United States Department of Labor
Employees' Compensation Appeals Board

E.H., Appellant	)	
	)	
and	)	**Docket No. 16-1678**
	)	**Issued: February 6, 2017**
U.S. POSTAL SERVICE, POST OFFICE, San Antonio, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 15, 2016 appellant filed a timely appeal from a July 25, 2016 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.

ISSUE

The issue is whether OWCP properly reduced appellant's compensation to zero effective December 14, 2014 for failing to cooperate with the early stages of vocational rehabilitation.

FACTUAL HISTORY

This case has previously been before the Board.[2] The facts outlined in the Board's prior order are incorporated herein by reference. The relevant facts appear below. OWCP accepted

[1] 5 U.S.C. § 8101 *et seq.*

[2] Docket No. 16-0180, *Order Remanding Case* (issued June 7, 2016).

that on or before April 15, 2003 appellant, then a 39-year-old clerk sustained bilateral rotator cuff sprains due to repetitive motion in the performance of duty. This was developed under File No. xxxxxx265. April 27, 2003 imaging studies revealed a partial full-thickness tear of the right supraspinatus tendon, with an anterior to posterior lesion of the long head of the biceps tendon. Appellant underwent a right rotator cuff repair on June 19, 2003. She received compensation for total disability from June 19 to August 3, 2003 during her recovery. Appellant returned to limited-duty work on August 3, 2003. She remained on modified duty through July 2004, with intermittent absences due to symptom flares.[3]

Effective July 28, 2004, appellant retired from the employing establishment. She initially received benefits through the Office of Personnel Management (OPM). Following additional development and an election of benefits, OWCP paid appellant wage-loss compensation for the period July 29, 2004 through September 14, 2006 under File No. xxxxxx380. It resumed payment of total disability compensation on the periodic rolls under claim number xxxxxx265 on May 20, 2007.

In an effort to determine appellant's work capacity, on February 28, 2013 OWCP obtained a second opinion from Dr. James Butler, III, a Board-certified orthopedic surgeon. Dr. Butler reviewed the medical record and a statement of accepted facts. On examination, he observed slight weakness in the deltoid muscles bilaterally, tenderness to palpation of the right shoulder from the chest to the back of the neck, and from the chest to both shoulders. Range of motion of both shoulders was voluntarily limited due to pain, with no crepitus. Dr. Butler diagnosed a complete right shoulder rotator cuff tear and partial left shoulder tear. He found appellant able to perform full-time work, with climbing, reaching, reaching above shoulder level, and driving each limited to two hours, pushing and pulling limited to 20 pounds, and lifting limited to 10 pounds. Dr. Butler referred her for a functional capacity evaluation on March 4, 2013. In a report of that date, he advised that the evaluation showed that appellant could perform sedentary work.

A June 18, 2013 magnetic resonance imaging (MRI) scan of the right shoulder showed a recurrent full-thickness tear of the supraspinatus tendon, intrasubstance tearing of the subscapularis tendon, and "[c]omplex tearing of the superior labrum with maceration of the posterior labrum and linear tearing of the superior half of the anterior labrum." A June 28, 2013 MRI scan of the left shoulder showed intrasubstance tearing of the subscapularis tendon, superficial tearing of the long head of the biceps tendon, a full-thickness supraspinatus tear, and maceration and fraying of the superior and anterior labrum.

In an August 21, 2013 report, Dr. Travis Burns, an attending Board-certified orthopedic surgeon, opined that appellant required work limitations due to two failed shoulder surgeries. He restricted reaching, reaching above shoulder level, lifting, driving, climbing, pulling, and pushing. Dr. Burns limited lifting to five pounds, and limited repetitive arm motions.

[3] Appellant filed a second claim for bilateral shoulder pain on October 13, 2004 under File No. xxxxxx380, accepted for bilateral rotator cuff sprains. In 2008, OWCP administratively combined File Nos. xxxxxx380 and xxxxxx265 with File No. xxxxxx265 serving as the master file.

Dr. Richard E. Duey, an attending Board-certified orthopedic surgeon, diagnosed a recurrent right rotator cuff tear on September 20, 2013.

On October 1, 2013 OWCP requested that Dr. Burns review Dr. Butler's opinion and indicate if appellant could perform full-time work. Dr. Burns responded on October 9, 2013, finding appellant able to perform full-time work within the restrictions provided by Dr. Butler on February 28, 2013. In an October 23, 2013 report, he noted that appellant viewed herself as disabled, and that she disagreed with Dr. Butler's assessment of her physical capacities. Dr. Burns opined that appellant might require another second opinion examination to assess her work limitations.

As Dr. Butler and Dr. Burns agreed that appellant could perform full-time light duty work, OWCP referred her for vocational rehabilitation services on July 16, 2014.

In a July 25, 2014 letter, a vocational rehabilitation counselor asked appellant for her assistance in arranging an initial meeting. During an August 4, 2014 telephone conversation, appellant agreed to meet on August 13, 2014. The meeting took place as scheduled. Appellant described her educational and vocational background. However, she asserted that she was physically disabled from all work. In support of her contentions, appellant provided Dr. Duey's September 20, 2013 report and the June 18, 2013 imaging studies. She also provided a July 8, 2013 report of Dr. Duey in which shoulder pain and recurrent right shoulder rotator cuff tear were diagnosed and injections were administered.

On September 30, 2014 OWCP wrote to appellant confirming that she had telephoned the vocational rehabilitation counselor, asserting that she was physically unable to work and that her pain symptoms precluded her from participating in vocational preparation activities at any level. Appellant described great difficulty with driving and other activities of daily living. OWCP confirmed that appellant understood the consequences for failing to participate in vocational rehabilitation but that she chose to forfeit wage-loss payments.

In an October 23, 2014 letter, OWCP formerly advised appellant that failure to participate in vocational rehabilitation was preventing her return to gainful employment. It determined that if she cooperated with rehabilitation, she could be reemployed with no loss of wage-earning capacity. OWCP afforded appellant 30 days to make a good faith effort to participate or to submit additional evidence or argument substantiating that she could not participate in vocational rehabilitation. If she did not demonstrate good cause for her failure to cooperate, it explained that it would reduce her wage-loss compensation to zero.

Appellant responded on November 14, 2014 letter, asserting that she was disabled from work. She alleged that the work tolerances given by Dr. Butler did not reflect her true capacities as she had a steroid injection prior to the functional capacity evaluation, making it appear that she was more physically able than she actually was. Appellant described constant arm pain, swelling, weakness, along with headaches and dizziness that prevented her from gainful employment. She submitted a May 2, 2014 MRI scan which showed mild degenerative changes in the cervical spine with no stenosis.

By decision dated November 25, 2014, OWCP reduced appellant's wage-loss compensation to zero, effective December 14, 2014, based on her refusal to cooperate with the preliminary stages of vocational rehabilitation. It found that the medical evidence of record did not support her contention that she was totally disabled from work.

Effective December 14, 2014, appellant resumed receiving retirement disability retirement benefits through OPM.

In a December 9, 2014 letter, appellant requested a telephonic hearing, which was held on August 5, 2015. At the hearing, she testified that reports from Dr. Butler were contradictory, and that Dr. Burns' reports demonstrated that he disagreed with Dr. Butler's work limitations. Appellant contended that Dr. Butler only considered medical records through 2012, and misinterpreted the functional capacity evaluation. She also argued that OWCP had not fully considered her medical condition before referring her to vocational rehabilitation. Appellant further alleged that the vocational rehabilitation counselor did not contact her between August 13 and September 30, 2014 and that she underwent a third right shoulder surgery in March 2015.

Following the hearing, appellant submitted additional medical evidence. In reports from September 20, 2013 to December 5, 2014, Dr. Duey diagnosed a recurrent full-thickness tear of the right supraspinatus tendon, a possible subscapularis tear, complex labral tearing, and acromioclavicular joint derangement, a recurrent left rotator cuff tear, arthritis, and hypertension.[4] He noted that appellant would require a third right shoulder arthroscopy as physical therapy and injections failed to provide symptomatic relief.

By decision dated and finalized October 20, 2015, an OWCP hearing representative affirmed the November 25, 2014 decision, finding that appellant had failed to submit evidence sufficient to establish that she cooperated in good faith with the vocational rehabilitation effort. He further found that the medical evidence, including Dr. Duey's March 17 and September 4, 2015 reports, and Dr. Duncan's September 11, 2015 report, failed to establish that she was physically unable to participate in vocational rehabilitation. As appellant's refusal occurred in the early stages of the vocational rehabilitation effort, OWCP was unable to determine her wage-earning capacity. Therefore, OWCP properly assumed that appellant could have returned to work with no loss of wages, and reduced her monetary compensation to zero. Appellant then appealed to the Board.

By order remanding case issued June 7, 2016, the Board remanded the case to OWCP for reconstruction of the case record, finding that medical reports referred to in the October 20, 2015 decision, dated from March 17 to September 11, 2015, were not of record.[5] Therefore, the Board could not review the complete evidentiary basis for OWCP's determination.

[4] A November 26, 2014 MRI scan of the right shoulder showed "overall not greatly changed appearance with adequate acromiohumeral outlet decompression and supraspinatus tendon repair," mild arthrosis and labral tearing.

[5] *Supra* note 2.

On remand of the case, OWCP imaged the missing reports into the electronic case record, including March 17 and September 4, 2015 reports from Dr. Duey, and a September 11, 2015 report by Dr. Ellen Duncan, Board-certified in anesthesiology and pain medicine.

Dr. Duey had performed a repeat right shoulder arthroscopy on March 17, 2015, with arthroscopic excision of the distal clavicle and arthroscopic biceps tenotomy.

In a September 4, 2015 report, Dr. Duey encouraged appellant to perform gentle stretching exercises and to avoid heavy lifting or strengthening maneuvers. He opined that her bilateral upper extremity pain could be due to cervical stenosis, and not to her history of bilateral rotator cuff tears. Dr. Duey found appellant's symptoms unchanged as of an October 26, 2015 examination. He recommended stretching and strengthening exercises. Dr. Duey found appellant's condition unchanged in reports through February 19, 2016, noting that multiple surgeries, multiple medication regimes, and conservative measures failed to alleviate her pain symptoms.

Dr. Duncan provided a September 11, 2015 report reviewing appellant's account of her injuries and treatment. Examination showed normal range of motion in all joints of both arms. Dr. Duncan diagnosed a rotator cuff sprain and cervical spondylosis. She prescribed medication. Dr. Duncan submitted periodic reports through December 7, 2015 relating appellant's assertion that prescribed medication did not help her symptoms.

A November 16, 2015 functional capacity evaluation performed by a physical therapist indicated that appellant could perform light-duty work.

Dr. Maged Mina, an attending physician Board-certified in anesthesiology and pain management, diagnosed fibromyalgia and cervical radiculopathy on February 9, 2016. He prescribed osteopathic manipulation.

Dr. Michael S. McKee, an attending physician Board-certified in anesthesiology and pain management, provided reports dated April 14 to June 22, 2016, attributing appellant's pain symptoms to severe cervical disc degeneration and shoulder impingement, bursitis, or scarring. He found no major sensory or motor deficits on examination. Dr. McKee administered a subacromial injection to the right shoulder on June 2, 2016.

Dr. Robert Hartzler, an attending orthopedic surgeon, provided May 27 and June 9, 2016 reports reviewing appellant's history of injury and treatment. He diagnosed a possible infection in the left shoulder with a full-thickness supraspinatus tear. Dr. Hartzler recommended additional testing.

Appellant submitted a June 6, 2016 impairment rating from Dr. Salvador Baylan, a Board-certified physiatrist, finding 33 percent impairment of the left arm.

A June 7, 2016 right shoulder MRI scan showed postsurgical changes, possible residual tendinosis, and subacromial subdeltoid bursitis. A June 7, 2016 MRI scan of the left shoulder showed a full-thickness supraspinatus tear, infraspinatus tendinosis with a partial-thickness intrasubstance tear, subscapularis tendinosis and partial-thickness tear, intra-articular biceps tendinosis with distal tears, labral degeneration, and acromioclavicular arthrosis.

In a July 25, 2016 decision, OWCP reduced appellant's compensation to zero as of December 14, 2014, under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, finding that she failed to participate in preparatory vocational planning. Appellant's failure to cooperate deprived OWCP of the opportunity to determine her wage-earning capacity had she undergone training or rehabilitation. Therefore, OWCP assumed that, had appellant cooperated with the preliminary stages of vocational rehabilitation, the process would have resulted in her reemployment at the same or higher wages than the position she held when injured. It further found that the medical evidence failed to establish that she was medically unable to participate in vocational rehabilitation.

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]

OWCP regulations, at 20 C.F.R. § 10.519, provide in pertinent part:

> "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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> * * *
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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, meetings with the OWCP nurse, interviews, testing, counseling, functional capacity evaluations, and work evaluations) OWCP cannot determine what would have been the employee's wage-earning capacity.
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> (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

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

[7] *Id.* at § 8113(b); *R.M.*, Docket No. 16-0011 (issued February 11, 2016). *See also Freta Branham*, 57 ECAB 333 (2006).

> reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP."[8]

OWCP procedures provide that specific instances of noncooperation include a failure to appear for the initial interview, counseling sessions, a functional capacity evaluation (FCE), 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.[9]

ANALYSIS

The Board finds that OWCP properly reduced appellant's wage-loss compensation to zero effective December 14, 2014 because she failed, without good cause, to participate in the early stages of vocational rehabilitation efforts. OWCP accepted that appellant sustained bilateral rotator cuff strains requiring surgery.

Dr. Butler, a Board-certified orthopedic surgeon and second opinion physician, found appellant able to perform full-time sedentary work as of February 28, 2013. Dr. Burns, an attending Board-certified orthopedic surgeon, who reviewed Dr. Butler's report opined on August 21, 2013 that appellant was able to perform limited-duty work. He cautioned, however, that appellant viewed herself as totally disabled.

Upon receiving medical evidence that appellant was no longer totally disabled from work, but was capable of working eight hours a day with restrictions, OWCP referred appellant to vocational rehabilitation services on July 16, 2014. Appellant met with the vocational rehabilitation counselor as directed on August 13, 2014, but asserted that she was medically unable to work. She telephoned the counselor on September 30, 2014, contending that she would not participate in vocational rehabilitation as she remained totally disabled from work. Appellant thus refused to cooperate with the rehabilitation effort, as documented for the record by her rehabilitation counselor.

In an October 23, 2014 letter, OWCP advised appellant of the need to participate in vocational rehabilitation and the consequences of not participating. Appellant was afforded 30 days to participate in such efforts or provide good cause for not doing so, or her compensation would be reduced to zero. She responded by November 14, 2014 letter, contending that she should not have been referred for vocational rehabilitation as she was totally disabled. Therefore, by decision dated November 25, 2014, OWCP reduced appellant's compensation to zero, effective December 14, 2014. An OWCP hearing representative affirmed the reduction in an October 20, 2015 decision.

After the Board's June 7, 2016 order remanding case, appellant submitted additional reports from Drs. Duey, Duncan, McKee, Mina, and Hartzler. She asserted that these reports

[8] 20 C.F.R. § 10.519; *see R.H.*, 58 ECAB 654 (2007).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.17(b) (February 2011); *see Sam S. Wright*, 56 ECAB 358 (2005).

demonstrated that she remained totally disabled such that the vocational rehabilitation referral was erroneous. However, none of these physicians found appellant totally disabled from work for any period or that she was unable to participate in vocational rehabilitation. Therefore, OWCP properly issued its July 25, 2016 decision reducing appellant's compensation to zero as of December 14, 2014 because she refused to participate in the preliminary stages of vocational rehabilitation without good cause.

Appellant's failure without good cause to continue preparatory vocational activities with her counselor constitutes a failure to participate in the early, but necessary stages of a vocational rehabilitation effort.[10] OWCP regulations provide that, in such a case, it cannot be determined what would have been the employee's wage-earning capacity had there been no failure to participate and it is assumed, 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.[11] As appellant failed to submit evidence to refute such an assumption, OWCP had a proper basis upon which to reduce her disability compensation to zero.

Prior to OWCP's July 25, 2016 decision, appellant was given appropriate notification of the sanctions for continuing to refuse to cooperate with the rehabilitation program in the early stages. Despite this notice, she failed to comply with these rehabilitation efforts. The Board finds, therefore, that OWCP properly reduced appellant's compensation benefits to zero for failure to cooperate with the early stages of vocational rehabilitation.[12]

On appeal, appellant contends that OWCP improperly relied on work restrictions provided by Dr. Butler whereas Dr. Duey had a better understanding of her condition. The Board notes, however, that neither physician found appellant totally disabled from work at the time of the July 16, 2014 referral to vocational rehabilitation. Other than a period of convalescence following March 17, 2015 surgery, Dr. Duey did not find appellant totally disabled from work.

Additionally, appellant alleges that OWCP failed to comply with Chapter 2.813.5(c)(4) of its procedures prior to referring her for rehabilitation, as the medical evidence of record was "stale and conflicting."[13] This section provides that at the time of referral, there "should not be any outstanding medical issues, work-related or nonwork related, precluding participation in the rehabilitation effort." As noted above, at the time of the July 16, 2014 referral, both Dr. Burns and Dr. Butler found her able to perform light-duty work. Dr. Burns expressed this opinion on October 9, 2013, within a year of the referral to vocational rehabilitation.

[10] *See supra* note 7. *See also Conard Hightower*, 54 ECAB 796 (2003).

[11] 20 C.F.R. § 519(c).

[12] Once appellant indicates in writing her intent to comply and participate in vocational rehabilitation, compensation will be reinstated as long as actual compliance is confirmed. Compliance is shown by actions such as undergoing interviews or testing. *See B.W.*, Docket No. 14-0372 (issued November 12, 2014).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.5(c)(4) (February 2011).

Appellant also asserts that she complied with all instructions from the vocational rehabilitation counselor and did not refuse to participate in the preparatory stages of rehabilitation. However, the counselor's September 30, 2014 letter, which appellant does not refute, clearly demonstrates that appellant refused to participate in further vocational efforts as she believed the referral was erroneous.

Appellant may request modification of the wage-earning capacity determination supported by new evidence or argument at any time before OWCP.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation to zero beginning on December 14, 2014 for failing to cooperate with the early stages of vocational rehabilitation.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 25, 2016 is affirmed.

Issued: February 6, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board