

FACTUAL HISTORY

This case has previously been before the Board. The facts as set forth in the Board's prior decision are hereby incorporated by reference.² In the September 18, 2007 decision, the Board found that OWCP improperly reduced appellant's compensation for failure to cooperate with vocational rehabilitation services as OWCP gave weight to the report of a second opinion physician who evaluated him prior to his April 2006 surgery. The Board found that OWCP should have referred him for another physical examination to determine his current work capacity prior to reducing his compensation for failure to participate in vocational rehabilitation.

By letters to appellant dated October 4, 2007, August 7, 2008, February 18, April 2 and July 8, 2009 and July 12, 2010, OWCP asked appellant for a current medical report from his treating physician. Appellant did not file a timely response.

On March 25, 2010 OWCP referred appellant to Dr. Frank H. Schildgen, a Board-certified orthopedic surgeon, for a second opinion. In an April 13, 2010 report, Dr. Schildgen discussed appellant's medical history and detailed his physical examination findings including circumferential measurements of the arms, wear pattern on the fingertips and grip strength. He noted a markedly positive Tinel's sign to gentle pressure in the right cubital tunnel and that the ulnar nerve was not present in this area. Dr. Schildgen noted tenderness throughout the entire medial and lateral aspect of the right elbow, noted that elbow range of motion lacked 10 degrees of extension but had full flexion. He noted no restriction of rotor motion, no joint crepitus with range of motion testing and that the ligamentous stability of the joint is intact. Dr. Schildgen noted no specific Tinel's sign over the median nerve at the wrist, but noted that wrist flexion produced immediate paresthesias in his fourth and fifth digits. He found that pinprick testing revealed diminished sensation only over the tips of the fourth and fifth digits. Dr. Schildgen noted full active range of motion in the right shoulder, good muscular development and well-healed surgical incisions.

With regard to the epicondylitis in both elbows, he noted that there was no soft tissue swelling or evidence of active inflammation in either joint. Dr. Schildgen noted that appellant's degree of symptomatology in his right forearm did not correlate well with the physical findings. He noted that on examination appellant had marked subjective findings, but objectively there was no basis to continue his total disability status. Dr. Schildgen opined that appellant had a moderate disability attributable to his work-accepted conditions. He recommended that appellant not return to unrestricted work duties as a postal clerk. Dr. Schildgen noted that appellant may work on what would be primarily a sedentary basis in which two-thirds of his work time would be in a seated position and one-third would be either standing or on an ambulatory basis. He noted that appellant should not lift more than 15 pounds and should avoid repetitious use of his elbows. Dr. Schildgen noted that appellant's carpal tunnel syndrome did not appear to be significant at this time, as he had good median nerve sensation and there was no evidence of thenar atrophy.

² Docket No. 07-418 (issued September 18, 2007). OWCP accepted the occupational disease claim of appellant, who was then a 39-year-old postal clerk, for bilateral/lateral epicondylitis and right medial epicondylitis. Appellant underwent a right elbow arthroscopy on June 9, 2000 and a right ulnar nerve decompression with submuscular anterior transposition on March 20, 2001.

By letter dated November 12, 2010, OWCP referred appellant for vocational rehabilitation services. In a report dated December 8, 2010, Vocational Care Manager, Susan Deif noted that she attempted to call him on November 23, 2010, but was not connecting, so she wrote two certified letters to him requesting that he contact her as soon as possible to schedule an appointment with regard to vocational services. She noted that she did reach appellant by telephone on December 8, 2010, he had acknowledged that he had received both letters, but had not contacted her because he believed that he was too disabled to participate in vocational rehabilitation services. Appellant also contended that the employing establishment was supposed to find him a job or make him an offer. He stated that he felt harassed by OWCP. Ms. Deif agreed not to meet with appellant.

By letter dated March 22, 2011, OWCP directed appellant to contact the claims examiner and the rehabilitation specialist within 30 days to make a good effort to participate in the rehabilitation effort. It advised him that, if he believed he had good reason for not participating in this effort, he should advise OWCP within 30 days from the date of the letter of his reasons for noncompliance. OWCP also informed appellant of the consequences of his failure to cooperate with vocation rehabilitation.

Appellant responded in a letter dated April 15, 2011. He contended that Dr. Schildgen did a five-minute examination with no testing at all. Appellant noted that he was unwilling to participate in the rehabilitation effort because of his disability. He stated that he had difficulty driving a vehicle and also had limitations with his hands and arms, which would make it difficult to get to rehabilitation. With his letter, appellant sent two work capacity evaluation forms by Dr. William Kober, a Board-certified family practitioner, dated June 4, 2008 and April 29, 2009. In the more recent April 20, 2009 report, Dr. Kober found that appellant could do zero hours of work reaching above his shoulder, bending or stooping, repetitive movements with his wrist and elbow, pushing, pulling, lifting, squatting, kneeling or climbing. He restricted appellant to 30 to 45 minutes of walking, two to three hours of standing and six hours of sitting. Appellant stated that these restrictions will last appellant's lifetime. Dr. Kober noted that appellant was unable to use either upper extremity to do any work. Appellant also attached a letter from the Social Security Administration dated March 7, 2003, indicating that his disability was continuing. Dr. Kober also attached a letter that appellant received from his Senator's case worker wherein she indicated that social security still considered him disabled and that appellant's physician's continued to verify his disability under OWCP.

By decision dated May 10, 2011, OWCP reduced appellant's compensation for his refusal to participate in connection with vocational rehabilitation. It noted that he did not respond to the March 22, 2011 letter. OWCP discussed the letter from appellant's senator's office, the duty evaluations by Dr. Kober and the social security notice, but found that the evidence submitted did not show good cause for not complying with rehabilitation efforts. Because appellant failed to undergo the essential preparatory effort of vocational testing, OWCP found that it could not determine what his wage-earning capacity would have been and that therefore it is assumed that the vocational rehabilitation effort would have resulted in his return to work at the same or higher wages than he had in the position before he was injured. Accordingly, his compensation was reduced to zero as of June 5, 2011.

On June 3, 2011 appellant requested an oral hearing before an OWCP hearing representative.

In a June 2, 2011 report, Dr. Anping Han, a Board-certified family practitioner, indicated that appellant became disabled approximately 10 years ago. He noted that appellant injured both of his elbows while working for the employing establishment and that he was unable to use his upper extremities to do any type of work. Dr. Han indicated that recent electromyograms show neuropathy of both ulnar nerves of both elbows. He stated that, based on his review of appellant's medical record and his examination of appellant, it was his medical opinion that appellant was unable to return to work in the future.

The hearing was held on October 20, 2011. Appellant discussed his multiple surgeries. He also indicated that the reason he became a postal clerk was because he had four-knee operations after 20 years. Appellant indicated that he had approximately nine surgeries related to his employment. He testified that Dr. Schildgen did no tests and only saw him for five minutes. Appellant indicated that social security found that he was in worse condition now than when they first found him disabled. He discussed how difficult it was for him to go about the daily tasks of living.

By decision dated December 27, 2011, OWCP's hearing representative affirmed the May 11, 2011 decision.

On March 5, 2012 appellant requested reconsideration. In support of his request, appellant submitted a February 28, 2012 report by Dr. Paul Donovan, an osteopath, who listed his impressions as: (1) bilateral elbow tendinitis with ulnar nerve entrapment syndrome, status post surgery; (2) right shoulder bursitis/rotator cuff tendinitis with known impingement and AC arthralgia, status post surgeries; and (3) bilateral carpal tunnel syndrome. Dr. Donovan indicated that his current findings were consistent with the results of the previous clinical evaluations and imaging and diagnostic data. He stated that appellant's present condition would prevent him from using his upper extremities in the workplace, as even activities of daily living often cause a flare up of pain and incapacitation. Dr. Donovan opined that appellant was fully disabled.

By decision dated July 9, 2012, OWCP denied modification of the prior decisions, noting that the weight of the medical evidence remained with the well-rationalized report of Dr. Schildgen who opined that appellant was capable of performing limited-duty work for eight hours per day with certain restrictions.

LEGAL PRECEDENT

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.”³

Section 10.519 of Title 20 of the Code of Federal Regulations provide, in pertinent part:

“(b) Where a suitable job has not been identified, because 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.”⁴

“(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].”⁵

OWCP’s procedures state 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 appellant’s claim for bilateral/lateral epicondylitis and right medial epicondylosis. Appellant underwent numerous surgeries. After the Board’s remand of this case, OWCP made numerous attempts to receive an updated medical evaluation by his treating physician. When these attempts failed, it referred appellant to Dr. Schildgen for a second opinion.

In an April 13, 2010 report, Dr. Schildgen discussed appellant’s medical history and made multiple findings on physical examination, including a discussion of the circumferential measurements of the arms, grip strength, Tinel’s sign, tenderness in the elbow, the results of pinprick testing and range of motion findings sensation only over the tips of the fourth and fifth digits. He noted that appellant had full active range of motion in the right shoulder, good muscular development and well-healed surgical incisions. With regard to the epicondylitis in both elbows, Dr. Schildgen noted no soft tissue swelling or evidence of active inflammation in

³ 5 U.S.C. § 8113(b); *see J.E.*, 59 ECAB 606 (2008).

⁴ 20 C.F.R. § 10.519(b).

⁵ *Id.* at § 10.519.

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).

either joint. He found that appellant had a moderate disability and indicated that he could not return to unrestricted work duties as a postal clerk. However, Dr. Schildgen did note that appellant could return to work with restrictions.

On the basis of the report of Dr. Schildgen, OWCP referred appellant for vocational counseling, but he refused to cooperate in this counseling. Appellant contended that he was disabled and that he could not drive a car to counseling. Due to his lack of cooperation, the vocational counselor terminated her efforts.

The Board finds that appellant obstructed vocational rehabilitation. Appellant refused to participate in a rehabilitation effort when so directed and has failed to establish good cause for not cooperating with the vocational counselor.

At the time of the referral to vocational counseling, the only current medical report was that of Dr. Schildgen, who conducted a review of the medical record and a complete physical examination and determined that appellant was able to work in a limited-duty capacity. Dr. Schildgen's opinion is supported by a detailed medical report. Appellant's allegations that Dr. Schildgen only saw him for five minutes and conducted no testing is contradicted by the detail shown in this report.

No subsequent report sufficiently contradicts the well-rationalized report of Dr. Schildgen. Dr. Kober's work capacity evaluation forms are not sufficiently detailed or rationalized to support a determination that appellant was totally disabled. Dr. Han indicated that appellant was totally disabled, but failed to provide a complete explanation of his findings. Finally, Dr. Donovan did not provide any new testing or evaluations to support his conclusion that appellant was totally disabled. Accordingly, the weight of the medical evidence rests with the opinion of Dr. Schildgen.

Appellant argued that the Social Security Administration considers him disabled. The Board notes that findings of other administrative agencies are not determinative of his level of disability under FECA. It is well established that decisions of other federal agencies or government bodies are not dispositive to issues raised under FECA. Decisions made by such tribunals are rendered under different statutes which have varying standards for establishing eligibility for benefits.⁷

The Board finds that appellant refused to cooperate with the vocational rehabilitation specialist and OWCP properly determined that his reasons for noncooperation were not valid and reduced his compensation benefits to zero.

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.

⁷ A.C., Docket No. 12-1579 (issued December 13, 2012).

CONCLUSION

The Board finds that OWCP properly reduced appellant's wage-loss compensation to zero for failure to cooperate with vocational rehabilitation efforts.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 9, 2012 is affirmed.

Issued: March 15, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board