

**United States Department of Labor
Employees' Compensation Appeals Board**

K.P., Appellant)
and) Docket No. 13-56
U.S. POSTAL SERVICE, POST OFFICE,) Issued: March 21, 2013
Detroit, MI, 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
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 10, 2012 appellant filed a timely appeal from the August 20, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 to zero for failure to cooperate with vocational rehabilitation efforts.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted appellant's January 27, 1987 occupational disease claim for left knee sprain, left knee dislocation, left-sided medial meniscus tear, and permanent aggravation and acceleration of left knee osteoarthritis. He underwent total left knee replacement surgery on January 6, 1998 and received wage-loss compensation on the periodic rolls since that time.

OWCP referred appellant to Dr. Bruce Abrams, a Board-certified orthopedic surgeon, for a second opinion examination to ascertain his work capacity. In a June 2, 2009 report, Dr. Abrams provided left knee examination findings and diagnosed status post left total knee arthroplasty and apparent degenerative knee arthritis. He noted that appellant was currently taking nonsteroid anti-inflammatory medication as needed. Dr. Abrams opined that appellant was "significantly limited" in his ability to work, but that he could perform "sit/stand" optional work activity. In an accompanying work capacity evaluation, he recommended restrictions that included less than one-hour standing and no squatting, kneeling, climbing, bending, stooping, pulling or pushing.

Based on the restrictions outlined by Dr. Abrams, OWCP referred appellant for vocational rehabilitation services on September 2, 2009. The reports from the vocational rehabilitation counselor reflect that appellant completed vocational testing on September 30, 2009, but cancelled several meetings with the counselor due to reported illness and did not follow the vocational rehabilitation counselor's suggestions to register for computer classes. The vocational rehabilitation counselor reported that appellant was experiencing increasing low back pain and would probably have to undergo back surgery.

On December 23, 2009 OWCP advised appellant that he was impeding the initial vocational rehabilitation services. It informed him of its intent to reduce his compensation under 5 U.S.C. § 8113(b) and the implementing regulations if he failed to show good cause within 30 days for not participating in the rehabilitation effort.

In a January 8, 2010 report, the vocational rehabilitation counselor noted appellant's failure to complete preemployment activities, such as registering for free computer classes. On December 7, 2009 appellant informed the vocational rehabilitation counselor that he was unable to attend the classes due to his work-related and nonwork-related medical conditions, which required the use of medications that made him drowsy. On December 19, 2009 he showed the vocational rehabilitation counselor a report from his treating physician, Dr. Bryan Little, a Board-certified orthopedic surgeon, indicating that he would be undergoing total left knee replacement surgery on February 1, 2010. A report from another treating physician, Dr. Elaine Cassen, a Board-certified internist, reflected that she had been treating appellant for chronic back pain. Appellant did not provide either of the reports to the vocational rehabilitation counselor.

In a letter dated January 28, 2010, OWCP advised appellant that it would defer formal sanctions for noncooperation for an additional 30 days in light of information received regarding the possible surgery scheduled for February 1, 2010. Appellant was asked to provide a medical report explaining how the proposed surgery was causally related to his accepted condition. The

record reflects that he informed OWCP by telephone on February 2, 2010 that he would have to undergo back surgery before he could undergo the required knee surgery.

By letter dated March 8, 2010, OWCP provided appellant another 20-day extension so that he could explain his reasons for noncompliance with the vocational rehabilitation process.

In a December 11, 2009 report, Dr. Cassen diagnosed “CBP [chiropractic bio-physics] DSD [detrusor sphincter dyssynergia] spinal stenosis” and prescribed a “[h]ome TENS [transcutaneous electrical nerve stimulation] unit” and physical therapy. In a February 25, 2010 report, Dr. Little stated that appellant needed left knee surgery to resurface his patella. He indicated that the knee surgery would be delayed until Dr. Marilyn Gates, a Board-certified neurological surgeon, completed a back evaluation.

In a letter dated March 30, 2010, OWCP asked appellant when and if he was scheduled to undergo knee or back surgery. Appellant was given 30 days to provide the requested information. He did not respond.

In a decision dated May 5, 2010, OWCP reduced appellant’s compensation for wage loss to zero effective May 9, 2010 for refusal to participate in vocational rehabilitation. On June 3, 2010 appellant requested an oral hearing.

The record contains reports dated March 26, August 16 and October 4, 2010 from Dr. Gates. On March 26, 2010 Dr. Gates diagnosed spinal stenosis at two levels. She prescribed a medical dosepak and had sent appellant to pain management. In follow-up reports, Dr. Gates prescribed three epidural injections prior to recommending surgery.

At a November 9, 2011 hearing, appellant stated that he was unable to participate in vocational rehabilitation due to chronic pain. The record was held open for 30 days pending receipt of supporting medical evidence.

Appellant submitted a December 12, 2011 report from Dr. Gates, who stated that for the period between May 2010 and May 2011, he was under her care and was on pain medication in order to allow him to be moderately functional. He was unable to work at that time and stated that the vocational rehabilitation counselor would have been a “lost cause.” Appellant would have been unable, due to the pain medication and the degree of pain that he experienced, to pay attention to any kind of a program that was being offered to him.

In a January 19, 2012 decision, OWCP’s hearing representative set aside the May 5, 2010 decision. The hearing representative found that Dr. Gates’ report, absent any evidence to the contrary, was sufficient to require further development of the medical evidence in order to determine whether appellant had a valid reason for failing to participate in vocational rehabilitation.

In a letter dated January 25, 2012, OWCP asked Dr. Gates for additional information regarding appellant’s back condition and the medications she prescribed. The record reflects that Dr. Gates notified OWCP by telephone on February 6, 2012 that she had nothing further to add

to appellant's medical records and that she was leaving her medical practice at the end of that week.

In a letter dated February 24, 2012, OWCP informed appellant that Dr. Gates declined to provide additional information. It requested that he provide the name of another physician within 15 days. In response, appellant authorized Dr. Cassen to release information.

On March 13, 2012 OWCP requested information from Dr. Cassen regarding appellant's medical condition during the applicable time period, including the prescribed medications.

The record reflects that OWCP's March 13, 2012 request was forwarded to, and processed by the medical records office (MRO), on behalf of Henry Ford Hospital. On April 9, 2012 MRO notified OWCP that it was unable to disclose the medical evidence requested without a redisclosure statement, signed by appellant. The referenced redisclosure statement was provided to OWCP for execution by appellant.

By decision dated April 23, 2012, OWCP denied modification of the May 5, 2010 decision. The claims examiner found that the inconsistent actions and requests of the medical group made it impossible for OWCP to obtain the necessary medical evidence required to further evaluate modifying the May 5, 2010 decision. OWCP advised appellant that he was welcome to complete the form provided by MRO and, upon receipt of a completed form, it could pursue additional medical development as warranted.

On May 10, 2012 appellant requested review of the written record.

In a decision dated August 20, 2012, OWCP's hearing representative affirmed the reduction of appellant's wage-loss compensation to zero, finding that the weight of the medical evidence was represented by the opinion of Dr. Abrams, the second opinion physician.

LEGAL PRECEDENT

Section 8104(a) of FECA provides that OWCP may direct a permanently disabled individual whose disability is compensable to undergo vocational rehabilitation. The Secretary shall provide for furnishing the vocational rehabilitation services.²

Section 8113(b) of FECA provides:

"(b) 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-

² 5 U.S.C. § 8104(a).

earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary.”³

³ *Id.* at § 8113(b).

Section 10.519 of the implementing regulations provides:

“Under 5 U.S.C. § 8104(a), OWCP may direct a permanently disabled employee to undergo vocational rehabilitation. To ensure that vocational rehabilitation services are available to all who might be entitled to benefit from them, an injured employee who has a loss of wage-earning capacity shall be presumed to be permanently disabled, for purposes of this section only, unless and until the employee proves that the disability is not permanent. 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:

- (a) Where a suitable job has been identified, OWCP will reduce the employee’s future monetary compensation based on the amount which would likely have been his or her wage-earning capacity had he or she undergone vocational rehabilitation. [It] will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meeting with OWCP nurse and the employer. The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.
- (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.”⁴

Given the variety of reasons which claimants may offer for noncooperation, and the circumstances in which these reasons may be offered, it is impossible to establish a definitive list of acceptable and unacceptable reasons for lack of cooperation. In general, however, a claimant is expected to treat the vocational rehabilitation effort as seriously as employment and reasons for lack of cooperation should be considered in this light. A situation which would be

⁴ *Id.* at § 10.519.

considered a valid reason for absence from work (*e.g.*, an illness) may be considered good cause for failure to cooperate with vocational rehabilitation for a reasonable period of time.⁵

The United States is required to pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁶ Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁷

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to reduce appellant's compensation to zero under section 8113(b). The Board will therefore reverse the August 20, 2012 decision.

Based on the opinion of its second opinion physician, Dr. Abrams, OWCP found that appellant was capable of returning to work and referred him for vocational rehabilitation services. The Board finds, however, that Dr. Abrams did not support referral to vocational rehabilitation. In a June 2, 2009 report, Dr. Abrams opined that appellant was "significantly limited" in his ability to work, but that he could perform sit/stand optional work activity. In an accompanying work capacity evaluation, he recommended restrictions that included less than one-hour standing and no squatting, kneeling, climbing, bending, stooping, pulling or pushing. OWCP procedures provide that a claimant should be capable of at least sedentary work, as defined by the Dictionary of Occupational Titles, including, pushing, pulling and lifting at least 10 pounds, one-third of the workday.⁸ According to Dr. Abrams, appellant did not meet the criteria for referral.

The Board also finds that OWCP failed to develop the medical evidence in accordance with the instructions of OWCP's hearing representative's January 19, 2012 decision. The December 12, 2011 report of Dr. Gates opined that appellant was unable to participate in vocational rehabilitation due to prescribed pain medication. The hearing representative set aside the May 5, 2010 decision and remanded the case for further development regarding appellant's condition and medications. On remand, however, OWCP failed to fully develop the medical evidence. As Dr. Gates failed to provide the requested information MRO, the agent processing the request for Dr. Cassen, requested a redisclosure statement. OWCP determined that it was impossible to obtain the necessary medical evidence required to evaluate modifying the May 5, 2010 decision. The Board notes that had OWCP obtained appellant's signature on a redisclosure statement, it could have obtained Dr. Cassen's medical records for review.

⁵ C.C., Docket No. 09-556 (issued October 1, 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.12.a (November 1996).

⁶ 5 U.S.C. § 8102(a).

⁷ *Harold S. McGough*, 36 ECAB 332 (1984).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.5(c)(2) (February 2011).

Dr. Abrams stated that appellant was taking nonsteroid anti-inflammatory medications as needed at that time. OWCP, however, did not ask him for a supplemental opinion on the effect the prescribed medications might have had on his ability to participate in vocational rehabilitation. Once OWCP undertakes to develop the medical evidence, it has the responsibility to do so in the proper manner.⁹ Dr. Abrams' opinion did not address this issue, it is of limited probative value and insufficient to carry the weight of the medical evidence.

CONCLUSION

The Board finds that OWCP improperly reduced appellant's compensation to zero for failing to cooperate with vocational rehabilitation efforts.

ORDER

IT IS HEREBY ORDERED THAT the August 20, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 21, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

⁹ See Melvin James, 55 ECAB 406 (2004). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9(j) (September 2010) (OWCP has a duty to seek clarification from a second opinion physician where the second opinion physician does not address the specified medical issues).