United States Department of Labor
Employees' Compensation Appeals Board

R.L., Appellant	)	
and	)	**Docket No. 17-0670**
	)	**Issued: July 14, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Pontiac, MI, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 3, 2017 appellant, through counsel, filed a timely appeal from a November 16, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly reduced appellant's compensation to zero under 5 U.S.C. § 8113(b) effective January 12, 2016 for failing to cooperate with the early stages of vocational rehabilitation.

FACTUAL HISTORY

On March 17, 2012 appellant, then a 48-year-old custodial laborer, filed a traumatic injury claim (Form CA-1) alleging that he sprained his upper back on March 16, 2012 in the performance of duty. He was moving a carrier case when the adjacent case flipped forward and fell on him. Appellant stopped work on March 16, 2012 and did not return. OWCP accepted the claim for a head contusion, lumbar strain, cervical strain, cervical radiculopathy, cervical disc displacement at C4-5, right shoulder sprain, and bilateral rotator cuff tears. On August 9, 2012 appellant underwent an authorized right rotator cuff repair and subacromial decompression and superior labral debridement. OWCP paid compensation for total disability beginning May 1, 2012.

In a report dated February 28, 2014, Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon and OWCP referral physician, reviewed the history of injury and the medical reports of record. He diagnosed cervical spondylosis with disc disease at multiple levels, particularly C4-5 and C5-6, cervical disc displacement at C4-5 with C5 bilateral radiculopathy, a right rotator cuff tear and type 1 superior labral tear following a repair, mild right shoulder adhesive capsulitis, a small left rotator cuff tear, and symptom magnification. Dr. Obianwu opined that appellant had continued objective findings of cervical disc displacement at C4-5, radiculopathy, and mild adhesive capsulitis of the right shoulder. He found that he could not return to his usual employment. In a work restriction capacity evaluation (OWCP-5c), Dr. Obianwu provided work restrictions of lifting, pushing, and pulling up to 10 pounds and no reaching over the shoulder, bending/stooping, climbing, or twisting.

Based on Dr. Obianwu's findings, on April 24, 2014 OWCP referred appellant for vocational rehabilitation.

In a report dated September 26, 2014, Dr. Michael F. Haenick, an attending Board-certified physiatrist, evaluated appellant for neck, shoulder, and back pain. He diagnosed an unsteady gait due to cervical myelopathy causally related to his employment injury. Dr. Haenick opined that appellant was totally disabled.

OWCP closed vocational rehabilitation efforts on October 28, 2014 after finding a conflict in medical opinion between Dr. Haenick and Dr. Obianwu regarding the extent of his disability. It referred appellant to Dr. Donald Garver, a Board-certified orthopedic surgeon, for an impartial medical examination.

Dr. Garver, in a December 17, 2014 report, discussed appellant's work injury and the medical evidence of record, including the results of diagnostic studies. He advised that appellant was not "entirely cooperative" during the examination. Dr. Garver found no evidence of cervical myelopathy or shoulder problems. He indicated that it was difficult to determine whether

appellant could return to his usual employment due to his lack of cooperation and symptom magnification. Dr. Garver recommended a sedentary position, noting that appellant told him that he intended to retire. He found that he could perform work mostly sitting and "doing some filing or light work." In a work restriction evaluation dated December 29, 2014, Dr. Garver opined that appellant could work eight hours a day with no walking, standing, reaching, reaching above the shoulder, squatting, kneeling, or climbing.

The employing establishment provided a notification of personnel action (SF-50) indicating that the Office of Personnel Management (OPM) had approved appellant's application for disability retirement effective August 31, 2015.

On November 30, 2015 OWCP referred appellant to a vocational rehabilitation counselor. In a December 9, 2015 rehabilitation action report, (OWCP-44) the vocational rehabilitation counselor advised that appellant had not responded to her certified letter scheduling a meeting and had not returned her telephone calls.

By letter dated December 10, 2015, OWCP notified appellant that he had not responded to the vocational rehabilitation counselor's attempts to contact him to schedule an initial meeting. It afforded him 30 days to make a good faith effort to participate with vocational rehabilitation or to submit additional evidence or argument substantiating that he was unable to participate. OWCP informed appellant that if he refused to cooperate without good cause his compensation would be reduced to zero.

The vocational rehabilitation counselor, in a December 16, 2015 letter, informed appellant that she had scheduled a meeting for December 30, 2015 and that, if he did not appear she would have to report the noncompliance with vocational rehabilitation.

Counsel, by letter dated December 16, 2015 and received on December 21, 2015, advised OWCP that appellant did not want to participate with vocational rehabilitation and requested an election form so that he could select retirement benefits in lieu of workers' compensation benefits.

In a December 17, 2015 election form received by OWCP on December 22, 2015, appellant elected retirement benefits from OPM effective December 31, 2015. OWCP terminated compensation effective that date.

Appellant telephoned OWCP on December 28, 2015 and questioned why he had to meet the vocational rehabilitation counselor on December 30, 2015. OWCP informed him that he had to cooperate with vocational rehabilitation until the date of his election of OPM benefits.

In a December 31, 2015 rehabilitation action report, the vocational rehabilitation counselor related that appellant initially agreed to meet on December 30, 2015, but then refused to attend the meeting as he was retiring on December 31, 2015.

By decision dated January 12, 2016, OWCP reduced appellant's wage-loss compensation to zero effective that date as he refused to cooperate with the preliminary stages of vocational rehabilitation. It noted that it had informed him that he had to cooperate with vocational rehabilitation until the date of his election.

Counsel, on January 19, 2016, requested a telephone hearing with an OWCP hearing representative. At the hearing, held on September 13, 2016, counsel contended that the penalty was overly harsh for his failure to cooperate with vocational rehabilitation for one day prior to appellant's retirement. He asserted that appellant believed that he had good cause for not cooperating as he was retiring.

In a decision dated November 16, 2016, OWCP's hearing representative affirmed the January 12, 2016 decision. She found that OWCP issued the warning letter prior to receiving appellant's election of retirement benefits and that he had not cooperated. Thus OWCP properly reduced his compensation to zero under section 8113(b).

LEGAL PRECEDENT

Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.[3] 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 wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary.[4]

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--
>
> > '(b) Where a suitable job has not been identified, because the failure or refusal occurred in the early but necessary stages of a vocational rehabilitation effort (that is, meetings with OWCP nurse, interviews, testing, counseling, functional capacity evaluations [(FCE)], 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

[3] 5 U.S.C. § 8104(a); *see also J.E.*, 59 ECAB 606 (2008).

[4] *Id.* at § 8113(b); *R.M.*, Docket No. 16-0011 (issued February 11, 2016).

> reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.'"[5]

OWCP procedures provide that specific instances of noncooperation include a failure to appear for the initial interview, counseling sessions, an 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.[6]

Regarding the election of OPM benefits during vocational rehabilitation, OWCP procedures provide:

> "A noncooperation sanction under 5 U.S.C. § 8113 may not be *initiated* once a claimant has officially elected OPM benefits. It may only be finalized following an OPM election if the warning letter was issued while the claimant was in receipt of FECA benefits. If a sanction is applied prior to receipt of the actual election, the election is at the reduced amount pursuant to the sanction. When a warning is issued before the claimant elects OPM benefits, and the claimant continues to be uncooperative up to the point of the election, it is appropriate to issue the final sanction under 5 U.S.C. § 8113, even if it is issued after the election is signed."[7] (Emphasis in the original).

Section 8123(a) 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.[8] The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[9]

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.[10]

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[5] 20 C.F.R. § 10.519; *see R.H.*, 58 ECAB 654 (2007).

[6] 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).

[7] *Id*. at *Vocational Rehabilitation Services*, Chapter 2.813.18(c) (February 2011).

[8] 5 U.S.C. § 8123(a).

[9] 20 C.F.R. § 10.321.

[10] *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

ANALYSIS

The Board finds that OWCP properly reduced appellant's wage-loss compensation to zero effective January 12, 2016 as he failed, without good cause, to participate in the early stages of vocational rehabilitation efforts.

OWCP accepted that appellant sustained a head contusion, lumbar strain, cervical strain, cervical radiculopathy, cervical disc displacement at C4-5, right shoulder sprain, and bilateral rotator cuff tears as a result of a March 16, 2012 employment injury. It paid wage-loss compensation for total disability beginning May 1, 2012.

OWCP initially referred appellant for vocational rehabilitation on April 24, 2014; however, it subsequently ceased rehabilitation efforts in October 2014 after finding a conflict existed between his physician, Dr. Haenick, and OWCP's referral physician, Dr. Obianwu, regarding the extent of his work restrictions. It referred appellant to Dr. Garver for an impartial medical examination. On December 17, 2014 Dr. Garver related that it was difficult to evaluate the extent of his condition due to lack of cooperation and symptom magnification. He found however that appellant could perform sedentary work for eight hours per day.

When a case is referred to an impartial medical examiner for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a prior factual and medical background, must be given special weight.[11] The Board has reviewed Dr. Garver's opinion and finds that it has reliability, probative value, and convincing quality with respect to his conclusions reached regarding appellant's work ability. Dr. Garver's opinion is rationalized and based on a proper medical and factual history, and thus entitled to the special weight of the evidence.[12]

Based on Dr. Garver's findings, on November 30, 2015 OWCP referred appellant to a vocational rehabilitation counselor. The vocational rehabilitation counselor advised OWCP on December 9, 2015 that appellant had not responded to her certified letter or telephone calls. In a December 10, 2015 letter, OWCP informed appellant of the need to participate in vocational rehabilitation and of the consequences if he did not participate. It afforded him 30 days to participate in vocational rehabilitation efforts or to provide good cause for his failure to do so or have his compensation benefits reduced to zero.

Appellant, through counsel, responded that he did not want to participate in vocational rehabilitation services as he wanted to elect retirement benefits from OPM. On December 16, 2015 the vocational rehabilitation counselor scheduled a meeting with him for December 30, 2015.

On December 22, 2015 OWCP received an election form signed by appellant on December 17, 2015 electing retirement benefits from OPM beginning December 31, 2015. Appellant telephoned OWCP on December 28, 2015 and asked whether he had to meet with the

[11] *Id*; *see also P.C.*, Docket No. 16-1226 (issued March 23, 2017).

[12] *See L.C.*, Docket No. 13-2153 (issued May 19, 2014).

vocational rehabilitation counselor on December 30, 2015 as he planned to retire the following day. OWCP informed him that he had to cooperate with vocational rehabilitation until the date of his election, but he did not attend the scheduled December 30, 2015 meeting with the vocational rehabilitation counselor. Appellant's failure without good cause to meet with the vocational rehabilitation counselor for a preliminary meeting constitutes a failure to participate in the early, but necessary stages of the vocational rehabilitation effort.[13] 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, absent evidence to the contrary, that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity.[14] Appellant did not submit evidence to refute such an assumption and thus OWCP properly reduced his compensation to zero due to his failure to cooperate with the early and necessary stages of vocational rehabilitation.

Regarding appellant's election of retirement benefits, OWCP procedures provide that if a warning letter was issued while he was receiving FECA benefits and prior to receipt of officially elected benefits from OPM, he must cooperate with vocational rehabilitation until the time of the election.[15] If he does not, OWCP may reduce his compensation under section 8113 even if the decision is not issued until after the election.[16] OWCP issued its warning letter to appellant on December 10, 2015 and did not receive his election of retirement benefits until December 22, 2015; consequently, it properly issued its sanction determination. This reduction under section 8113 can be utilized irrespective of the brief time period as demonstrated in this case.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation to zero under 5 U.S.C. § 8113(b) effective January 12, 2016 for failing to cooperate with the early stages of vocational rehabilitation.

[13] *See J.C.*, Docket No. 11-1148 (issued March 8, 2012).

[14] 20 C.F.R. § 10.519(b); *see also* FECA (Federal) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.17 (February 2011).

[15] *See supra* note 7; *see also L.O.*, Docket No. 13-1578 (issued January 9, 2014).

[16] *Supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 14, 2017
Washington, DC

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

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

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