United States Department of Labor
Employees' Compensation Appeals Board

L.L., Appellant	)	
and	)	**Docket No. 10-1725**
	)	**Issued: May 10, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Redding, CA, Employer	)	

Appearances:
Debbie Sears, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 15, 2010 appellant filed a timely appeal from a February 12, 2010 merit decision of the Office of Workers' Compensation Programs and a June 1, 2010 decision that denied her request for reconsideration. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly reduced appellant's compensation to zero effective December 12, 2008 in accordance with section 8113(b) of the Act;[2] and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits pursuant to section 8128(a) of the Act.

[1] 5 U.S.C. § 8101 *et seq.*

[2] *Id*. at §§ 8101-8193.

On appeal, appellant's representative asserts that the Office erred in not retroactively restoring appellant's compensation back to the date of her written notification, that she should have been reimbursed for her out-of-pocket expenses and that the Office should have conducted a merit review on June 1, 2010.

FACTUAL HISTORY

On August 23, 2004 appellant, then a 44-year-old city letter carrier, sustained injuries to her cervical spine when her postal vehicle was rear-ended.[3] She returned to modified duty for four hours a day on October 26, 2004 and missed intermittent periods thereafter. On October 3, 2008 appellant began an eight-hour workday. She stopped work on October 5, 2007 and has not returned. Appellant was placed on the periodic compensation rolls.

In April 2008, the Office referred appellant to Dr. Leo Van Dolson, a Board-certified orthopedic surgeon, for a second opinion evaluation as to her work-related disability and, if she could not work her physical limitations and potential for vocational rehabilitation.

In a May 13, 2008 report, Dr. Van Dolson reviewed the statement of accepted facts, including all accepted conditions and medical record. He noted that a right shoulder claim was under development by the Office. Dr. Van Dolson described appellant's complaints and provided physical examination findings. He advised that the medical records showed a diagnosis of herniated cervical disc but that this was not shown on magnetic resonance imaging (MRI) scan and that her multilevel foraminal stenosis was related to underlying and preexisting arthritis, accepted as cumulative trauma. Dr. Van Dolson stated that appellant's pain was a residual of the accepted conditions and, because of the chronicity of her pain complaints, it was unlikely that these would resolve. He concluded that she had very limited work ability because of her underlying orthopedic problems and that she could not return to work until she had definitive analysis and treatment for the conditions. Dr. Van Dolson recommended a functional capacity evaluation (FCE) "at some point" and, perhaps, a surveillance video.

On September 23, 2008 appellant was referred to Layne Guinnane, a rehabilitation counselor, for vocational rehabilitation. By letter dated September 29, 2008, Ms. Guinnane informed appellant that an FCE had been scheduled. In a September 30, 2008 report, Dr. J. David Schillen, a Board-certified orthopedic surgeon, noted appellant's complaint of right shoulder and neck pain. He provided examination findings and diagnosed degenerative joint disease of the glenohumeral joint, subacromial impingement syndrome and bicipital tendinitis of the right shoulder. Dr. Schillen advised that shoulder surgery was indicated but that he was

[3] The 2004 injury, adjudicated by the Office under file number xxxxxx831, was accepted for cervical strain/sprain, aggravation of degenerative disc disease and cervicalgia. The Office also accepted cervical spondylosis at C4-7, aggravation of cervical degenerative disc disease and cervical radiculopathy, adjudicated under file number xxxxxx601; bilateral shoulder strains, adjudicated under file number xxxxxx600; bilateral carpal tunnel syndrome, adjudicated under file number xxxxxx602; and right shoulder strain and aggravation of cervical degenerative disc disease, adjudicated under file number xxxxxx142. All claims were doubled, with file number xxxxxx601 becoming the master files. By order dated April 29, 2008, Docket No. 08-97, the Board dismissed appellant's appeal under file number xxxxxx831 because there was no Office decision over which the Board had jurisdiction.

concerned about appellant's neck condition and wanted her to see Dr. D. Brad Jones, a Board-certified orthopedic surgeon, for further evaluation of her neck.

The FCE was initially scheduled for October 14, 2008 at Maxim Physical Therapy, but because authorization had not been received, the initial appointment was cancelled. The FCE was rescheduled for October 21, 2008. Appellant did not attend the October 21, 2008 evaluation. Ms. Guinnane reported that appellant was told by her attending physician not to attend the FCE pending an MRI scan study.

By letter dated October 29, 2008, the Office proposed to suspend appellant's monetary compensation on the grounds that she failed to cooperate in rehabilitation efforts when she did not attend the scheduled October 21, 2008 FCE. Appellant was notified of the penalty provisions of section 8113(b) of the Act and afforded 30 days to respond. On October 30, 2008 she submitted an October 20, 2008 report from Dr. Jones, who noted her complaint of right neck, arm and shoulder pain. Dr. Jones provided examination findings, diagnosed cervical spinal stenosis, neck pain, cervicalgia, cervical radiculopathy or brachial neuritis and cervical spondylosis with myelopathy. He concluded, "I would not recommend the functional capacity exam[ination] until we obtain the [cervical spine] MRI [scan] and clear this."

On November 4, 2008 appellant's attorney advised that appellant did not attend the scheduled FCE on the advice of Dr. Jones. He stated that, if it was determined by her physicians that the FCE was not harmful, she would participate. Appellant underwent a cervical MRI scan on November 6, 2008.[4] In a November 12, 2008 attending physician's report, Dr. Jay Roitman, an attending osteopath, advised that, per Dr. Jones, appellant could not do a FCE until an MRI scan was obtained and Dr. Jones cleared her because she could possibly worsen her condition without clearance.[5]

By decision dated December 10, 2008, the Office finalized the reduction in compensation, effective December 12, 2008, under section 8113(b) of the Act and section 10.519 of the implementing regulations, on the grounds that appellant did not fully cooperate with the FCE scheduled for October 21, 2008.

By report dated December 8, 2008, received by the Office on December 12, 2008, Dr. Jones reviewed the cervical MRI scan. Because appellant had exhausted all reasonable attempts at conservative management of her spinal disease, she would benefit from surgery and he recommended surgery at C4-5. By letter dated December 17, 2008, appellant's representative contended that, as appellant did not attend the FCE on the advice of her surgeon, her wage-loss compensation should be restored. She further noted that appellant would attend an FCE scheduled on January 22, 2009. On December 18, 2008 an Office medical adviser advised that

[4] A November 6, 2008 MRI scan of the cervical spine demonstrated a disc/osteophyte complex at C4-5 that compressed the spinal cord, moderately on the left and mildly on the right; a disc/osteophyte complex at C5-6 that created a very slight impression on the anterior surface of the left side of the spinal cord; a duplex cystic lesion in the lateral aspect of the right C5-6 neural foramen; a cystic-appearing lesion in the lateral aspect of the right C7-T1 neural foramen; and neural foraminal stenosis, most severe bilaterally at C4-5 and on the left at C6-7.

[5] Dr. Roitman submitted numerous reports dating from August 23, 2004, in which he provided physical examination findings, made numerous diagnoses and advised that appellant was totally disabled.

the recommended cervical surgery appeared reasonable and on December 22, 2008 surgery was authorized.[6] In a January 14, 2009 report, Dr. Roitman noted the November 6, 2008 MRI scan findings and the recommendation of Dr. Jones. Based on appellant's complex medical conditions and the extensive nature of her disease, he was against her participating in an FCE because it could unnecessarily aggravate her cervical and shoulder conditions and cause spinal cord damage.

Appellant attended an FCE on January 22, 2009 at Maxim Physical Therapy. The physical therapist who administered the test advised that she was marginally functional at a sedentary physical demand level. Appellant was returned to the periodic rolls, effective January 22, 2009. On April 23, 2009 the Office authorized payment for the January 22, 2009 FCE. Appellant had another FCE on May 5, 2009 and the occupational therapist who administered the evaluation reported that her effort was judged to be not maximal due to diminished sincerity of effort through the test and that her observed abilities placed her within a part-time sedentary work level with a 10-pound lifting restriction.

On July 14, 2009 appellant, through her representative, requested reconsideration, arguing that her compensation should be restored as of December 12, 2008 and that she be reimbursed for all out of pocket expenses for the January 22, 2009 FCE. She submitted additional correspondence, medical evidence previously of record and reports dated April 13 to August 20, 2009, in which Dr. Roitman discussed appellant's condition and advised that she was severely disabled. In a May 11, 2009 report, Dr. Eric Klineberg, a Board-certified orthopedic surgeon, provided examination findings and advised that he would not recommend surgery until appellant stopped smoking.

By decision dated October 16, 2009, the Office denied modification of the December 10, 2008 decision. It did not address whether appellant was entitled to reimbursement of expenses incurred in the January 21, 2009 FCE.

On November 16, 2009 appellant again requested reconsideration, reiterating her argument that she was entitled to compensation from December 11, 2008 through January 21, 2009 and for expenses incurred for the January 21, 2009 FCE. She submitted copies of correspondence, Office procedures and a receipt from Maxim Physical Therapy showing a $200.00 payment.[7]

In a merit decision dated February 12, 2010, the Office denied modification of the prior decisions regarding suspension of wage-loss compensation for the period December 12, 2008 to January 22, 2009. It advised that issues regarding reimbursement should be addressed by the medical authorization unit.

On February 25, 2010 appellant, through her representative, requested reconsideration, reiterating her arguments that the December 10, 2008 decision should be reversed and that her

[6] There is no indication in the record that the surgery was performed.

[7] The receipt shows that the payment was made on the 22nd day in the year 2009. The month of the payment is not legible.

out-of-pocket expenses should be reimbursed, noting that $43.23 had been reimbursed, leaving a $157.77 payment. She submitted reports dated January 22 and March 3, 2010, in which Dr. Bettina von Moltke, a clinical psychologist, described appellant's medical and work history and her complaints of sleeplessness and cervical and shoulder pain. Dr. von Moltke noted limitations in activities of daily living and appellant's report of payroll errors by the employing establishment. She diagnosed major depression. In an April 14, 2010 report, Dr. Roitman advised that appellant continued to be totally disabled. Appellant's representative also stated that she was submitting correspondence and remittance vouchers, but these are not found in the case record.

In a June 1, 2010 decision, the Office denied appellant's reconsideration request on the grounds that her arguments were repetitious in nature and that she submitted no new evidence to support that she could not attend the FCE scheduled for October 21, 2008. It also advised that the process for claiming reimbursement was explained in its February 12, 2010 decision.

LEGAL PRECEDENT -- ISSUE 1

Section 8104(a) of the Act provides that the Office may direct a permanently disabled employee to undergo vocational rehabilitation.[8] Section 8113(b) provides that, if 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.[9]

Section 10.519 of Office regulations state that, where a suitable job has not been identified because the failure or refusal of the employee occurred in the early but necessary stages of a vocational rehabilitation effort (that is, meetings with the Office nurse, interviews, testing, counseling, FCE and work evaluations), the Office cannot determine what would have been the employee's wage-earning capacity. Under these circumstances, in the absence of evidence to the contrary, the Office will assume 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 to zero. This reduction will remain in effect until such time as the employee acts in good faith to comply with the directions of the Office.[10]

Office procedures provide that specific instances of noncooperation include a failure to appear for the initial interview, counseling sessions, a FEC, other interviews conducted by the rehabilitation counselor, vocational testing sessions and work evaluations, as well as lack of

[8] 5 U.S.C. § 8104(a); *see J.E.*, 59 ECAB 606 (2008).

[9] *Id*. at § 8113(b); *see Freta Branham*, 57 ECAB 333 (2006).

[10] 20 C.F.R. § 10.519; *see Marilou Carmichael*, 56 ECAB 451 (2005).

response or inappropriate response to directions in a testing session after several attempts at instruction.[11]

ANALYSIS -- ISSUE 1

The Board finds that the Office properly reduced appellant's monetary compensation to zero because she failed, without good cause, to cooperate with vocational rehabilitation efforts. The record establishes that appellant was referred for an FCE on October 21, 2008 but did not attend. The reason offered for her failure was that her attending orthopedic surgeon, Dr. Jones, advised her not to attend. Dr. Van Dolson, the Office referral physician, recommended that appellant have a FCE to assess her work capability. While Dr. Jones advised on October 20, 2008 that he would not recommend such evaluate until an MRI scan was obtained, he did not provide a rationalized opinion as to why appellant could not undertake the FCE. He did not address any specific risks involved that would prevent her from participating in the study. Dr. Roitman advised on November 12, 2008 and January 14, 2009 that an FCE could possibly aggravate appellant's complex medical conditions and cause spinal cord damage without MRI scan or clearance by Dr. Jones. However, the possibility of injury does not form a basis for compensation.[12] The Board finds that appellant did not provide good cause for her refusal to submit to an FCE on October 21, 2008. Pursuant to section 8113(b), appellant's compensation was properly suspended effective December 12, 2008.

The Board, however, finds that appellant is entitled to wage-loss compensation beginning December 17, 2008, the date her representative advised that she could attend an FCE scheduled for January 22, 2009. Appellant attended the January 22, 2009 FCE and her monetary compensation was restored effective that day. Office procedures provide that the effective date of reinstatement of the previous rate of compensation should be the date the claimant indicates in writing his or her intent to comply, as long as actual compliance is confirmed.[13] The record supports that appellant complied with this requirement by the December 17, 2008 written correspondence and her attendance at the January 22, 2009 evaluate. Her compensation should have been reinstated as of December 17, 2008.

Regarding appellant's assertion that she should have been reimbursed for her out-of-pocket expenses incurred for the January 22, 2009 FCE, other than the report of the test itself, the record contains scant information regarding the evaluation. In a February 12, 2010 decision, the Office advised her that the issues regarding reimbursement should be addressed by the medical authorization unit. Although appellant stated that she submitted correspondence and remittance vouchers with her February 25, 2010 reconsideration request, these are not found in the record on appeal. The only evidence is a copy of a receipt for a $200.00 payment to Maxim Physical Therapy. The Board's jurisdiction extends only to the review of final decisions by the Office.[14]

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[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11(a) (November 1996); *see Sam S. Wright*, 56 ECAB 358 (2005).

[12] *C.S.*, Docket No. 09-1597 (issued February 4, 2010).

[13] *Supra* note 11 at Chapter 2.813.11(b)(3) (November 1996).

[14] 20 C.F.R. § 501.2(c); *E.L.*, 59 ECAB 405 (2008).

The record in this case does not contain a final decision of the Office denying reimbursement for expenses incurred for the January 22, 2009 FCE.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.[15] Section 10.608(a) of the Code of Federal Regulations provide that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[16] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[17] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[18]

ANALYSIS -- ISSUE 2

On February 25, 2010 appellant requested reconsideration and submitted reports from Dr. von Moltke dated January 22 and March 3, 2010. Dr. von Moltke reiterated previous arguments made in July 14 and November 16, 2009 reconsideration requests, *i.e.*, that appellant awarded wage-loss compensation for the period December 12, 2008 through January 21, 2009 and that her out-of-pocket expenses for the January 22, 2009 FCE should be reimbursed. These arguments had been reviewed by the Office in merit decisions dated October 16, 2009 and February 12, 2010 and the Board modified appellant's entitlement to compensation, as addressed above in Issue 1. Appellant therefore did not show that the Office erroneously applied or interpreted a specific point of law and argument, such as this, that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.[19] Consequently, she was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).[20]

With respect to the third above-noted requirement under section 10.606(b)(2), Dr. von Moltke's reports are irrelevant as she did not address whether appellant had good cause for not attending the FCE scheduled for October 22, 2008. Likewise, Dr. Roitman did not address the scheduled FCE in his April 14, 2010 report. While appellant's representative stated

[15] 5 U.S.C. § 8128(a).

[16] 20 C.F.R. § 10.608(a).

[17] *Id*. at § 10.608(b)(1) and (2).

[18] *Id*. at § 10.608(b).

[19] *M.E.*, 58 ECAB 694 (2007).

[20] 20 C.F.R. § 10.606(b)(2).

that she was submitting additional correspondence and remittance vouchers, these are not found in the case record. Appellant thus did not submit relevant and pertinent new evidence such that a merit review of the claim was warranted.

As appellant did not show that the Office erred in applying a point of law, advance a relevant legal argument not previously considered or submit relevant and pertinent new evidence not previously considered by the Office, the Office properly denied her reconsideration request.[21]

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation to zero effective December 12, 2008 in accordance with section 8113(b) of the Act but finds that she is entitled to monetary compensation beginning December 17, 2008. The Board further finds that the Office properly refused to reopen appellant's claim for further review of the merits pursuant to section 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the June 1, 2010 decision of the Office of Workers' Compensation Programs is affirmed. The February 12, 2010 decision is affirmed as modified.

Issued: May 10, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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

[21] *Supra* note 17.