United States Department of Labor
Employees' Compensation Appeals Board

L.C., Appellant	)	
and	)	**Docket No. 13-2153**
	)	**Issued: May 19, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Long Island City, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 23, 2013 appellant, through his attorney, filed a timely appeal from the June 10, 2013 merit decision and August 14, 2013 nonmerit decision 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 the case.

ISSUES

The issues are: (1) whether OWCP properly reduced appellant's compensation to zero for failing to cooperate with the early stages of vocational rehabilitation efforts; and (2) whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

This case has previously been before the Board.[2] In a November 9, 2012 decision, the Board reversed a March 6, 2012 OWCP decision and remanded the claim for further medical development. The Board found that a conflict of medical opinion existed between OWCP's referral physician and appellant's treating physician regarding his work restrictions and whether his nonaccepted right carpal tunnel condition impacted his ability to work or to participate in vocational rehabilitation. The Board instructed OWCP to refer appellant to a referee physician to resolve the conflict of opinion.[3] The facts of the case as set forth in the Board's prior decision are incorporated herein by reference.

On December 7, 2012 OWCP referred appellant to a referee physician, Dr. Robert W. Elkins, a Board-certified orthopedic surgeon. In a January 23, 2013 report, Dr. Elkins reviewed the record, including the history of appellant's injury and treatment. On examination the neck revealed limited range of motion on flexion, extension, right tilt, left tilt, right turn and left turn. Right shoulder range of motion was normal and the left shoulder had range of motion deficits on abduction, internal rotation, external rotation, flexion and extension. Appellant had diminished strength testing using the Jamar Hand Dynamometer for the right hand, negative compression testing of the head and neck for radiculopathy, negative impingement, no tenderness of the neck, shoulder, scapula, forearm, or trigger points, intact and equal sensation, 4/5 grip strength on the right and 3/5 on the left, biceps jerks were +2 and brachioradialis was +1. He refused to complete a questionnaire on his past medical history, a pain diagram, pain questionnaire or self-rating depression scale.

Dr. Elkins diagnosed prior left shoulder impingement and rotator cuff tendinitis with September 14, 2004 surgery for subacromial decompression, partial distal clavicle excision, rotator cuff debridement, labral debridement, chondromalacia of the glenohumeral joint, partial rotator cuff tear and mild carpal tunnel syndrome. He opined that based on the objective findings appellant could do sedentary work, no overhead work, a lifting restriction of an occasional 10 pounds and no repetitive motion with the left arm. Dr. Elkins found that appellant could participate in vocational rehabilitation despite his diagnoses of right carpal tunnel syndrome and or left carpal tunnel syndrome. He advised that appellant appeared to have more subjective complaints than objective findings, but his objective findings corroborated the subjective complaints. In a work capacity evaluation, Dr. Elkins noted that appellant could not work his usual job but could perform sedentary work eight hours per day with restrictions on reaching above the shoulder, repetitive movements of the left wrist and elbow and eight hours of lifting limited to an occasional 10 pounds.

[2] On May 17, 2003 appellant a letter carrier, had pain in his neck, shoulder and left arm as he pushed his mail cart. OWCP accepted his claim for left shoulder sprain and neck strain and expanded his claim to include left rotator cuff strain/sprain and tear, left carpal tunnel syndrome and cervical radiculitis. Appellant stopped work on May 20, 2003, returned to full-time light duty on May 23, 2003 and stopped completely on September 4, 2004. He was paid wage-loss compensation.

[3] Docket No. 12-972 (issued November 9, 2012). The Board found that a conflict of medical opinion existed between OWCP's referral physician, Dr. Richard Steinfeld, an orthopedic surgeon, who opined that appellant could work full time with restrictions and Dr. Sanjay B. Shah, an internist, who determined that appellant could not return to work full time but could work one hour per day with restrictions.

In a letter dated February 26, 2013, OWCP advised appellant that based on Dr. Elkins opinion he was being referred to vocational rehabilitation services.

On March 5, 2013 OWCP referred appellant for vocational rehabilitation. In a March 15, 2013 vocational rehabilitation report, the rehabilitation counselor noted calling appellant on March 12 and 13, 2013 and leaving messages to schedule an initial interview. On March 13, 2013 she sent an appointment letter to him to meet on March 18 or 19, 2013. The rehabilitation counselor advised that meeting with her represented compliance with OWCP requirements but did not commit appellant to return to work. On March 14, 2013 she received a telephone call from appellant's attorney that appellant was not able to participate in vocational rehabilitation per his physician. In a March 22, 2013 status report, the rehabilitation counselor noted that appellant's case was in interrupted status as he had not agreed to participate in rehabilitation efforts or to meet with the assigned rehabilitation counselor.

On April 17, 2013 OWCP notified appellant that he was impeding vocational rehabilitation efforts. It advised 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 he without good cause failed to apply for and undergo vocational rehabilitation when directed, OWCP could reduce prospectively his compensation based on what probably would have been his wage-earning capacity had he not failed to undergo vocational rehabilitation. Appellant was provided 30 days to submit evidence and argument if he felt that he had good reason for not participating in rehabilitation. OWCP advised him that, after any response was evaluated, further action would be taken without additional notice. If appellant did not comply with the instructions within 30 days, the rehabilitation effort would be terminated and his compensation reduced.

On April 23, 2013 appellant's attorney asserted that appellant's failure to participate in vocational rehabilitation was based on good cause as he could not medically undergo rehabilitation or return to gainful employment. Appellant contended that Dr. Elkins' report lacked medical rationale and did not constitute the weight of the medical evidence. He asserted that Dr. Elkins did not consider his additional nonwork-related conditions, including degenerative cervical spine changes, C4-6 osteophytes, C4-7 disc space narrowing, C6-7 disc bulges and C2-3 left neural foraminal narrowing. Appellant stated that these conditions must be considered in evaluating the suitability of vocational rehabilitation efforts.

Appellant submitted a May 3, 2013 report from Dr. Shah, who noted the May 17, 2003 work injury of pushing a mail cart and left side and neck pain. Dr. Shah treated appellant on multiple occasions and diagnosed cervicalgia, bilateral forearm pain and back pain. A September 21, 2010 nerve conduction study confirmed that the carpal tunnel was affecting sensory and motor components, therefore, causing numbness in both forearms, not allowing appellant to have normal feeling and leaving him at times unable to grasp objects without dropping them. X-rays of appellant's neck and back confirmed the diagnoses of back and neck pain including a September 14, 2009 back x-ray, which revealed moderate degenerative changes with disc narrowing in the L1, L2 and L3. Dr. Shah noted that appellant had a history of left rotator cuff tear with surgical repair and continued to have pain with movement in the shoulder area after the surgery. He opined that it was because of appellant's extensive health history and

ongoing medical issues that he remained unable to work. Dr. Shah noted that appellant continued to have pain in the neck, arms and hands and required pain medication. He opined that appellant must avoid lifting over 15 pounds, pulling more than 15 pounds, prolonged standing more than 15 pounds and prolonged sitting more than 15 minutes as this aggravates his medical condition. Dr. Shah stated that appellant was permanently disabled from his work injuries and was not a good candidate for vocational rehabilitation due to bilateral arm numbness related to carpal tunnel syndrome as well as cervicalgia and back pain.

In a June 10, 2013 decision, 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 that 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 he underwent the vocational testing or showed good cause for not complying.

In a June 12, 2013 vocational rehabilitation report, the rehabilitation counselor noted that appellant's case was closed as he had not agreed to contact or meet with the assigned counselor.

On July 29, 2013 appellant's attorney requested reconsideration. He asserted that OWCP erroneously found that appellant failed without good cause to undergo vocational rehabilitation. Appellant contended that the report of Dr. Elkins was brief, incomplete and void of a rationale. He stated that Dr. Elkins did not consider appellant's additional and preexisting conditions that were not work related including degenerative cervical spine changes, C4-6 osteophytes, C4-7 disc space narrowing, C6-7 disc bulges and C2-3 left neural foraminal narrowing. Appellant indicated that these conditions must be considered in evaluating the suitability of vocational rehabilitation efforts. He argued that Dr. Shah's May 3, 2013 report supported that he could not participate in vocational rehabilitation and OWCP did not consider this in finding that he failed to participate in vocational rehabilitation without good cause. Appellant submitted a June 13, 2013 treatment note from Dr. Shah who treated him for right carpal tunnel syndrome with hand pain, right thumb pain and hand tingling. Dr. Shah diagnosed backache, lumbago, sprain/strain of the lumbar region, hypertension and osteoarthrosis.

In August 14, 2013 OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review.

LEGAL PRECEDENT -- ISSUE 1

Section 8113(b) of FECA provides:

> "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 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."[4]

Section 10.124(f) of OWCP's regulations further provide:

"Pursuant to 5 U.S.C. § 8104(a), OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.... If an employee without good cause fails or refuses to apply for, undergo, participate in or continue participation in the early but necessary stages of a vocational rehabilitation effort (*i.e.*, interviews, testing, counseling and work evaluations), OWCP cannot determine what would have been the employee's wage-earning capacity had there not been such failure or refusal. It will be assumed, therefore, 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 and OWCP will reduce the employee's monetary compensation accordingly. Any reduction in the employee's compensation under the provisions of this paragraph shall continue until the employee in good faith complies with the direction of OWCP."[5]

Section 8123 of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician, who shall make an examination.[6] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[7]

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for left shoulder sprain, neck, left rotator cuff strain/sprain and tear, left carpal tunnel syndrome and cervical radiculitis. Once it has made a determination that an employee is totally disabled as a result of an employment injury and pays compensation, it has the burden of justifying a subsequent reduction of benefits.[8] OWCP reduced appellant's compensation based on his failure to participate in vocational rehabilitation. As noted, it must initially determine the employee's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning capacity.[9] The Board found a conflict in medical opinion between appellant's treating physician, Dr. Shah, and

[4] 5 U.S.C. § 8113(b).

[5] 20 C.F.R. § 10.124(f).

[6] 5 U.S.C. § 8123.

[7] *James F. Weikel*, 54 ECAB 660 (2003).

[8] *M.A.*, 59 ECAB 624, 631 (2008).

[9] *Id.*

the second opinion physician, Dr. Steinfeld, as to appellant's work restrictions and whether appellant's nonaccepted right carpal tunnel condition impacted his ability to participate in vocational rehabilitation or perform a position. To resolve the conflict, it properly referred appellant to Dr. Elkins for an impartial examination and relied on his opinion as a referee physician to find that appellant could participate in vocational rehabilitation and return to sedentary employment. The Board finds that it properly reduced appellant's compensation benefits, as he failed, without good cause, to participate in rehabilitation efforts.

The Board finds that the opinion of Dr. Elkins is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight. The Board establishes that appellant could participate in rehabilitation services and return to work in a sedentary position with restrictions on lifting and repetitive motion with the left upper extremity. As noted, where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[10]

Dr. Elkins provided a thorough review of appellant's medical treatment and examination findings. In his January 23, 2013 report, he diagnosed prior left shoulder impingement and rotator cuff tendinitis with surgery on September 14, 2004 for arthroscopic subacromial decompression, partial distal clavicle excision, rotator cuff debridement, labral debridement, chondromalacia of the glenohumeral joint, partial rotator cuff tear and mild carpal tunnel syndrome. Dr. Elkins noted that appellant refused to provide background information and declined to complete a questionnaire on his past medical history, a pain diagram, pain questionnaire and self-rating depression scale. On examination, the neck revealed limited range of motion, the left shoulder demonstrated range of motion deficits, diminished strength testing for the right hand, with intact and equal sensation. Dr. Elkins found that based on the objective findings he was allowed to perform sedentary work, no overhead work, a lifting restriction of an occasional 10 pounds and no repetitive motion with the left arm. Appellant could participate in vocational rehabilitation despite his diagnoses of right carpal tunnel syndrome and or left carpal tunnel syndrome. Dr. Elkins noted that appellant appeared to have more subjective complaints than objective findings, but objective findings corroborated the subjective complaints. In a work capacity evaluation, he noted that appellant could not work his usual job but could work in a sedentary position, eight hours per day with restrictions of no reaching above the shoulder, no repetitive movements of the left wrists and elbow and eight hours of lifting limited to an occasional 10 pounds.

The Board has carefully reviewed Dr. Elkin's opinion and notes that it has reliability, probative value and convincing quality with respect to his conclusions regarding the relevant issue in this case. Dr. Elkin's opinion is sufficiently rationalized and based on a proper factual and medical history in that he reviewed the medical record and statement of accepted facts, provided a thorough and factual medical history. His report is entitled to special weight with regard to establishing appellant's ability to work.

[10] *See supra* note 7. *See* 5 U.S.C. § 8123(a).

OWCP referred appellant for vocational rehabilitation services on March 5, 2013. The rehabilitation counselor telephoned appellant on March 12 and 13, 2013 and left messages to schedule an initial interview. On March 13, 2013 she sent a letter to appellant requesting to meet March 18 or 19, 2013. The rehabilitation counselor advised him that meeting with her represented compliance with OWCP requirements but did not commit him to return to work. On March 14, 2013 appellant's attorney contended that appellant was not able to participate in vocational rehabilitation. In a March 22, 2013 report, the rehabilitation counselor noted that appellant's case was in interrupted status as he had not agreed to participate in rehabilitation efforts or to meet with the assigned counselor. The Board finds that OWCP properly made a medical determination of partial disability and of specific work restrictions and referred appellant's case to a rehabilitation counselor.

In an April 17, 2013 letter, OWCP advised appellant that his compensation would be reduced if he did not participate in the essential preparatory efforts of vocational rehabilitation. Appellant was informed of the provisions of 5 U.S.C. § 8113(b) and given 30 days to participate in vocational rehabilitation or to show good cause for not participating. On April 23, 2013 counsel asserted that appellant could not medically undergo vocational rehabilitation or return to work. He contended that Dr. Elkins' medical report lacked medical rationale and did not consider the cervical spine conditions. Appellant's complaints concerning Dr. Elkins' report would be more persuasive had appellant cooperated with the examination and provided requested background information requested by the doctor. He submitted a May 3, 2013 report from Dr. Shah, who diagnosed cervicalgia, bilateral forearm pain and back pain. Dr. Shah noted that a September 21, 2010 nerve conduction study confirmed that the carpal tunnel was affecting sensory and motor components, therefore, causing numbness in both forearms. He opined that appellant was permanently disabled as a result of his injuries sustained at work and was not a good candidate to participate in vocational rehabilitation due to numbness in the bilateral arms related to the carpal tunnel syndrome, cervicalgia and back pain. Dr. Shah opined that it was because of appellant's extensive health history and ongoing medical issues that he was unable to work. Although he noted appellant's physical limitations and stated that he was not a good candidate for vocational rehabilitation due to bilateral arm numbness related to carpal tunnel syndrome as well as cervicalgia and back pain, he did not preclude participation in vocational rehabilitation. Further Dr. Shah provided insufficient medical reasoning for his opinion. His reports are similar to his prior reports with regard to appellant's ability to work. The Board has held that reports from a physician who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.[11]

The Board finds that appellant did not participate in the early but necessary vocational rehabilitation efforts or provide good cause for not doing so. OWCP properly reduced his compensation to zero finding that the vocational rehabilitation efforts would have returned appellant to work at the same or higher wages than the position when injured.

[11] *I.J.*, 59 ECAB 408 (2008). The Board notes that Dr. Shah's reports do not contain new findings or rationale upon which a new conflict might be based.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of FECA,[12] OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that OWCP erroneously applied or interpreted a specific point of law; or
>
> "(ii) Advances a relevant legal argument not previously considered by OWCP; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP."[13]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.[14]

ANALYSIS -- ISSUE 2

OWCP reduced appellant's compensation to zero as he did not participate in the early but necessary vocational rehabilitation efforts or provide good cause for his failure to do so. Thereafter, it denied appellant's reconsideration request, without a merit review.

The issue presented is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In his request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. In his July 29, 2013 request, he asserted that OWCP erroneously determined that he failed without good cause to undergo vocational rehabilitation, which was based on the report of Dr. Elkins. Appellant contends that the report of Dr. Elkins was brief, incomplete and void of a rationale. He reiterated that Dr. Elkins did not consider appellant's additional conditions that were not work related. These assertions were presented by appellant before the June 10, 2013 decision.[15] They do not show a legal error by OWCP or a new and relevant legal argument.

[12] 5 U.S.C. § 8128(a).

[13] 20 C.F.R. § 10.606(b)(2).

[14] *Id.* at § 10.608(b).

[15] *See C.N.*, Docket No. 08-1569 (issued December 9, 2008) (evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case).

Appellant also did not submit any new and relevant medical evidence in support of his claim. He submitted a new June 13, 2013 treatment note from Dr. Shah who reported appellant's status. However, this report is not relevant because Dr. Shah did not address whether appellant was able to participate in vocational rehabilitation.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation under section 5 U.S.C. § 8113(b) for failing, without good cause, to cooperate with vocational rehabilitation. The Board finds that OWCP properly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the August 14 and June 10, 2013 decision of the Office of Workers' Compensation Programs are affirmed.

Issued: May 19, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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