United States Department of Labor
Employees' Compensation Appeals Board

F.T., Appellant	)	
and	)	**Docket No. 13-1073**
	)	**Issued: October 24, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Medford, OR, 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 April 3, 2013 appellant filed a timely appeal from the October 23, 2012 and January 14, 2013 decisions of the Office of Workers' Compensation Programs (OWCP). 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, effective October 21, 2012, on the grounds that he failed without good cause to cooperate with vocational rehabilitation efforts.

On appeal, appellant asserts that he was in compliance with vocational rehabilitation and requested that his compensation be restored for the period October 20, 2012 through February 5, 2013.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On October 14, 2010 OWCP accepted that appellant, a 44-year-old mail processor, sustained an employment-related left shoulder rotator cuff tear.[2] Appellantstopped work on July 20, 2010 and received wage-loss compensation.

In a January 31, 2011 work capacity evaluation, Dr. Thomas J. Purtzer, an attending Board-certified neurosurgeon, advised that appellant could return to modified duty with permanent restrictions of no reaching and no reaching above the shoulder, and a 20-pound weight restriction. He recommended that appellant work four hours a day for two weeks, six hours a day for two weeks and then eight hours daily. On June 2, 2011 OWCP suspended appellant's compensation because he failed to attend a second-opinion evaluation. Appellant's compensation was restored on June 13, 2011 when he indicated his willingness to comply with the examination.

In a July 26, 2011 report, Dr. Douglas P. Morrison, a Board-certified orthopedic surgeon, performed a second-opinion evaluation. He noted that appellant was two-plus years post right shoulder surgery and refused treatment, other than analgesics, for his left shoulder. Dr. Morrisonfound that appellant was at maximum medical improvement and provided permanent restrictions of no reaching above waist level, a 10-pound restriction on pushing, pulling and lifting and no climbing.[3]

OWCP determined that a conflict in medical evidence arose between Dr. Purtzer and Dr. Morrison. On November 15, 2011 it referred appellant to Dr. Gerard H. Dericks, a Board-certified orthopedic surgeon, for an impartial evaluation. In a February 14, 2012 report, Dr. Dericks advised that appellant, who was left-handed, had end-stage severe acromioclavicular joint osteoarthritis in both shoulders. He provided restrictions that appellant should not lift, push or pull more than 10 pounds on an intermittent basis for 50 percent of an eight-hour day and should do no above-shoulder work, no climbing and intermittent reaching at waist level. In reports dated March 21, 2012, Dr. Dericks advised that appellant could work eight-hours a day with permanent restrictions, that he could not climb, that he use the right arm only for reaching and reaching above the shoulder and that he could only perform limited duties with his left arm.

On August 1, 2012 appellant was referred to Dan R. Hutson, a rehabilitation counselor, for vocational rehabilitation. Mr. Hutson prepared an initial intake on August 24, 2012 and a transferable skills analysis on August 26, 2012. In a September 18, 2012 e-mail,he informed OWCP that appellant advised him by telephone that he would be travelling to the Philippines on

[2] The Board notes that appellant has an accepted right shoulder impingement syndrome and rotator cuff tear with surgery, adjudicated under OWCP file number xxxxxx682. The instant claim is adjudicated under file number xxxxxx698.

[3] Appellant filed a schedule award claim on January 11, 2011 and submitted an impairment rating from Dr. Purtzer, who reviewed by OWCP's medical adviser. On November 2, 2011 OWCP informed him that he could not receive periodic rolls compensation and a schedule award for the same condition but could file for disability retirement with the Office of Personnel Management and, once granted, could then receive a schedule award. On November 4, 2011 appellant indicated that he did not want a schedule award at that time.

September 24, 2012, to be with his mother who was having surgery. Appellantestimated that he would be away for approximately 45 days.

In a September 18, 2012 letter, OWCP proposed to suspend appellant's monetary compensation on the grounds that he impeded rehabilitation efforts. Appellant was notified of the penalty provisions of section 8113(b) of FECA[4] and section 10.519 of OWCP's regulations.[5] It was assumed that vocational rehabilitation would have resulted in a return to work with no loss of wage-earning capacity and, accordingly, his compensation would be reduced to zero. Appellant was directed to make a good faith effort to participate in vocational rehabilitation and given 30 days in which to respond by contacting both OWCP and his rehabilitation counselor, Mr. Hutson.

By decision dated October 23, 2012, OWCP advised appellant that his failure to undergo the essential preparatory effort of vocational testing did not permit a determination of his wage-earning capacity, had he undergone the testing and rehabilitation effort. In the absence of evidence to the contrary, the vocational rehabilitation effort would have resulted in his return to work at the same or higher wages than for the position held when injured. Under the provisions of section 8113(b) of FECA and section 10.519 of OWCP's regulations, OWCP reduced appellant's wage-loss compensation to zero on the grounds that he failed to cooperate with vocational rehabilitation efforts or show good cause for not complying. Appellant was informed that the reduction would continue until he was in good faith, participated in directed vocational testing or showed good cause for not complying, at which time the reduction of compensation would cease.

In an undated report, received by OWCP on October 26, 2012, Mr. Hutson summarized vocational rehabilitation activities regarding appellant from September 13 to October 19, 2012. He stated that appellant notified him on September 17, 2004 that he would travel to the Philippines on September 24, 2012. On October 11, 2012 appellant telephoned from the Philippines to state that he would return on October 19, 2012. Mr. Hutson arranged to meet with appellant on that day, but when he went to appellant's house, he learned appellant was still in route from the Philippines. Hewrote to appellant on October 19, 2019. Mr. Hutson opined that appellant remained willing to reenter the work force.He attached copies of two letters. On September 19, 2012 Mr. Hutson wrote appellant stating that he had notified OWCP of his upcoming absence and scheduled a meeting with appellant on October 5, 2012. On October 19, 2012he informed appellant of a scheduled appointment on November 1, 2012 for vocational testing. The record is unclear exactly when appellant returned from the Philippines.

In a report dated October 24, 2012, Mr. Hutson noted that OWCP had closed appellant's rehabilitation file. He attached a copy of a letter to appellant in which he notified appellant that his vocational rehabilitation file had been closed.

On November 5 and 6, 2012 appellant telephoned OWCPto discuss the October 23, 2012 decision. He was advised to follow his appeal rights. On November 6, 2012 appellant wrote

[4] 5 U.S.C. § 8113(b).

[5] 20 C.F.R. § 10.519.

OWCP, stating the he was enclosing a copy of a letter dated September 21, 2012 that he mailed to OWCP. He stated that before he left for the Philippines, he checked with Mr. Hutson who told him he did not have to do anything. A letter dated September 21, 2012 was attached. In this letter, appellant stated that after he received OWCP's letter dated September 18, 2012, he called Mr. Hutson to tell him he had a family emergency and would be away for 45 days. He stated that Mr. Hutson told him they would have a meeting sometime in October and there was no other schedule set. The letter stated, "I will always stay in compliance."Appellant signed his name as Exxxx Txxxxxxxx, not his full name or include a return address or his OWCP file number in the September 18, 2012 letter.

Appellant requested reconsideration on November 6, 2012.

In a merit decision dated January 14, 2013, OWCP denied modification of the October 23, 2012 decision, finding that appellant did not, as instructed in the September 18, 2012 notice, inform and request permission to miss any part of the vocational rehabilitation process by contacting OWCP. It noted that his letter dated September 21, 2012 was not received until November 14, 2012, well after the October 23, 2012 decision. OWCP found that appellant had to date not shown that he properly requested or was granted permission to miss any or part of the rehabilitation program.

LEGAL PRECEDENT

Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.[6] 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.[7]

Section 10.519 of OWCP regulations state that OWCP may direct a permanent disabled employee to undergo vocational rehabilitation. 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. This reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.[8]

[6] 5 U.S.C. § 8104(a); *see J.E.*, 59 ECAB 606 (2008).

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

[8] *Supra* note 5.

ANALYSIS

The Board finds that OWCP properly reduced appellant's monetary compensation on October 23, 2012 because he failed, without good cause, to cooperate with vocational rehabilitation efforts. Upon receiving medical evidence from Dr. Dericks, a referee physician,that appellant was not totally disabled and was capable of working eight hours a day with restrictions,OWCP properly referred him to Mr. Hutson for vocational rehabilitation services. Appellant cooperated with the initial intake, meeting with Mr. Hutson on August 24, 2012. He, however, telephoned Mr. Hutson on September 12, 2012, to state that he was leaving for the Philippines on September 24, 2012 and would be gone for approximately 45 days.

On September 18, 2012 OWCP proposed to suspend appellant's monetary compensation on the grounds that he impeded rehabilitation efforts. Appellant was notified of the penalty provisions of section 8113(b) of FECA and section 10.519 of OWCP's regulations and was given 30 days in which to respond by contacting both OWCP and Mr. Hutson. He did not respond until November 6, 2012, when he submitted a letter to OWCP with a September 21, 2012 letter attached. This correspondence was received by OWCP on November 14, 2012.

The Board finds that, as appellant did not timely respond to the September 18, 2012 notice, he did not establish good cause for his failure to continue participation in the vocational rehabilitation process at the time OWCP suspended his monetary compensation on October 23, 2012. Although the record reflects that appellant called Mr. Hutson from the Philippines on October 11, 2012, he made no attempt to notify OWCP. OWCP properly suspended his compensation on October 24, 2012.[9]It had not reinstated appellant's monetary compensation at the time it issued the January 14, 2013 merit decision.

The Board also finds that appellant's November 6, 2012 letter, together with his September 21, 2012 letter, establishes his willingness to participate in vocational rehabilitation at the time this correspondence was received by OWCP on November 14, 2012. The September 21, 2012 letter was not of record until its submission in November.[10] The September 21, 2012 letter stated that appellant had a family emergency and had to travel to thePhilippines for 45 days, and indicated that he would always stay in compliance. This letter demonstrates that he was willing to participate in vocational rehabilitation efforts. The Board will therefore modify the January 13, 2013 decision to find that appellant's monetary compensation should be restored effective November 14, 2012, the date the correspondence evidencing his willingness to comply, was received by OWCP.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation under section 8113(b) of FECA on October 24, 2012 because he failed, without good cause, to cooperate with

[9] *Supra* note 7.

[10] As noted above, appellant did not sign the letter with his full name, did not include a return address and did not include an OWCP file number in the September 21, 2012 letter.

vocational rehabilitation. The Board finds that appellant established willingness to comply with vocational rehabilitation services on November 14, 2012 and his monetary compensation should be restored effective that day.

ORDER

IT IS HEREBY ORDERED THAT the October 23, 2012 decision of the Office of Workers' Compensation Programs is affirmed. The January 14, 2013 decision is affirmed as modified.

Issued: October 24, 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