United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 11-1148**
	)	**Issued: March 8, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Tiverton, RI, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 13, 2011 appellant filed a timely appeal from a November 12, 2010 decision of the Office of Workers' Compensation Programs (OWCP) reducing his compensation for noncooperation with vocational rehabilitation efforts. 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 for failure to cooperate with vocational rehabilitation without good cause under 5 U.S.C. § 8113(b).

On appeal, appellant requested the Board to overturn OWCP's suspension of his compensation on the grounds that he lost time to respond due to the decision being issued the day before the Thanksgiving holiday.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 4, 2002 appellant, then a 45-year-old rural carrier, filed a traumatic injury claim alleging that on that day he injured his back while loading mail into his vehicle. OWCP accepted the claim for a lumbar strain, which was subsequently expanded to include L4-5 and L5-S1 disc herniations. Appellant stopped work following his injury and returned to a part-time modified job on April 7, 2003 working five hours a day, which was increased to eight hours a day on June 20, 2003. On July 20, 2007 he accepted a modified job offer and returned to work for four hours a day six days a week.

On November 25, 2008 Dr. Kenneth L. Lambert, a second opinion Board-certified orthopedic surgeon, conducted a physical examination on November 21, 2008 and diagnosed L4-5 and L5-S1 disc herniations. Based on his review of medical records, statement of accepted facts and physical findings, he opined that appellant was only capable of working four hours a day with restrictions. Restrictions included: up to three hours of standing and sitting; up to four hours of walking and operating a motor vehicle; up to one hour of twisting, bending and stooping, repetitive wrist and elbow movements; no squatting, kneeling or climbing; up to one hour of pushing, pulling and lifting no more than 10 pounds; and up to a half-hour of reaching above the shoulder.

By letter dated April 28, 2009, the employing establishment advised appellant that it no longer had work available for him within his work restrictions.

On October 20, 2009 Dr. Parakrama M. Ananta, a treating Board-certified physiatrist, diagnosed discogenic low back pain. He opined that appellant was capable of working four hours a day provided he lift no more than 10 pounds.

On March 4, 2010 OWCP 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.

OWCP placed appellant on the periodic rolls for temporary total disability by correspondence dated March 15, 2010.

The rehabilitation counselor assigned to assist appellant in returning to gainful employment within his medical limitations noted that he did not respond to her telephone messages. In a June 10, 2010 report, she noted that finding a location and date to meet had been problematic, but that a meeting was finally held at his home. During the meeting appellant was angry and could not understand why he could not continue his career at the employing establishment. The rehabilitation counselor referred him to a local career center to research the job market. She stated that appellant did the bare minimal of work and provided one word answers and information. The rehabilitation counselor stated that he essentially disappeared as there have been no calls or e-mails from him regarding his progress.

On July 14, 2010 OWCP's rehabilitation specialist recommended suspension of appellant's wage-loss benefits as he was obstructing his rehabilitation plan. He noted that

appellant was not consistently reporting his vocational activities and failed to maintain e-mail/telephone contact with his rehabilitation counselor.

On September 8, 2010 OWCP advised appellant that it had been notified that he was impeding vocational rehabilitation efforts. It informed him 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. OWCP notified appellant 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. OWCP advised him that, after any evidence submitted was evaluated, further action would be taken, without additional notice to him. If appellant did not comply with the instructions contained within the letter within 30 days, the rehabilitation effort would be terminated and his compensation reduced in accordance with 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519. There was no response from him.

By decision dated November 12, 2010, OWCP reduced appellant's compensation to zero finding that he had failed to participate in the early but necessary vocational rehabilitation efforts which would permit OWCP 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.

LEGAL PRECEDENT

Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.[2] 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.[3]

Section 10.519 of OWCP's 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 OWCP nurses, interviews,

[2] *Id.* at § 8104(a). *See J.E.*, 59 ECAB 606 (2008); *C.V.*, 58 ECAB 648 (2007); *Marilou Carmichael*, 56 ECAB 451 (2005); *R.C.*, Docket No. 09-2095 (issued August 4, 2010).

[3] *Id.* at § 8113(b); *see Freta Branham*, 57 ECAB 333 (2006); *R.C.*, *supra* note 2.

testing, counseling, functional capacity evaluations and work evaluations), OWCP cannot determine what would have been the employee's wage-earning capacity.[4] Under these circumstances, 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 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.[5]

OWCP procedures provide 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 evaluations, as well as lack of response or inappropriate response to directions in a testing session after several attempts at instruction.[6]

ANALYSIS

OWCP accepted the claim for a lumbar strain and L4-5 and L5-S1 disc herniations. On November 25, 2008 Dr. Lambert, a second opinion Board-certified orthopedic surgeon, and an October 9, 2009 report from Dr. Ananta, appellant's treating Board-certified physiatrist, who concluded that appellant was capable of working four hours a day provided he lift no more than 10 pounds.

The Board finds that OWCP 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. OWCP 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 his rehabilitation counselor. The rehabilitation counselor indicated finding a location and date to meet had been problematic initially and that during the meeting at appellant's home he appeared angry and asked why he could not continue working at the employing establishment. In a June 10, 2010 report, she indicated that he had not contacted her by e-mail or telephone and was not keeping her advised as to his progress. OWCP advised appellant in a September 8, 2010 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 instruction provided in the letter. Appellant continued to refuse to maintain contact with or fully participate in the rehabilitation program.

Appellant provided no reasons for his failure to cooperate with his rehabilitation counselor nor does he dispute this. On appeal, he requested that the suspension be reversed as he

[4] 20 C.F.R. § 10.519; *see Marilou Carmichael*, *supra* note 2; *J.O.*, Docket No. 10-85 (issued July 27, 2010).

[5] *Id.*

[6] 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); *J.O.*, *supra* note 4.

lost time to respond because the decision was issued right before the Thanksgiving holiday and OWCP reinstated him on March 29, 2011 following his telephone calls and letter. Appellant has provided no evidence or argument showing that he had not failed to participate in the early stages of vocational rehabilitation.

Appellant's failure without good cause to participate in preliminary communications with his rehabilitation counselor regarding his progress 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. Therefore the Board finds 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 for failing to cooperate with the early stages of vocational rehabilitation efforts.

[7] *See* 20 C.F.R. § 10.124(f). *See also Conard Hightower*, 54 ECAB 796 (2003).

[8] *See id*. at Chapter 2.813.17(a) (February 2011).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 12, 2010 is affirmed.[9]

Issued: March 8, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[9] The Board notes that OWCP's Branch of Hearings and Review issued a January 7, 2011 nonmerit decision denying appellant's request for an oral hearing before an OWCP hearing representative as untimely filed. As appellant did not request an appeal of this decision, the Board will not address it. *See* 20 C.F.R. § 501.3(a).