United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 12-818**
	)	**Issued: July 5, 2013**
DEPARTMENT OF THE NAVY, NAVAL AIR REWORK FACILITY, Cherry Point, NC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 5, 2012 appellant filed a timely appeal of the November 8, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 OWCP properly reduced appellant's compensation benefits to zero effective November 20, 2011 based on his refusal to undergo vocational rehabilitation as directed.

FACTUAL HISTORY

This case was previously before the Board with respect to appellant's receipt of an overpayment of compensation.[2] In a July 7, 1998 decision, the Board affirmed an OWCP

[1] 5 U.S.C. § 8101 *et seq.*

[2] Docket No. 87-1845 (issued July 7, 1998).

decision dated July 10, 1987, finding that appellant was not without fault in the creation of a $31,251.83 overpayment and directing recovery of the overpayment by deducting $83.25 every four weeks from his continuing compensation. The facts as relevant to the present issue on appeal are set forth.[3]

In an April 6, 2006 medical report, Dr. Stephen A. Grubb, an attending Board-certified orthopedic surgeon, advised that appellant had discogenic lumbar pain status post lumbar decompression, stabilization and fusion surgery. He opined that appellant was totally disabled from all work. On May 2, 2006 Dr. Grubb advised that appellant reached maximum medical improvement on that date and that he was permanently totally disabled.

On August 9, 2010 OWCP determined that a second opinion medical examination was necessary to determine whether appellant had any contributing disability causally related to his April 19, 1976 employment injuries. By letter dated April 9, 2010, Medical Consultants Network advised appellant that OWCP had requested a second opinion examination with Dr. James A. Maultsby, a Board-certified orthopedic surgeon.

In reports dated May 4, 2010, Dr. Maultsby advised that continued stiffness and weakness in appellant's back prevented him from performing his usual work duties. He found that appellant had a nonemployment-related preexisting right knee injury sustained as a result of military duty and unrelated diabetes with secondary kidney failure and hypertension. Dr. Maultsby opined that appellant was capable of performing full-time sedentary work with restrictions. He noted that appellant did not graduate from high school, but he received a General Education Diploma and seemed to be fairly quick mentally. Dr. Maultsby concluded that appellant could be trained to perform office activities but could not perform heavy manual work.

On May 12, 2010 OWCP found a conflict in the medical opinion evidence between Dr. Grubb and Dr. Maultsby regarding appellant's work capacity. By letter dated May 27, 2010, it referred him, together with a statement of accepted facts and the case record, to Dr. Robert Moore, a Board-certified orthopedic surgeon, for an impartial medical examination. In reports dated July 22, 2010 and July 22, 2011, Dr. Moore found that appellant was capable of performing sedentary work eight hours a day with permanent restrictions.

By letter dated December 15, 2010, OWCP advised appellant that he was being referred for vocational rehabilitation services based on the opinion of Dr. Moore. In a May 13, 2011 report, Robert E. Manning, Jr., a rehabilitation counselor, conducted a labor market survey and determined that no limited-duty positions were available in appellant's commuting area based on his lack of significant transferable skills, prescribed physical restrictions, limited hands-on work experience and significant nonemployment-related disabling conditions. On June 6, 2011 Georgiana Farmer, a rehabilitation specialist, noted that appellant had not worked in over 35 years following his accepted April 19, 1976 employment injuries. She noted that he was restricted to sedentary work due to a number of noncompensable medical problems and

[3] OWCP accepted that on April 19, 1976 appellant, then a 29-year-old rotor blade helper, sustained a right knee and back strain, herniated nucleus pulposus at L4-S1 and arachnoiditis when he slipped and fell on his right knee. He stopped work on April 22, 1976. Appellant underwent a hemilaminectomy on May 20, 1976 and a laminectomy on January 13, 1987.

reemployment with the employing establishment had been ruled out. As a result, Ms. Farmer recommended that Mr. Manning arrange for appellant to undergo vocational testing.

By letters dated June 17 and 28, 2011, Mr. Manning requested that appellant contact him to complete a vocational evaluation. He had previously attempted to contact appellant by telephone and facsimile (fax) without success. In a July 15, 2011 report, Mr. Manning noted that he unsuccessfully tried to contact appellant by telephone and fax on June 10, 2011 and by telephone on June 16, 2011. On both occasions he left a message. Mr. Manning also reported that on July 14, 2011 he advised the employing establishment about appellant's failure to respond to his requests.

By letters dated August 8 and 19, 2011, OWCP reminded appellant that he had not responded to Mr. Manning's June 17 and 28, 2011 letters requesting that he be contacted about possible rehabilitation services. It directed him to make a good faith effort to participate in the rehabilitation effort within 30 days or, if he believed he had good cause for not participating in the effort, to provide reasons and supporting evidence of such good cause within 30 days. OWCP stated that if these instructions were not followed within the allotted time period action would be taken to reduce his compensation under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519. Appellant did not respond.

In a November 8, 2011 decision, OWCP noted that there had been no contact with appellant and thus reduced his compensation benefits to zero effective November 20, 2011 as he failed to undergo essential preparatory vocational rehabilitation efforts as directed which would permit it to determine his wage-earning capacity.

LEGAL PRECEDENT

Section 8104(a) of FECA provides:

> "[OWCP] may direct a permanently disabled individual whose disability is compensable under this subchapter to undergo vocational rehabilitation. The Secretary shall provide for furnishing the vocational rehabilitation services."[4]

Section 8113(b) of FECA provides:

> "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 have probably been his wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary."[5]

[4] 5 U.S.C. § 8104(a).

[5] *Id.* at § 8113(b).

Section 10.519 of OWCP's regulations provide:

> "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--
>
> "(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's] nurse, interviews, testing, counseling, functional capacity evaluations, and work evaluations), [OWCP] cannot determine what would have been the employee's wage-earning capacity."[6]

ANALYSIS

The Board finds that OWCP properly reduced appellant's monetary compensation to zero effective November 20, 2011 because he failed, without good cause, to participate in the early stages of vocational rehabilitation efforts. Upon receiving medical evidence that he was not totally disabled for all work, but was capable of working eight hours a day with restrictions, OWCP properly referred appellant to vocational rehabilitation services. Appellant refused to cooperate with this rehabilitation effort as documented for the record by his rehabilitation counselor. In letters dated June 17 and 28, 2011, Mr. Manning requested that appellant contact him to complete a vocational evaluation, noting that his previous attempts to contact him by telephone and fax were unsuccessful. On July 15, 2011 he reported that the attempts were made on June 10 and 16, 2011. Mr. Manning also advised the employing establishment of appellant's failure to respond to his requests.

OWCP advised appellant in letters dated August 8 and 19, 2011 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 instruction provided in the letters. Appellant provided no reasons for his failure to cooperate with his rehabilitation counselor nor does he dispute this fact on appeal.

Appellant's failure without good cause to participate in preliminary communications with his rehabilitation counselor regarding his work capacity constitutes a failure to participate in the early but necessary stages of a vocational rehabilitation effort.[7] OWCP 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.[8] Appellant did not submit evidence to refute such an assumption and OWCP 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.

[6] 20 C.F.R. § 10.519.

[7] *Id.* at § 10.519(b). *See also Conard Hightower*, 54 ECAB 796 (2003).

[8] 20 C.F.R. § 10.519(c).

The Board finds, therefore, that OWCP properly reduced appellant's compensation benefits to zero for failure to cooperate with the early stages of vocational rehabilitation.

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.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation to zero effective November 20, 2011 for refusing to undergo vocational rehabilitation efforts as directed.

ORDER

IT IS HEREBY ORDERED THAT the November 8, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 5, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board