United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 11-2073**
	)	**Issued: April 20, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Sussex, NJ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 29, 2011 appellant filed a timely appeal of a May 13, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration of the merits of an April 7, 2010 OWCP decision that reduced his compensation benefits. As more than 180 days has elapsed between the issuance of OWCP's last merit decision of April 7, 2010 and the filing of this appeal on September 29, 2011 the Board has no jurisdiction over the merits of the case pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's claim for merit review pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. §§ 8101-8193.

On appeal, appellant generally asserts that OWCP improperly referred him for vocational rehabilitation services because he was not totally disabled and that OWCP relied on information provided by "fictitious" employing establishment employees, B.C. and S.F.

FACTUAL HISTORY

On November 26, 2001 appellant, then a 45-year-old rural carrier, filed an occupational disease claim alleging that his job duties exacerbated a preexisting condition of his right lower extremity. He stopped work on August 25, 2001. The claim was adjudicated under OWCP file number xxxxxx547 and accepted for aggravation of nonunion fracture and osteomyelitis of right tibia and fibula.[2] On September 30, 2002 Dr. Melvin P. Rosenwasser, a Board-certified orthopedic surgeon, performed a surgical debridement. Appellant returned to work on October 9, 2002.

On May 21, 2008 appellant filed an occupational disease claim, alleging that his job duties from October 2002 to March 29, 2008, when he stopped work, contributed to an exacerbation of his right lower extremity condition, such that he was unable to perform his job duties. This claim was adjudicated under OWCP file number xxxxxx077 and on August 22, 2008, OWCP accepted aggravation of preexisting nonunion of fracture and of preexisting osteomyelitis of the right leg. The case files were combined.

In January 2009, appellant was assigned a nurse for medical management. On February 3 and March 10, 2009 Dr. Rosenwasser performed debridement and drainage of the right lower leg. On July 16, 2009 he advised that appellant could return to work for one full day of work, to be followed by two days of rest. In an August 4, 2009 report, the medical management nurse noted that Dr. Rosenwasser had advised that appellant could return to limited duty but the employing establishment could not accommodate his restrictions.

On August 25, 2009 appellant was referred for vocational rehabilitation services. By letter dated August 27, 2009, he questioned the referral to vocational rehabilitation, stating that he was not totally disabled. On September 6, 2009 Dr. Rosenwasser advised that appellant could return to limited duty as a rural carrier, for three days a week and gradually increase to a five-day workweek. Appellant continued to question his referral for vocational rehabilitation services and in an October 7, 2009 letter OWCP explained the vocational rehabilitation process. On October 13, 2009 he was assigned a second vocational rehabilitation counselor, Philip K. Hess, for placement with his previous employer.[3] On October 27, 2009 Dr. Rosenwasser advised that appellant could return to his regular duties for 25 hours a week.

[2] On November 4, 1972 appellant broke his right tibia and fibula in a high school football game. He underwent 11 surgeries between the injury and June 4, 1985, when he began work as a rural letter carrier. On July 29, 1997 appellant again broke his right tibia and fibula while on vacation with his family. He thereafter had nonunion of the right tibia and returned to modified duty on September 18, 1998 wearing a short leg brace. Appellant returned to full duty, without restrictions, on October 23, 1998. In August 2001, he was diagnosed with osteomyelitis. Appellant is also a certified public accountant.

[3] The record indicates that the counselor first assigned was not able to handle federal workers' compensation cases.

By letter dated October 30, 2009, Mr. Hess advised appellant of the attempt to reach him several times by telephone in order to schedule a vocational interview but he had not returned the calls. He stated that the first step in vocational rehabilitation was to contact appellant's employer to investigate whether it had suitable employment and asked appellant to contact him by November 10, 2009. On November 2 and 4, 2009 Dr. Rosenwasser advised that appellant was weight bearing and was anxious to return to part-time work at the employing establishment. He stated that appellant could work five hours per day, five days a week.

In a November 3, 2009 letter to Mr. Hess, appellant asserted that he was not permanently disabled and should be immediately returned to his previous job and not placed in mandatory vocational rehabilitation.

By letter dated November 20, 2009, OWCP proposed to suspend appellant's monetary compensation on the grounds that he failed to cooperate in rehabilitation efforts. Appellant was informed of the penalty provisions of section 8113(b) of FECA[4] and was given 30 days to show good cause for noncompliance. In a November 25, 2009 report, Mr. Hess advised that a vocational rehabilitation interview had not taken place. He stated that he made multiple attempts to contact appellant by telephone but that he had not returned the counselor's calls and had responded with letters contending that he did not need to participate in vocational rehabilitation. Mr. Hess reported that the employing establishment was going to evaluate if it had suitable employment and concluded that appellant had not cooperated with the vocational rehabilitation process to date.

On December 18, 2009 Dr. Rosenwasser advised that appellant could return to his usual duties for 32 hours a week and should be able to return to full duties without restriction on February 1, 2010. In a December 21, 2009 letter, OWCP informed appellant that the vocational rehabilitation process was to assist him in returning to work and that, due to the National Reassessment Policy, the employing establishment was not usually making limited-duty job offers. Appellant was advised to inform OWCP of his intentions to cooperate with the rehabilitation process within five days of the letter. In a December 31, 2009 report, Mr. Hess advised that no vocational interview had taken place.

On January 4, 2010 appellant accepted a modified carrier position for approximately 32 hours per week. He returned to work on January 5, 2010. In a January 12, 2010 report, Mr. Hess advised that appellant had returned to work. He stated that he had called appellant requesting follow-up vocational counseling for 60 days and noted that no vocational interview had taken place. In a January 29, 2010 report, Mr. Hess noted that appellant continued to not respond to inquiries. On January 26, 2010 he was informed by the employing establishment that appellant was involved in a motor vehicle accident at work and was being issued a letter of removal. On February 2, 2010 the employing establishment informed OWCP that appellant was at fault in a motor vehicle accident that occurred at work on January 14, 2010. OWCP was informed that appellant last worked on January 23, 2010 and had informed the employing establishment that he would never return to work. It stated that appellant was to be removed from employment, effective February 20, 2010. In a February 19, 2010 report, Mr. Hess stated that he spoke with

[4] 5 U.S.C. § 8113(b).

appellant's supervisor, Stephen Fischer, who informed him that appellant was being removed on January 23, 2010 for failure to report a motor vehicle accident. Mr. Fischer informed Mr. Hess that he sent three letters to appellant, requesting that he return to work, but that appellant ignored the letters and was filing a grievance about the proposed removal. Mr. Hess concluded that appellant had not cooperated with the vocational rehabilitation process to date.

By letter dated March 4, 2010, OWCP noted that appellant had briefly returned to work and that he had ignored Mr. Hess' attempts to schedule a vocational interview and letters from the employing establishment requesting that he return to work after a motor vehicle accident. The vocational rehabilitation process was again explained and appellant was advised that he should resume a good faith effort to participate in vocational rehabilitation or provide a good reason for not participating. Appellant was given 30 days to contact OWCP and resume a good faith effort in the placement program. In an April 2, 2010 report, Mr. Hess advised that he again attempted to engage appellant in the vocational rehabilitation process and placed telephone calls on March 8 and 22, 2010, neither of which was returned. He concluded that appellant had not cooperated with any attempts to engage him in the vocational rehabilitation process.

By decision dated April 7, 2010, OWCP reduced appellant's compensation to zero as a result of his refusal to participate in the vocational rehabilitation process. It found that appellant had been afforded the opportunity to participate in a vocational rehabilitation program to return him to employment based on his medical restrictions, education, experience and other factors and that he declined to participate. OWCP found that he had not shown good cause for not complying with vocational rehabilitation efforts and informed him that the reduction of compensation would continue until he, in good faith, complied with the vocational rehabilitation process.[5]

On February 11, 2011 appellant requested reconsideration.[6] He referenced previous correspondence, section 8113(b) of FECA, section 10.519 of OWCP's regulations and section 3.100 of OWCP's procedure manual. Appellant asserted that OWCP did not explain why he had been referred to vocational rehabilitation, stating that section 10.519 of OWCP's regulations did not apply to him because he was not permanently disabled and asserted that there was a question regarding the identify of an agency employee. In correspondence to OWCP dated February 11 to April 4, 2011, he submitted Freedom of Information Act (FOIA) requests and requests for copies of his records. In letters dated April 14 and May 6, 2011, OWCP advised appellant that it had complied with his requests.

In a nonmerit decision dated May 13, 2011, it denied his request for reconsideration.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on

[5] On August 12, 2010 OWCP administratively terminated an overpayment of compensation of $219.49. The record indicates that appellant retired.

[6] Appellant again requested reconsideration on March 18, 2011.

application by a claimant.[7] Section 10.608(a) of the Code of Federal Regulations provide that a timely request for reconsideration may be granted if OWCP 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).[8] 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 OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.[9] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.[10]

Section 8104(a) of FECA pertains to vocational rehabilitation and provides that the Secretary of Labor may direct a permanently disabled individual whose disability is compensable under that subchapter to undergo vocational rehabilitation. The Secretary shall provide for furnishing the vocational rehabilitation services.[11] Section 10.518(a) of OWCP's regulations provide that OWCP may, in its discretion, provide vocational rehabilitation services, as authorized by section 8104 of FECA.[12] Section 10.518(b) provides that vocational rehabilitation services may include vocational evaluation, testing, training and placement services with either the original employer or a new employer, when the injured employee cannot return to the job held at the time of injury.[13] OWCP has developed procedures by which an emphasis is placed on returning partially disabled employees to suitable employment and/or determining their wage-earning capacity.[14] If it is determined that the injured employee is prevented from returning to the date-of-injury job, vocational rehabilitation services may be provided to assist returning the employee to suitable employment.[15] Such efforts will be initially directed at returning the partially disabled employee to work with the employing establishment.[16] Where reemployment

[7] 5 U.S.C. § 8128(a).

[8] 20 C.F.R. § 10.608(a).

[9] *Id*. at § 10.608(b)(1) and (2).

[10] *Id*. at § 10.608(b).

[11] 5 U.S.C. § 8104(a).

[12] 20 C.F.R. § 10.518(a).

[13] *Id*. at § 10.518(b).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813 (February 2011).

[15] *Id*. OWCP's regulations provide: In determining what constitutes suitable work for a particular disabled employee, OWCP considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors. 20 C.F.R. § 10.500(b).

[16] *See Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000); *see also* Federal (FECA) Procedure Manual, *supra* note 14 at Chapter 2.813.3.

at the employing establishment is not possible, OWCP will assist the claimant to find work with a new employer and sponsor necessary vocational training.[17]

Section 8113(b) of FECA provides:

> "If an individual without good cause fails to apply for or 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."[18]

20 C.F.R. § 10.519 provides in pertinent part:

> "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 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."[19]

OWCP's procedure manual states that specific instances of noncooperation include a failure to appear for the initial interview, counseling sessions, a functional capacity evaluation, other interviews conducted by the rehabilitation counselor, vocational testing sessions and work

[17] Federal (FECA) Procedure Manual, *id*.

[18] 5 U.S.C. § 8113(b).

[19] 20 C.F.R. § 10.519; *see R.H.*, 58 ECAB 654 (2007).

evaluations, as well as lack of response or inappropriate response to directions in a testing session after several attempts at instruction.[20]

ANALYSIS

The only decision before the Board in this appeal is the nonmerit decision of OWCP dated May 13, 2011 denying appellant's application for review. Because there is no OWCP merit decision within the Board's jurisdiction, the Board lacks jurisdiction to review the merits of his claim.[21]

With his February 11, 2011 reconsideration request, appellant asserted that OWCP did not adequately explain why he had been referred to vocational rehabilitation, stating that section 10.519 of OWCP's regulations did not apply to him because he was not permanently disabled. As noted, section 10.518 of OWCP's implementing regulations provide that it may, in its discretion, provide vocational rehabilitation services, as authorized by section 8104 of FECA and that these services may include vocational evaluation, testing, training and placement services with either the original employer or a new employer, when the injured employee cannot return to the job held at the time of injury.[22] In letters dated October 7 and December 21, 2009 and in the March 4, 2010 notice to appellant, OWCP provided ample explanation regarding the vocational rehabilitation process. Appellant did not demonstrate that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Consequently, he was not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).[23]

With respect to the third above-noted requirement under section 10.606(b)(2), appellant referenced correspondence that had previously been reviewed by OWCP. The Board has long held that evidence that repeats or duplicates evidence of record has no evidentiary value and does not constitute a basis for reopening a case.[24]

Appellant submitted a number of FOIA requests and requests for copies of his records, vocational rehabilitation statistics and copies of correspondence with the employing establishment and the U.S. Attorney's office. None of this evidence is relevant to the underlying merit issue in this case, of whether OWCP properly reduced his compensation to zero on the grounds that he failed, without good cause, to cooperate with vocational rehabilitation efforts.

[20] Federal (FECA) Procedure Manual, *supra* note 14 at Chapter 2.813.17(b).

[21] For final adverse OWCP decisions issued prior to November 19, 2008, a claimant has up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse decisions issued on or after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* C.F.R. § 501.3(e); *R.C.*, Docket No. 10-2371 (issued July 14, 2011).

[22] 20 C.F.R. § 10.518(b).

[23] *Id*. at § 10.606(b)(2).

[24] *Freddie Mosley*, 54 ECAB 255 (2002).

Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[25]

Regarding appellant's arguments on appeal, as discussed above, section 10.518(b) provides that OWCP may, in its discretion, provide vocational rehabilitation services.[26] Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to both logic and probable deduction from established facts.[27] Appellant has not shown that OWCP's actions were unreasonable in this case. He has also not shown that OWCP relied on information provided by fictitious agency employees.[28] In any event, as noted, the Board lacks jurisdiction over the merits of the claim.

As appellant did not show that OWCP 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 OWCP, it properly denied his reconsideration request.[29]

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).[30]

[25] *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

[26] 20 C.F.R. § 10.518.

[27] *L.W.*, 59 ECAB 471 (2008).

[28] In a June 13, 2011 letter, the employing establishment provided employment information regarding the employees appellant asserted were fictitious.

[29] *Supra* note 10.

[30] The Board notes that appellant submitted evidence with his appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

ORDER

IT IS HEREBY ORDERED THAT the May 13, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 20, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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