United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	**Docket No. 09-2161**
	)	**Issued: August 11, 2010**
DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, St. Louis, MO, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 20, 2009 appellant filed a timely appeal from the February 23, 2009 merit decision of the Office of Workers' Compensation Programs reducing his compensation to zero for noncooperation in vocational rehabilitation efforts. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation to zero for failing to cooperate with the early stages of vocational rehabilitation efforts.

FACTUAL HISTORY

The Office accepted that on December 15, 1992 appellant, then a 27-year-old police officer, sustained a lumbar subluxation, lumbar sprain and sciatica due to lifting the front skids of a snowmobile at work. On October 4, 1994 appellant underwent laminectomy and discectomy

surgery which was authorized by the Office. He stopped work prior to the surgery and received wage-loss compensation from the Office.[1]

Appellant received medical treatment from Dr. Seth Paskon, a Board-certified family practitioner. On September 27, 2005 Dr. Paskon stated that appellant continued to report persistent low back pain radiating down his left sciatic nerve into his leg. He advised that appellant could not lift more than 10 pounds, could not walk further than two blocks at a time and could not perform excessive bending. Dr. Paskon asserted that appellant's pain and disability contributed to anxiety disorder and depressive disorder requiring medication. On July 13, 2007 he noted that appellant reported having a hard time doing daily household routine activities. Appellant was not capable of working eight hours a day but could work on a part-time basis with restrictions on various activities. Dr. Paskon found that appellant could lift up to 30 pounds for up to 15 minutes per day and could operate a motor vehicle for about 2 hours per day.

On November 12, 2007 Dr. Jack Tippett, a Board-certified orthopedic surgeon who served as an Office referral physician, reported findings on examination and opined that, while appellant continued to have residual symptoms from his back injury, he was capable of working with restrictions. He also recommended a function capacity evaluation. On December 5, 2007 Dr. Paskon advised that appellant continued to experience chronic low back pain, sciatica, disc herniations, osteoarthritis of his left knee, anxiety disorder, insomnia, and depression due to pain and asserting that he needed assistance to handle heath care, daily hygiene and household chores.

On December 19, 2007 appellant underwent a functional capacity evaluation which he terminated prior to completion due to pain. The report of the evaluation found that his effort was submaximal and that he demonstrated self-limiting behavior. This determination was based on the results of various diagnostic tests, the lack of change in appellant's heart rate during testing and inconsistent behavior noted during functional range of motion testing. The report concluded that very little information was obtained due to the voluntary termination of the testing, the submaximal performance and the self-limiting behavior.

The functional capacity evaluation report was provided to Dr. Tippett. On January 3, 2008 he advised that the evaluation was not valid as appellant did not cooperate sufficiently. Dr. Tippett stated that the testing did not alter his previous opinion that appellant could work with restrictions. The Office provided him with the description of sedentary work as defined by the Department of Labor, *Dictionary of Occupational Titles* and asked him whether appellant could perform such work. On March 3, 2008 Dr. Tippett stated that, based on his examination of appellant, it was medically reasonable for him to perform this level of work which required occasional exertion of up to 10 pounds of force to lift, carry, push and pull. He noted that a normal 15-minute break each 4 hours was sufficient.

The Office provided appellant a copy of Dr. Tippett's reports and advised him that the weight of medical evidence supported that he was capable of performing modified duties. Appellant was advised that he was being referred to an Office-sponsored vocational rehabilitation program to assist him in finding employment within his medical limitations.

[1] Appellant retired from federal service and elected to continue to receive Federal Employees' Compensation Act (FECA) benefits.

Copies of Dr. Tippett's reports were provided to Dr. Paskon, who was requested to review and provide comments. Dr. Paskon did not respond.

On March 20, 2008 the Office advised appellant that a rehabilitation counselor had been assigned to him and would soon be contacting him. Appellant was informed that he was expected to cooperate fully with the rehabilitation counselor. The rehabilitation counselor assigned to assist appellant in returning to gainful employment within his medical limitations noted that she could not reach him by telephone. She sent appellant a letter on March 21, 2008 advising him she had been unable to contact him, indicating that the rehabilitation program was nonvoluntary and directing him to contact her within seven days. The rehabilitation counselor advised appellant that she would notify the Office claims examiner if he did not contact her.

The rehabilitation counselor advised the Office that she had talked with appellant who stated his disagreement with the Office, Dr. Tippett and the people who performed the functional capacity evaluation. Appellant indicated that he had been approved for disability retirement and wanted to discontinue receiving compensation benefits. The rehabilitation counselor was advised to proceed until such time as appellant elected Office of Personnel Management (OPM) retirement benefits. Later communications from her discussed her difficulty in getting an appointment set up for an initial interview with appellant. The rehabilitation counselor expressed her concern about meeting with appellant after their telephone conversations.

On March 26, 2008 the Office advised appellant that it had been notified that he was impeding vocational rehabilitation efforts. It informed appellant that failure to participate in the essential preparatory efforts of vocational rehabilitation (such as interviews, testing, counseling, guidance and work evaluation) without good cause would be construed as a refusal to apply for or undergo rehabilitation. The Office notified him that 5 U.S.C. § 8113(b) provided that, if an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed, and it finds that, in the absence of the failure the individual's wage-earning capacity would probably have substantially increased, it may reduce prospectively the compensation based on what probably would have been the individual's wage-earning capacity had he not failed to apply for and undergo vocational rehabilitation. Appellant was provided 30 days to submit evidence and argument if he felt he had good reason for not participating in the rehabilitation effort. The Office advised appellant that, after any evidence submitted was evaluated, further action would be taken, without additional notice to him. If he did not comply with the instructions contained within the letter within 30 days, the rehabilitation effort would be terminated and his compensation reduced. On April 4, 2008 the Office provided an informed election to appellant discussing his Office benefits and allowing him to elect OPM benefits by signing and returning an election form.

In an April 18, 2008 report, the rehabilitation counselor documented telephone conversations with appellant in order to schedule an appointment for their first meeting as well as appellant's behavior during their meeting of April 4, 2008. She stated that appellant acted in a bizarre manner throughout their meeting at his home. The rehabilitation counselor advised that appellant answered the door in his "skivvies" still drying off from a shower, stood in garage polishing a mop handle he used as a cane, pulled down his slacks showing her his underwear, showed her his gun and requested a congressional inquiry and investigation. She stated that he discussed various conspiracy theories and appeared to be trying to intimidate her. The

rehabilitation counselor advised appellant that it was necessary for him to cooperate with the rehabilitation program as it was not a voluntary program, but he stated that he did not care and that he would not cooperate with any vocational rehabilitation efforts. Appellant also wanted a lump-sum settlement. On May 9, 2008 the rehabilitation counselor advised the Office that, despite her requests, appellant had not contacted her by telephone, mail or any other means. On May 12, 2008 she closed the rehabilitation program as appellant refused to cooperate with reemployment efforts.

In a May 19, 2008 decision, the Office reduced appellant's compensation to zero finding that he had failed to participate in the early but necessary vocational rehabilitation efforts which would permit the Office to determine his wage-earning capacity. It found, in the absence of evidence to the contrary, that the vocational rehabilitation efforts would have returned him to work at the same or higher wages than the position he held when injured. Appellant was advised that this reduction would continue until such time as he would undergo directed vocational testing, or showed good cause for not complying with this testing.

Appellant requested a hearing before an Office hearing representative. At the hearing held on December 18, 2008, he testified that he continued to have residuals of his work injury and asserted that the medical evidence of record showed that he was entitled to receive compensation benefits for wage loss. Appellant discussed his disagreement with Dr. Tippett and the functional capacity evaluation. He opined that these reports were full of inaccuracies and should not be relied upon by the Office. Appellant discussed his telephone conversations and meeting with the rehabilitation counselor. He asserted that he had the right to "not enter vocational rehabilitation counseling with good cause" because of his previous Merit Systems Protection Board decision from 2000 granted him disability retirement. Appellant contended that he would be violating a court order if he returned to work. He stated that he was retired and that it was in his best interest not to cooperate any further. Appellant denied that he did anything "obscene or threatening or out of line at any time."

In a February 23, 2009 decision, an Office hearing representative affirmed the May 19, 2008 decision. She found that appellant did not show good cause for not participating in the early stages of vocational rehabilitation.

LEGAL PRECEDENT

Section 8113(b) of the Federal Employees' Compensation Act provide:

> "If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of this title, the Secretary, on review under section 8128 of this title 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 wage-earning

capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary."[2]

Section 10.124(f) of the Office's regulations further provide:

"Pursuant to 5 U.S.C. § 8104(a), the Office may direct a permanently disabled employee to undergo vocational rehabilitation.... If an employee without good cause fails or refuses to apply for, undergo, participate in or continue participation in the early but necessary stages of a vocational rehabilitation effort (*i.e.*, interviews, testing, counseling and work evaluations), the Office cannot determine what would have been the employee's wage-earning capacity had there not been such failure or refusal. It will be assumed, therefore, 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 the Office will reduce the employee's monetary compensation accordingly. Any reduction in the employee's compensation under the provisions of this paragraph shall continue until the employee in good faith complies with the direction of the Office."[3]

ANALYSIS

The Office accepted that on December 15, 1992 appellant sustained a lumbar subluxation, lumbar sprain and sciatica due to lifting the front skids of a snowmobile at work. In March 2008, Dr. Tippet, a Board-certified orthopedic surgeon who served as an Office referral physician, determined that appellant could perform modified work, including sedentary work which required occasional exertion of up to 10 pounds of force to lift, carry, push and pull. Around this time, Dr. Paskon, an attending Board-certified family practitioner, indicated that appellant could perform work with restrictions.

The Board finds that the Office properly reduced appellant's compensation to zero on the grounds that he failed without good cause to participate in the early stages of vocational rehabilitation efforts. The Office advised appellant in a March 26, 2008 letter that he had failed to participate in the early stages of vocational rehabilitation efforts, that he had 30 days to participate in such efforts or provide good cause for not doing so and that his compensation would be reduced to zero if he did not comply within 30 days with the instructions contained in the letter. Appellant did not, however, participate in vocational rehabilitation efforts or provide good cause for not doing so within 30 days of the Office's March 26, 2008 letter.

The Office appropriately referred appellant to a rehabilitation program to assist him in returning to gainful employment within his medical limitations. Appellant refused to cooperate with this rehabilitation effort as documented by the evidence from the rehabilitation counselor and his testimony during the hearing when he continued to indicate he would not work with the rehabilitation effort to return him to work. The rehabilitation counselor indicated that during their first meeting on April 4, 2008 appellant flatly stated his intention not to participate in

[2] 5 U.S.C. § 8113(b).

[3] 20 C.F.R. § 10.124(f).

vocational rehabilitation efforts. On May 9, 2008 she advised the Office that, despite her repeated requests, appellant had not contacted her by telephone, mail or any other means. At the hearing before an Office hearing representative, appellant stated that he was retired and concluded that it was in his best interest not to cooperate with rehabilitation efforts. The Office appropriately advised him of the consequences of refusing to cooperate with the rehabilitation effort but appellant continued to refuse to maintain contact with or fully participate in the rehabilitation program.

The evidence of record establishes that appellant refused to cooperate with the rehabilitation program by not maintaining contact with the rehabilitation counselor and refusing to agree to participate in the rehabilitation program designed to return him to work within his medical limitations. Appellant asserted that he would not return to work, opining that he was retired and positing that returning to work would violate a Merit Systems Protection Board decision. He did not cite precedent explaining how these circumstances justified his refusal to cooperate. The Board has long held that entitlement to benefits under statutes administered by other federal agencies does not establish entitlement to benefits under the Act.[4] Appellant's reasons for not cooperating with the rehabilitation effort are not valid.

On appeal, appellant argued that he had good cause not to participate in vocational rehabilitation efforts. He discussed Office procedures relating to the establishment of work-related conditions and contended that the Office did not adequately consider his work-related injuries. Appellant claimed that an Office claims examiner made willful misrepresentations regarding various matters, including the contents of medical reports and the date of his move to Missouri. Appellant asserted that Dr. Tippet did not adequately evaluate his medical condition and that his reports were incomplete.

Appellant's contentions relate to whether he continued to have work-related disability and therefore had good cause to not participate in vocational rehabilitation efforts. He did not provide any support for his assertions. The Office documented that he had the ability to perform work with restrictions when it referred him to the vocational rehabilitation program. The evidence of record does not establish that appellant's medical condition was so severe that he could not participate in vocational rehabilitation efforts.

Appellant's failure without good cause to participate in preliminary vocational meetings and other communications with his rehabilitation counselor constitutes a failure to participate in the "early but necessary stages of a vocational rehabilitation effort."[5] Office 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.[6] Appellant did not submit evidence to refute such an assumption

[4] *See Donald Johnson*, 44 ECAB 540, 551 (1993).

[5] *See* 20 C.F.R. § 10.124(f).

[6] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11a (December 1993).

and the Office had a proper basis to reduce his disability compensation to zero. He was given appropriate notification of the sanctions for continuing to refuse to cooperate with the rehabilitation program in the early stages, but failed to comply with these rehabilitation efforts. Therefore the Office properly reduced appellant's compensation benefits to zero for failure to cooperate with the early stages of vocational rehabilitation.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation to zero for failing to cooperate with the early stages of vocational rehabilitation efforts.

ORDER

IT IS HEREBY ORDERED THAT the February 23, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 11, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board