowledged that his time had expired but advised that he had received his mail three weeks late, and that the postmaster had informed him that all mail was running behind due to staff cutbacks.

By decision dated May 8, 2024, OWCP's Branch of Hearings and Review denied appellant's request for an oral hearing, finding that it was untimely filed. It 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 supporting his claim that the position of service clerk did not represent his wage-earning capacity.

⁸ *Supra* note 5.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened to justify termination or modification of compensation benefits.⁹ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹⁰

Under section 8115(a) of FECA, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect the wage-earning capacity in his or her disabled condition.¹¹ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.¹² The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.¹³ The fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his or her commuting area.¹⁴

OWCP must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which OWCP relies must provide a detailed description of the condition.¹⁵ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹⁶

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by OWCP or to an OWCP wage-earning capacity specialist, for selection of a position, listed in the DOT or otherwise available in the open labor market that, fits that employee's capabilities with regard to his or her physical limitations, education, age, and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made

⁹ *P.B.*, Docket No. 24-0566 (issued August 13, 2024); *C.F.*, Docket No. 19-0595 (issued September 9, 2019); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

¹⁰ *S.N.*, Docket No. 17-1589 (issued January 3, 2018); *Del K. Rykert*, 40 ECAB 284 (1988).

¹¹ 5 U.S.C. § 8115(a); *J.L.*, Docket N. 23-1024 (issued April 2, 2024); *K.S.*, Docket No. 19-0678 (issued October 25, 2019); *E.W.*, Docket No. 14-0584 (issued July 29, 2014); 5 U.S.C. § 8115(a).

¹² *See M.P.*, Docket No. 18-0094 (issued June 26, 2018); *see also supra* note 7 at Chapter 2.816.3 (June 2013).

¹³ *J.L.*, *supra* note 11; *C.M.*, Docket No. 18-1326 (issued January 4, 2019).

¹⁴ *See B.G.*, Docket No. 17-0477 (issued September 20, 2017).

¹⁵ *Id.*

¹⁶ *Supra* note 7 at Chapter 2.816.4d (June 2013); *see also A.E.*, Docket No. 22-0119 (issued February 13, 2023); *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

through contact with the state employment service, local chamber of commerce, employing establishment contacts, and actual job postings.¹⁷ Lastly, OWCP applies the principles set forth in *Albert C. Shadrick*¹⁸ as codified in section 10.403 of OWCP's regulations,¹⁹ to determine the percentage of the employee's LWEC.²⁰

ANALYSIS -- ISSUE 1

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective March 4, 2024, based on his capacity to earn wages in the constructed position of a service clerk.

OWCP referred appellant for vocational rehabilitation in November 2019 based on the findings of Dr. Schlatterer, an OWCP referral physician, who opined that he could perform sedentary or light work full time. It subsequently obtained an updated opinion regarding his work abilities from Dr. Doman, an OWCP referral physician, who opined in a May 4, 2023 report that he could perform full-time work without restrictions. Dr. Doman documented normal physical examination findings and minimal complaints of pain. OWCP, properly referred appellant's record to a vocational rehabilitation counselor in May 2023 for an updated opinion as the medical evidence established that he was no longer totally disabled from work due to residuals of his April 29, 1983 employment injury.²¹

The Board finds that OWCP properly determined that appellant had the physical capacity to perform the duties of a service clerk. The position is classified as sedentary employment requiring occasional lifting of no more than 10 pounds; no climbing, balancing, stooping, kneeling, crouching, or crawling; and frequent reaching, handling, and fingering. Dr. Doman reviewed the job description for the position of service clerk and found that appellant could perform the duties of the position. The vocational rehabilitation counselor also noted that the service clerk position allowed for a variety of duties, none of which exceeded Dr. Doman's release.²² There is no contradictory medical evidence of record. For these reasons, the Board finds that the weight of the medical evidence, as represented by Dr. Doman, establishes that appellant had the physical capacity to perform the duties of the selected position.²³

In assessing the employee's ability to perform the selected position, OWCP must consider not only physical limitations, but also consider work experience, age, mental capacity, and educational background.²⁴ In the July 13, 2023 Form OWCP-66 for the service clerk position, the vocational rehabilitation counselor indicated that the source of wage data was a BLS labor market

¹⁷ *Supra* note 7 at Chapter 2.816.6a (June 2013).

¹⁸ *Supra* note 5.

¹⁹ 20 C.F.R. § 10.403.

²⁰ *See C.M.*, Docket No. 23-1169 (issued March 20, 2024); *D.S.*, Docket No. 17-0496 (issued May 25, 2017).

²¹ *S.C.*, Docket No. 19-1381 (issued November 24, 2020); *C.H.*, Docket No. 19-0136 (issued May 23, 2019).

²² *M.H.*, Docket No. 19-1410 (issued November 5, 2020); *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

²³ *Id.*; *see also S.B.*, Docket No. 23-0700 (issued September 26, 2023).

²⁴ *M.H.*, *supra* note 22; *C.P.*, Docket No. 19-0595 (issued September 9, 2019).

survey dated 2022. For the service clerk position, the vocational rehabilitation counselor determined that the position was medically and vocationally suitable and existed in sufficient numbers within the reasonable commuting area, with an average weekly wage of \$431.73. As the vocational rehabilitation counselor is an expert in the field of vocational rehabilitation, OWCP may rely on her opinion in determining whether a job is vocationally suitable and reasonably available.²⁵ The Board finds that OWCP considered the proper factors, including the availability of suitable employment, appellant's physical limitations, and employment qualifications in determining that she had the capacity to perform the unit clerk position.²⁶ The record reflects that his relevant work experience established that he had the requisite physical ability, skill, and experience to perform the service clerk position, which was reasonably available within the general labor market of his commuting area at a weekly wage of \$431.73.²⁷ OWCP properly applied the *Shadrick* formula, as codified in section 10.403 of its regulations,²⁸ in determining appellant's LWEC. Accordingly, the Board finds that OWCP properly found that the service clerk position reflected appellant's wage-earning capacity.²⁹

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

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."³⁰ 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.³¹ 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, or the date received in the Employees' Compensation Operations & Management Portal (ECOMP), and before the claimant has requested reconsideration.³² Although there is no right to a review of the written record or an oral hearing,

²⁵ See *M.H., id.*; *J.B.*, Docket No. 17-0817 (issued April 26, 2018).

²⁶ *S.B.*, *supra* note 23; *T.B.*, Docket No. 17-1777 (issued January 16, 2019); *Clayton Varner*, 37 ECAB 248 (1985).

²⁷ *C.M.*, Docket No. 18-0742 (issued March 12, 2020).

²⁸ *Supra* note 5.

²⁹ See *M.H.*, *supra* note 22; *J.F.*, Docket No. 19-0864 (issued October 25, 2019).

³⁰ *Supra* note 1 at § 8124(b)(1).

³¹ 20 C.F.R. §§ 10.616, 10.617.

³² *Id.* at § 10.616(a); *supra* note 7 at Chapter 2.1601.4a (February 2024).

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.³³

ANALYSIS -- ISSUE 2

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

OWCP's regulations provide that the request for a hearing or 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 an oral hearing was postmarked April 24, 2024, it postdated OWCP's March 4, 2024 decision by more than 30 days and, accordingly, was untimely. Appellant was, therefore, not entitled to an oral hearing as a matter of right.³⁴

OWCP, however, has the discretionary authority to grant the request and it must exercise such discretion.³⁵ The Board finds that, in the May 8, 2024 decision, OWCP properly exercised its discretion by determining that the issue in the case could be equally well addressed through a request for reconsideration, along with the submission of additional evidence.

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.³⁶ The Board finds that the evidence of record does not indicate that OWCP abused its discretion in connection with its denial of appellant's request for a review of the written record.

Appellant alleged that he did not receive a copy of the March 4, 2024 decision until April 9, 2024. The Board has held that, absent evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have been received.³⁷ This is called the mailbox rule.³⁸ The record in this case reflects a properly addressed copy of the March 4, 2024 decision, which was mailed to appellant on the date the decision was issued. The Board finds that there is no evidence to rebut the presumption of receipt by him.³⁹

³³ *W.H.*, Docket No. 20-0562 (issued August 6, 2020); *P.C.*, Docket No. 19-1003 (issued December 4, 2019); *M.G.*, Docket No. 17-1831 (issued February 6, 2018); *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

³⁴ *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).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *T.D.*, Docket No. 22-0705 (issued October 7, 2022).

³⁸ *M.S.*, Docket No. 22-0362 (issued July 29, 2022); *L.L.*, Docket No. 21-1194 (issued March 18, 2022); *L.T.*, Docket No. 20-1539 (issued August 2, 2021); *V.C.*, Docket No. 20-0798 (issued November 16, 2020).

³⁹ *See M.S.*, Docket No. 17-0012 (issued March 16, 2018); *M.H.*, Docket No. 11-1879 (issued June 8, 2012).

Accordingly, 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).

CONCLUSION

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective March 4, 2024, based on his capacity to earn wages in the constructed position of service clerk. 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).

ORDER

IT IS HEREBY ORDERED THAT the March 4 and May 8, 2024 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 18, 2024
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board