United States Department of Labor
Employees' Compensation Appeals Board

V.W., Appellant	)	
and	)	**Docket No. 15-1657**
	)	**Issued: February 9, 2016**
DEPARTMENT OF THE ARMY, ARMY CORPS, Wilmington, VA, Employer	)	

Appearances:
Charles E. Samuels, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 3, 2015 appellant, through counsel, filed a timely appeal from a June 17, 2015 merit 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 this case.[2]

ISSUE

The issue is whether OWCP properly reduced appellant's compensation to zero for failing to cooperate with the early stages of vocational rehabilitation.

On appeal, appellant, through counsel, argues that appellant cooperated with the vocational rehabilitation program but was unable to return to work due to health problems.

[1] 5 U.S.C. § 8101 *et seq.*

[2] Appellant initially requested an oral argument before the Board. On August 25, 2015 the Board received appellant's notice that he was withdrawing his request for oral argument. At appellant's request, the appeal will proceed on the record.

FACTUAL HISTORY

On July 27, 1994 appellant, then a 43-year-old electrical worker, filed a traumatic injury claim (Form CA-1) alleging that on July 26, 1994 he injured his back and left knee when he tilted a pile of steel over to look for a brace to hold a light fixture and the weight of the steel pushed him over. OWCP accepted that this incident resulted in a crush injury of the left leg and a lumbar sprain. It later accepted appellant's claim for radiculopathy. Appellant worked intermittently following the injury, until he stopped work completely on May 25, 1996, and was treated with medication, physical therapy, injections, work limitations, and pain management. He received disability compensation benefits and his claim was placed on the periodic rolls for payment of benefits on June 16, 2002.

In a March 21, 2012 progress report, Dr. Michael Decker, appellant's treating Board-certified physiatrist, listed appellant's diagnoses as lumbar radiculitis and low back pain. He noted that he was treating appellant with Vicodin. Dr. Decker indicated that appellant's back and leg pain was aggravated by walking, climbing stairs, bending, and driving. He noted that both back and leg pain were alleviated by medications. Dr. Decker listed appellant's walking tolerance as 15 minutes. He noted that appellant was not working.

On June 4, 2012 OWCP referred appellant to Dr. William C. Andrews, Jr., a Board-certified orthopedic surgeon, for a second opinion. In a June 22, 2012 report, Dr. Andrews diagnosed crush injury to the left leg with residual radiculopathy. He noted that appellant's complaints were subjective with no specific objective medical findings. Dr. Andrews believed that appellant's disability was due to his July 26, 1994 employment injury and prolonged deconditioning. He noted chronic pain syndrome treated with narcotics, pain stimulator, and that he was tremendously deconditioned. Dr. Andrews noted a poor prognosis, forecast that he would never return to work, and that no further treatment would be beneficial. He noted that appellant barely walked and could not walk without a large walking stick. Dr. Andrews did not believe appellant could even work in a sedentary capacity, noting that appellant claimed that he has difficulty sitting for prolonged periods of time.

In a July 27, 2012 Investigator Activity Summary, Jay Ghrigsby noted that during the period March 5 to 8, 2012, he observed appellant driving his vehicle and walking without a cane. From April 9 to 12, 2012, he observed appellant working on his yard. Specifically Mr. Ghrigsby noted that appellant was seen lifting large rocks and using a shovel, bending, squatting, and using a hammer as he constructed a rock wall. He noted that the rock wall was on an incline in appellant's yard and he was seen walking up and down the area without the assistance of a cane.

In a July 27, 2012 report, Dr. Andrews noted that he was asked to review the surveillance video from April 9 and 10, 2012, and that, after review of this video, he reviewed his previous report. He stated, "Obviously [appellant's] subjective complaints are not consistent with this video." Dr. Andrews noted that he was seen walking without an aid even though he was walking with an aid when he came for his doctor's visit. He noted that appellant was seen carrying cinder blocks and stones and building a stone wall. Dr. Andrews noted that appellant bends, twists, stoops, kneels, and uses a shovel even while kneeling. He noted that, while appellant does walk slowly, he obviously is functioning at a light capacity level if not higher. Dr. Andrews noted that appellant was limited to light-duty capacity. He recommended a functional capacity evaluation. In an October 18, 2012 addendum, Dr. Andrews noted that he reviewed the functional capacity

evaluation performed by Mark Waligora, a physical therapist, on September 21, 2012. He concluded that appellant is capable of working in a medium capacity. In an attached work capacity evaluation form, Dr. Andrews noted that appellant could sit for two hours at a time for a total of five to six hours a day, that pushing and pulling was limited to three to four hour shifts and 30 pounds, and that lifting was limited to 28 pounds.

On January 14, 2013 OWCP referred appellant for the development of a vocational rehabilitation program. A certified rehabilitation counselor (rehabilitation counselor), Charles DeMark, indicated that he initially met with appellant at his home on January 31, 2013. He stated that overall appellant was cooperative, and signed releases. The rehabilitation counselor stated that appellant told him that his back pain was severe and that he could not return to work and that he had arthritis in all joints and used a cane at all times. He noted increasing pain with any physical activity and stated that he can only stand about 5 to 10 minutes and walk 30 minutes. The rehabilitation counselor reported that appellant could not lift more than 10 to 20 pounds and cannot climb.

In a March 12, 2013 report, Dr. Decker again diagnosed lumbar radiculitis and low back pain. In describing appellant's symptoms, he noted that appellant's back pain was alleviated by medications and that his leg pain was alleviated by sitting and medications. Dr. Decker listed appellant's standing tolerance as 10 minutes and walking tolerance as 10 minutes. He noted that appellant did not use an assistive device for ambulation.

Vocational testing was conducted on May 17, 2013 by Heidi N. Chaney, a certified rehabilitation counselor. She noted that appellant was a 62-year-old man who had not worked in nearly 19 years, and presented himself as totally disabled. Ms. Chaney noted that appellant was a high school graduate of average intelligence and lived in a rural area. She noted that appellant showed very little interest in work activity of any kind. Ms. Chaney recommended that appellant participate in short-term training to adjust to a return to work, given his long-term absence from the work force, perhaps through on-the-job training and/or work adjustment training, such as that offered through Goodwill Industries.

In a June 3, 2013 report, Mr. DeMark stated that appellant told him on May 9, 2013 that he would not sign up with the Virginia Employment Commission and would not look for any light-duty work. Appellant stated that his doctor considered him to be disabled and unable to return to work. He stated that he had not looked for any work in over 17 years and that he was not going to begin looking for work now. Appellant told the rehabilitation counselor that he did not believe that he had the authority to ask him to look for work. The rehabilitation counselor indicated that appellant was not interested in any training. Appellant stated that he would not seek any work as he felt he was disabled and that he would not accept any work if offered. He stated that it was basically the rehabilitation counselor's job to find a job for him and that he was not able to work even a four-hour day.

In a June 10, 2013 report, Charles E. Terry, Jr., a vocational rehabilitation specialist, reported that appellant had obstructed the development of a vocational rehabilitation plan by reporting that he was not interested in vocational rehabilitation or returning to work. By letter dated June 3, 2013, Mr. DeMark confirmed that appellant did not register with the Virginia Employment Commission or apply for any appropriate light-duty work as he requested on May 9, 2013. He noted that appellant told him that he was not required to look for work because

he was disabled and unable to work, and that he would not look for any work unless it was ordered by OWCP. Mr. DeMark stated that this letter was to confirm that he told appellant that he was responsible to look for work.

By letter dated June 21, 2013, OWCP advised appellant that the medical evidence of record showed that he was not totally disabled and that without good cause he had failed to apply for and undergo vocational rehabilitation when directed in keeping with 5 U.S.C. § 8113(d). It also informed appellant that, if he failed to show good cause for his refusal to participate in the essential preparatory efforts as described in 20 C.F.R. § 10.519, OWCP would assume, 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 compensation will be reduced accordingly. Appellant was directed to contact both OWCP and the rehabilitation specialist within 30 days from the date of the letter to make a good effort to participate in the rehabilitation effort to return to gainful employment. He was advised that, if he believed that he had good reason for not participating in this effort, he should advise OWCP within 30 days.

By letter dated July 15, 2013 to OWCP, appellant indicated that he was willing to make an attempt to return to work to see if he would be successful.

In a September 10, 2013 note, Mr. DeMark noted that there had been a delay and that the previous employer had been in touch with him with regard to a return to work offer. He stated that he was hopeful that the issues could be resolved in the next reporting period.

Appellant continued to submit reports from Dr. Decker. In reports dated September 13 and November 13, 2013, Dr. Decker again noted that appellant's standing tolerance was 10 minutes and walking tolerance was 10 minutes.

In a report dated October 28, 2013, Mr. DeMark noted that on October 21, 2013 he sent appellant a letter scheduling a meeting at his home at 1:00 p.m. on October 25, 2013. He indicated that he called appellant on October 21, 23, and 25, 2013 to confirm the plans to meet, leaving messages on his voicemail. Mr. DeMark stated that appellant did not answer the telephone or call him back as requested. On October 25, 2013 he drove to appellant's home, but appellant was not there. Mr. DeMark left another telephone message with regard to the broken appointment. On October 28, 2013 he called appellant's home but there was no answer, so he left another message. Mr. DeMark indicated that appellant had not responded to his requests to meet in person or to speak by telephone. He stated that a rehabilitation plan had been developed to commence on November 4, 2013, but that, due to appellant's lack of cooperation, that plan would be delayed. Mr. DeMark contended that appellant was not cooperating with him and his lack of cooperation was delaying his return to work.

On November 1, 2013 OWCP advised appellant that he had impeded the rehabilitation efforts on his behalf. It further advised him that, under section 8113(b) of FECA, his compensation could be reduced prospectively based on what would have been his wage-earning capacity, had he not failed to undergo vocational rehabilitation. OWCP directed appellant to undergo a recommended training program or, if he believed that he had sufficient justification to not participate, he should provide his reasons with supporting documentation within 30 days, otherwise the vocational rehabilitation efforts would be terminated and his compensation would be reduced to zero as contemplated by 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.

By letter to OWCP dated November 7, 2013, appellant stated that he did not fail to keep any appointment because he had no knowledge of the appointment.

In a November 18, 2013 note, Mr. DeMark indicated that he met with appellant on November 8, 2013, who had agreed to a four-week prevocational work adjustment training program as part of the return to the work rehabilitation process. He noted that the program would take place at Goodwill Industries from December 2, 2013 to January 16, 2014.

In a November 26, 2013 report, Mr. DeMark stated that appellant reported at approximately 1:00 p.m. for his interview with Ms. Oliver at Goodwill Industries. During the interview, appellant was asked what he hoped to accomplish and he answered "Nothing, I don't want to go to work. I can't do this and they are forcing me to do this." Later in the interview he asked Ms. Oliver if Goodwill Industries had insurance. Appellant gave Ms. Oliver an office visit note of November 13, 2013 from Dr. Decker which included restrictions of no standing more than 10 minutes.

Mr. DeMark opined that appellant's behavior during the November 18, 2013 interview indicated a lack of cooperation, contrary to the agreement he signed. He reported that the likelihood of a successful work adjustment training program with Goodwill Industries was poor, and would not succeed without appellant's cooperation and effort.

In a December 4, 2013 report, Mr. DeMark indicated that, although appellant did report for his first day of training, he was very uncooperative with his training. He noted that Ms. Oliver reported that during a six-hour shift he completed the equivalent of two hours of work. Appellant told Ms. Oliver that he needed to go to the emergency room for numbness in his feet and legs and insisted that Goodwill Industries was responsible. He reported for the second day and again complained that he needed to go to the emergency room. Ms. Oliver called Mr. DeMark at 11:25 a.m. on the second day and stated that she was terminating the training, and that appellant was no longer needed at Goodwill Industries.

In a December 4, 2013 report, Dr. Decker noted that he saw appellant with a complaint of back pain with bilateral radiation, located in the middle lumbar, lower lumbar, midline, right side and left side. He noted that the pain was dull, stabbing, and with a deep ache and associated symptoms of numbness and tingling. Dr. Decker noted that appellant went to the emergency department on November 27, 2013 due to numbness in both legs. He listed appellant's diagnoses as lumbar radiculitis and low back pain. Dr. Decker again noted that appellant's standing and walking tolerance was 10 minutes.

By decision dated December 4, 2013, OWCP reduced appellant's compensation to zero for failure to cooperate with the vocational rehabilitation program. The reduction was to become effective December 15, 2013. OWCP noted that the reduction would continue until he made a good faith effort to undergo vocational rehabilitation training or to share good cause for his failure to comply.

By letter dated December 11, 2013, appellant stated that he disagreed with the decision. He argued that he did cooperate and made an attempt to complete every assignment he was given until the pain level rose, his feet became numb, and he went to the emergency room when he was no longer able to stand the pain. Appellant noted that on Tuesday when he arrived home

Ms. Oliver called and informed him that things did not work out and that he did not need to return to work.

On December 12, 2013 appellant requested an oral hearing before an OWCP hearing representative.

New evidence was submitted with regard to the vocational rehabilitation efforts. In an October 21, 2013 memorandum, Mr. DeMark indicated that appellant's previous employer had indicated a willingness to return him to work at their facility, but that as he had been out of work for over 17 years, he recommended a work adjustment training program to help prepare appellant for a successful return to work. He noted that Goodwill Industries has agreed to provide a work adjustment training program, beginning with five hours a day the first week, and culminating in eight hours per day during week four. Mr. DeMark also noted that a fifth week was scheduled in the event that he needed to make up any missed days due to medical appointments, illness, personal reasons, or holidays. The position would involve appellant hanging clothes, organizing shelves, and providing some light cleaning. After completing the work adjustment program, appellant was to return to work with his prior employer.

At the hearing held on May 5, 2015, counsel argued that appellant was injured in 1994 and for close to 18 years was never given an opportunity to be rehabilitated. He contended that during this period appellant was seen by the same physician, Dr. Decker, who opined that appellant was able to work with certain limitations and that the second opinion physician saw appellant for less than half an hour. Counsel also argued that appellant was at first happy to return to work, but that the employing establishment, upon receiving Dr. Decker's report, rescinded the offer of employment. He argued that the job requirements at Goodwill exceeded the limitations as set by Dr. Decker and that appellant was honest when he informed Ms. Oliver of his limitations and inability to perform the job. Counsel disagreed that appellant refused to cooperate in any way with vocational rehabilitation.

By decision dated June 17, 2015, OWCP's hearing representative affirmed the December 4, 2013 OWCP decision. The hearing representative noted that appellant testified at the hearing that he would cooperate in vocational rehabilitation efforts, and that once this is confirmed by the vocational rehabilitation specialist or counselor, OWCP would reinstate appellant's compensation effective May 5, 2015, the date of the hearing.

LEGAL PRECEDENT

FECA provides that the Secretary of Labor may direct a permanently disabled individual whose disability is compensable to undergo vocational rehabilitation.[3] According to 5 U.S.C. § 8113(b) if an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under 5 U.S.C. § 8104, OWCP may, after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, reduce prospectively the monetary compensation of the individual. The reduction of compensation is performed 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 to undergo vocational rehabilitation. It is OWCP's burden of proof with

[3] 5 U.S.C. § 8104(a).

respect to any reduction of compensation, including the reduction of compensation pursuant to 5 U.S.C. §8113(b).[4]

Section 10.519 of OWCP's regulations provide:

> "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."
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> * * *
>
> "(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, 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."[5]

ANALYSIS

OWCP accepted appellant's claim that a July 26, 1994 employment injury resulted in a crush injury of the left leg and lumbar sprain and radiculopathy. Appellant was treated with medication, physical therapy, injections, work limitations, and pain management. Although Dr. Andrews, the second opinion physician, initially opined that appellant would never return to work, he changed his opinion after reviewing video surveillance of appellant which included appellant building a rock wall in his yard. In an October 18, 2012 report, Dr. Andrews opined that appellant could sit for two hours at a time for five to six hours a day, that pushing and pulling were limited to three- to four-hour shifts and 30 pounds, and that lifting was limited to 28 pounds. Dr. Decker listed more severe restrictions, noting that appellant's standing tolerance and walking tolerance was 10 minutes each. However, Dr. Decker's limitations appear to be based largely on appellant's indications as to how long he could stand and walk and not on any independent medical basis.

OWCP referred appellant for vocational rehabilitation where his counselor, Mr. DeMark, attempted to develop a rehabilitation plan for appellant. However, the record reflects that appellant had a hostile attitude with regard to working with vocational rehabilitation. Mr. DeMark noted that when he interviewed appellant on May 9, 2013 appellant indicated that

[4] *See D.A.*, Docket No. 14-375 (issued May 28, 2014).

[5] 20 C.F.R. § 10.519.

he would not sign up with the Virginia Employment Commission and would not look for any light-duty work. Appellant stated that his doctor considered him disabled, that he had not looked for work for 17 years and was not going to start looking for work. Mr. DeMark also noted that appellant indicated that he was not interested in any training, that he felt he was disabled, and that he would not accept any work that was offered to him. On June 3, 2013 he confirmed that appellant did not register with the Virginia Employment Commission or apply for any appropriate light-duty work, as instructed at the May 9, 2013 meeting. OWCP then issued a letter on June 21, 2013 advising appellant to participate in vocational rehabilitation, and in a July 15, 2013 letter to OWCP, appellant indicated that he was willing to try to work. However, appellant continued to refuse to cooperate. He was not at home for a scheduled meeting with his counselor on October 25, 2013, despite the fact that Mr. DeMark left several messages for him. Mr. Demark noted that appellant did not respond to multiple telephone calls in October 2013. Appellant was again advised on November 7, 2013 that refusal to participate in an OWCP-approved training program constituted refusal to participate in the necessary early stages of vocational rehabilitation and could result in sanctions.

On or about November 18, 2014, appellant did agree to a prevocational adjustment training work program at Goodwill Industries that was to take place from December 2, 2013 to January 16, 2014. However, he again displayed a lack of cooperation with Goodwill Industries and the vocational rehabilitation process. During his initial interview with Ms. Oliver at Goodwill Industries, appellant, when asked what he hoped to accomplish, stated, "Nothing, I don't want to go to work. I can't do this and they are forcing me to do this." Later in the interview he asked Ms. Oliver if Goodwill Industries had insurance. Although appellant reported to Goodwill Industries on December 2, 2013, his behavior continued to be one of noncooperation. He did very little work, and left to allegedly go the emergency room on December 2, 2013, while complaining of numbness in his feet and legs and insisting that Goodwill Industries was responsible. On the second day appellant again indicated that he went to the emergency room. The Board notes that although he alleged that he left the assignment at Goodwill Industries to go the emergency room, there is no evidence in the record that he actually went to the emergency room on these dates. No hospital records were submitted evincing that appellant sought medical attention at the emergency room on December 2 or 3, 2013. There is a report from Dr. Decker on December 4, 2013, but Dr. Decker made no comment with regard to appellant's work with Goodwill Industries or to any aggravation of appellant's condition in the prior two days. Accordingly, the Board finds that appellant did not cooperate with the vocational rehabilitation efforts in that he did not cooperate with Ms. Oliver and Mr. DeMark in their attempts to vocationally rehabilitate him for a return to work.

The Board finds that OWCP properly reduced appellant's compensation to zero for his failure to cooperate in the early stages of vocational rehabilitation efforts.[6] Appellant has engaged in a consistent lack of cooperation with Mr. DeMark and vocational rehabilitation efforts. He was advised twice that his failure to cooperate with vocational rehabilitation could result in sanctions. Although appellant reported to Goodwill Industries for his rehabilitation assignment, the evidence indicates that he failed to cooperate with Ms. Oliver at Goodwill Industries in performing the assigned tasks. He has not submitted sufficient rationalized medical

[6] *See B.W.*, Docket No. 14-372 (issued November 12, 2014).

evidence to support his claimed inability to continue with the vocational rehabilitation process.[7] Appellant's argument that the assignment was not within his limitations and resulted in further injury is not supported by the evidence of record.

Appellant may submit new evidence or argument with a written request for reconsideration 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.

ORDER

IT IS HEREBY ORDERED THAT the June 17, 2015 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 9, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[7] *See S.E.*, Docket No. 12-1558 (issued February 26, 2013).