United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 17-1972**
	)	**Issued: July 24, 2018**
U.S. POSTAL SERVICE, ASHLEY POST OFFICE, Ashley, OH, 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 September 22, 2017 appellant, through counsel, filed a timely appeal from a July 21, 2017 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 the 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 under 5 U.S.C. § 8113(b) to reflect his wage-earning capacity had he continued to participate in vocational rehabilitation.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts of the case as presented in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

On September 8, 2004 appellant, then a 50-year-old postmaster, filed an occupational disease claim (Form CA-2) alleging that on or before November 19, 2002, while at work, he experienced back pain when he lifted tubs and large bags of mail during a detail assignment, and that on November 19, 2002 he pulled tubs of flats and felt a sharp pain in his low back. OWCP accepted the claim for a herniated L4-5 disc,[4] intractable lumbar radiculopathy, and post-laminectomy instability.[5]

Dr. Daryl R. Sybert, an attending osteopathic physician Board-certified in orthopedic surgery, performed a series of authorized lumbar surgical procedures commencing on February 11, 2003.[6] Appellant did not return to work following a January 19, 2009 procedure. OWCP paid compensation benefits on the periodic compensation rolls effective May 10, 2009.

In August 2013 investigative reports, the employing establishment described video surveillance and provided timekeeping records which demonstrated that appellant had worked at a petting zoo and golf course attraction on approximately 43 occasions commencing in April 2012. Appellant had also played golf there several times.

[3] *Order Remanding Case*, Docket No. 06-1224 (issued October 6, 2006).

[4] On February 10, 2005 appellant claimed a recurrence of disability (Form CA-2a) commencing July 15, 2004. He stopped work on January 6, 2005.

[5] OWCP initially denied the claim by decisions dated December 1, 2004 and April 26, October 13, and 17, 2005 as the medical evidence of record was insufficient to establish causal relationship. By decision dated March 14, 2006, it denied a request for reconsideration. Appellant then appealed to the Board. By order issued October 6, 2006, the Board set aside the March 14, 2006 and October 13 and 17, 2005 decisions and remanded the case to OWCP for reconstruction of the record. On May 9, 2011 OWCP obtained a second opinion regarding the nature and extent of appellant's work-related condition from Dr. E. Gregory Fisher, a Board-certified orthopedic surgeon, who found that appellant's lumbar condition totally and permanently disabled him from all work.

[6] Dr. Sybert performed the following procedures: an L4-5 decompressive laminectomy with excision of the right side of the L4-5 disc on February 11, 2003; right L4-5 reexploration and decompression on January 7, 2005; reexploration of the L4-5 decompressive laminectomy, laminectomy and decompression at L5-S1 with posterior lumbar interbody grafting at both levels, and a posterior spinal fusion at L4-5 and S1 on January 19, 2009; L4-5 and L5-S1 fusions, lumbar laminectomy reexploration foraminotomy L4-5 on the left, lumbar fusion at L4-5 and L5-S1 with exploration and bone graft, and lumbar fixation removal on November 23, 2009; T10 laminectomy and implantation of spinal cord stimulator on September 12, 2011; repositioning of the spinal cord stimulator on October 5, 2011; and January 27, 2014 removal of the spinal cord stimulator.

In an August 27, 2013 report, Dr. Sybert noted reviewing the surveillance videos. He asserted that, while appellant occasionally golfed with friends, he was "pretty much bedridden" the remainder of the time. Dr. Sybert opined that appellant was unable to work an eight-hour a day, "let alone significant eight-hour days back-to-back" due to residuals of the accepted lumbar conditions.

On August 29, 2013 OWCP obtained a second opinion regarding the nature and extent of appellant's ongoing work-related condition from Dr. Manhal Ghanma, a Board-certified orthopedic surgeon. Dr. Ghanma reviewed the medical record, a statement of accepted facts (SOAF), and the surveillance videos. He opined that appellant continued to have active symptoms of post-laminectomy syndrome. Dr. Ghanma found appellant able to perform full-time light-duty work with restrictions of pushing, pulling, and lifting limited to 25 pounds. He found appellant able to sit, walk, or stand for up to eight hours a day.[7]

Appellant retired from the employing establishment effective August 29, 2014 and relocated to California. He elected to continue to receive compensation benefits.

OWCP subsequently found a conflict of medical opinion between Dr. Sybert, for appellant, and Dr. Ghanma, for the government, regarding appellant's ability to return to work. To resolve the conflict, it selected Dr. Robert Baird, a Board-certified orthopedic surgeon, as an impartial medical examiner.[8] Dr. Baird provided December 11 and 26, 2014 reports reviewing the medical evidence of record, the SOAF, and the employing establishment surveillance videos. He noted his findings on examination consistent with post-laminectomy syndrome, mild bilateral lumbar radiculopathy, bilateral neuropathy of the lower extremities, and significant symptom magnifications. Dr. Baird found appellant able to perform full-time modified duty, with occasional pulling, pushing, and lifting up to 25 pounds, six hours of sitting with breaks, two hours of walking and standing with breaks, driving a motor vehicle to or from work for 45 minutes at a time up to 90 minutes a day, and operating a motor vehicle at work for three hours a day in 45-minute increments.

As Dr. Baird found that appellant was no longer totally disabled from work, OWCP referred appellant for vocational rehabilitation services on February 2, 2015. Following an initial interview, the plan was placed in interrupted status commencing April 18, 2015 as appellant had been hospitalized for second and third degree burns to both hands, right leg, and right foot. The vocational rehabilitation plan was closed effective July 24, 2015.

[7] In September 2013, the employing establishment offered appellant a modified position within the restrictions provided by Dr. Ghanma. Appellant did not accept the offered position.

[8] OWCP initially selected Dr. Ralph Rohner, a Board-certified orthopedic surgeon, as impartial medical examiner, and scheduled an appointment for March 4, 2014. Appellant did not attend the appointment. By decision dated June 30, 2014, OWCP suspended his compensation effective that day under 5 U.S.C. 8123(d) as he failed to attend the scheduled appointment with Dr. Rohner. On July 7, 2014 counsel requested a telephonic hearing before an OWCP hearing representative. Appellant contended that his mail had been on hold while he was on vacation, so he did not timely receive notice of the scheduled appointment. He emphasized that he was willing to attend a rescheduled second opinion examination. On July 18, 2014 OWCP rescinded its June 30, 2014 decision and reinstated appellant's compensation benefits retroactive to July 1, 2014.

On May 9, 2016 OWCP obtained a second opinion regarding appellant's work capacity from Dr. Steven M. Ma, a Board-certified orthopedic surgeon. In a May 9, 2016 report, Dr. Ma reviewed the medical record and a SOAF. On examination he observed limited lumbar motion in all planes and bilateral lumbar radiculopathy. Dr. Ma diagnosed status post L4 to S1 discectomy and fusion, lumbar post-laminectomy syndrome, and nonindustrial peripheral neuropathy related to the nonoccupational burn injuries. He opined that appellant had active residuals of the accepted lumbar conditions. Dr. Ma noted that appellant had attained maximum medical improvement. He found appellant could perform light duty for eight hours a day, with pulling, pushing, and lifting limited to 25 pounds, no climbing, and two hours of bending or stooping.

As Dr. Ma indicated that appellant was no longer totally disabled from work, OWCP referred appellant for vocational rehabilitation services on June 9, 2016. Appellant underwent vocational testing. He expressed interest in attending training for computer operations. The rehabilitation counselor prepared a training plan to prepare appellant for entry level employment as a receptionist, U.S. Department of Labor, *Dictionary of Occupational Titles* (DOT) #237.367-038, or appointment clerk, DOT #237.367.010. The positions were classified as sedentary, with four to six months of specific vocational preparation. The rehabilitation counselor conducted a labor market survey to verify that receptionist and appointment clerk positions were reasonably available in appellant's commuting area with entry level wages of $10.00 an hour. He prepared a rehabilitation plan on September 28, 2016 to train appellant for the positions of receptionist or appointment clerk, to be followed by 90 days of job placement assistance. The rehabilitation counselor advised that appellant required approximately four to six months of training. He estimated that, after vocational training and participation in a job placement program, appellant would have estimated yearly earnings between $20,800.00 and $24,814.40.

By letter dated September 28, 2016, OWCP notified appellant that the selected positions of receptionist and appointment clerk were within his medical limitations and commensurate with his vocational aptitudes and experience. It also informed him that failure to cooperate fully with the vocational rehabilitation process would result in the reduction of his monetary compensation benefits based on the wages he would have received had he been reemployed in the selected position.

Appellant signed the rehabilitation plan on October 6, 2016. On October 10, 2016 he enrolled in the authorized computerized office and accounting specialist program to prepare him for employment in the selected positions. Appellant attended class on October 12, 2016, but not thereafter.

In an October 18, 2016 report, the rehabilitation counselor noted meeting with appellant that day. Appellant had contended that new medical evidence established that he was unable to participate in vocational rehabilitation. He gave the rehabilitation counselor a physical therapy prescription slip dated October 13, 2016 from Dr. Audrey Kohar, a resident in physiatry, and an October 17, 2016 report from Dr. Baotran Vo, a Board-certified family practitioner. Dr. Vo noted that appellant was unable to sit for more than 15 minutes continuously due to chronic back pain following eight lumbar surgical procedures. She limited lifting to five pounds and directed that he be allowed to walk every 15 minutes.

By letter dated October 19, 2016, OWCP requested that appellant provide contact information from his current treating physician. It noted that Dr. Vo had not been authorized to treat him for the accepted conditions. RD 10/19/16)

By letter dated October 26, 2016, OWCP informed appellant that the rehabilitation counselor indicated that he had refused to participate in the approved training program for the positions of receptionist and appointment clerk. It explained that Dr. Ma's opinion continued to represent the weight of the medical evidence, and demonstrated that appellant was able to participate in vocational rehabilitation and comply with the approved training program. OWCP advised him to contact them and the vocational rehabilitation counselor to make a good faith effort to participate in the approved rehabilitation and training program, or to provide written justification for his failure to participate within 30 days. It notified appellant that if he refused to cooperate in the training without good cause his compensation would be reduced to reflect his wage-earning capacity had he participated.

In an October 27, 2016 report, the rehabilitation counselor advised OWCP that appellant's training program was five hours a day with two 30-minute breaks. Students were also permitted to leave the classroom to stretch or to use the restroom.

In a November 22, 2016 report, the vocational rehabilitation counselor noted that appellant had telephoned that morning, asserting that he was not physically able to participate in vocational rehabilitation service at that time.

In a November 22, 2016 telephone memorandum (Form CA-110), OWCP noted that appellant alleged that he was "injured from sitting in class too long," and wished to change physicians.

In a letter dated November 23, 2016, OWCP notified appellant that there was "currently no medical evidence to support a new injury" from sitting during vocational classes.

On November 28, 2016 OWCP directed the vocational rehabilitation counselor to close the vocational rehabilitation effort. The counselor closed appellant's rehabilitation effort on December 9, 2016.

In a December 16, 2016 letter, OWCP notified counsel that it temporarily suspended appellant's compensation as letters had been returned and it no longer had appellant's current address. By a copy of the letter, it requested that the employing establishment provide the current pay rate for appellant's date-of-injury postmaster position and a copy of the position description.

On December 19, 2016 an employing establishment official advised that appellant's current annual pay rate for level 15 step 0 was $65,927.00 a year.

By decision dated December 20, 2016, OWCP reduced appellant's wage-loss compensation effective November 30, 2016 under 5 U.S.C. § 8113(b) as he failed without good cause to participate in vocational rehabilitation. It found that had he undergone vocational rehabilitation he would have had the capacity to perform the duties of a receptionist/clerk with

entry level wages of $477.20 a week. In applying the formula set forth in *Albert C. Shadrick*,[9] it used a recurrent pay rate date of January 19, 2009. Based on its calculations, OWCP found that appellant was entitled to net compensation of $1,185.70 each 28 days.

On December 27, 2016 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, held June 9, 2017. At the hearing, he contended that he could not sit in class for five hours a day and that attendance at three days of class from October 10 to 12, 2016 had worsened his symptoms. Appellant asserted that he was physically unable to participate in the vocational training program or perform remunerative work as he remained unable to sit or stand for more than 15 minutes continuously. He submitted additional evidence.[10]

In a May 8, 2017 report, Dr. Hamid Mir, an attending[11] Board-certified orthopedic surgeon, provided a history of the November 19, 2002 employment incident when appellant lifted a 100-pound sack of mail. He summarized appellant's treatment history. Dr. Mir diagnosed lumbar stenosis and bilateral lumbar radiculopathy. He recommended an L3-4 laminectomy and fusion with posterior partial laminectomy and fusion with removal of fixation hardware. Dr. Mir prescribed a rigid lumbar brace. He noted, in a June 15, 2017 report, that appellant would be totally disabled from work for three months following the procedure. On June 19, 2017 OWCP authorized Dr. Mir's request for surgery. In a June 23, 2017 report, Dr. Mir diagnosed lumbar radiculopathy with numbness in both feet.

By decision dated July 21, 2017, an OWCP hearing representative denied modification of OWCP's December 20, 2016 decision. She found that appellant had not demonstrated cooperation with vocational rehabilitation or good cause for his refusal such that it would remove the sanction of section 8113(b). The hearing representative further found that Dr. Vo did not set forth any medical reason(s) that appellant could not attend the approved training program or otherwise cooperate in vocational rehabilitation. Additionally, she found that the training program did not exceed the work restrictions provided by Dr. Ma.

LEGAL PRECEDENT

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 FECA, OWCP, 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

[9] 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

[10] February 21, 2017 magnetic resonance imaging and computerized tomography scans demonstrated L3-4 foraminal stenosis, anterolisthesis, and a disc bulge causing severe central canal stenosis.

[11] In a March 6, 2017 letter, appellant requested authorization to consult Dr. Mir, a Board-certified orthopedic spine surgeon. He asserted that, after the third day of computer classes, he was unable to get out of bed. OWCP authorized appellant to consult Dr. Mir.

his wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of OWCP."[12]

Section 10.519 of Title 20 of the Code of Federal Regulations details the actions OWCP will take when 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. Section 10.519(a) provides, in pertinent part:

> "Where a suitable job has been identified, OWCP will reduce the employee's future monetary compensation based on the amount which would likely have been his wage-earning capacity had he undergone vocational rehabilitation. [It] will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with OWCP nurse and the employer. The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP."[13]

ANALYSIS

The Board finds that OWCP properly reduced appellant's compensation under 5 U.S.C. § 8113(b) to reflect his wage-earning capacity in the selected position of receptionist/appointment clerk had he continued to participate in vocational rehabilitation.

OWCP accepted that appellant sustained a herniated L4-5 disc, intractable lumbar radiculopathy, and post-laminectomy instability due to repetitive heavy lifting at work and a November 19, 2002 lifting incident. Appellant sustained periods of disability and underwent several lumbar surgeries. He stopped work in January 2009 and did not return.

On May 9, 2016 Dr. Ma, a Board-certified orthopedic surgeon and second opinion physician, found that appellant could work full time with restrictions of pushing, pulling, and lifting limited to 25 pounds, stooping and bending for up to two hours, and no climbing. Based on Dr. Ma's findings, OWCP referred appellant for vocational rehabilitation on June 9, 2016. The rehabilitation counselor identified the positions of receptionist and appointment clerk as within his physical limitations and vocational capabilities. He advised that appellant required approximately four to six months of training. The rehabilitation counselor directed appellant to enroll in a computerized office and accounting training program at a vocational college, which OWCP authorized. He prepared a rehabilitation plan and agreement for appellant's signature. Appellant signed the plan on October 6, 2016 and enrolled in the approved training course on October 10, 2016.

On October 28, 2016 appellant advised the rehabilitation counselor that he had not attended training classes after October 12, 2016 as he was medically unable to sit for prolonged periods. However, he did not submit any rationalized medical evidence precluding him from sitting for

[12] 5 U.S.C. § 8113(b); *see also N.C.*, Docket No. 16-1152 (issued October 19, 2016); *T.M.*, Docket No. 12-1614 (issued March 15, 2013).

[13] 20 C.F.R. § 10.519(a).

prolonged periods. The Board therefore finds that appellant's actions establish that he failed to participate in vocational rehabilitation efforts.[14]

Prior to adjusting appellant's compensation, OWCP advised him by letter dated October 26, 2016 of the consequences of his failure to participate in vocational rehabilitation and provided him 30 days to participate or show good cause for his failure. Appellant alleged that sitting in class worsened his condition. He did not, however, submit evidence showing good cause for his failure to participate. Dr. Ma determined that appellant could perform sedentary employment, such as that of a receptionist or appointment clerk. The Board thus finds that OWCP properly reduced appellant's wage-earning capacity to reflect what he would have earned had he cooperated with vocational rehabilitation.[15]

The reduction based on appellant's failure to cooperate remains in effect until he complies in good faith with the direction of OWCP. Subsequent to the reduction, appellant submitted a May 8, 2017 medical report from Dr. Mir, an attending Board-certified orthopedic surgeon, who recommended an L3-4 laminectomy and fusion. Dr. Mir did not, however, address appellant's ability to work at the time his compensation was reduced or provide work restrictions that would preclude him from participating in vocational rehabilitation at the time of OWCP's reduction of his compensation.

OWCP therefore properly reduced appellant's compensation in accordance with the *Shadrick* formula to reflect his wage-earning capacity.[16]

On appeal counsel contends that OWCP's authorization of the lumbar surgery proposed by Dr. Mir established that appellant was unable to participate in vocational rehabilitation. However, Dr. Mir did not find appellant disabled from participation in the approved training program on or before November 30, 2016.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation under 5 U.S.C. § 8113(b) to reflect his wage-earning capacity in the selected position of receptionist/appointment clerk had he continued to participate in vocational rehabilitation.

[14] *See S.M.*, Docket No. 15-1236 (issued February 18, 2016).

[15] *N.C., supra* note 12.

[16] *See M.L.*, Docket No. 16-0789 (issued June 7, 2017).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 21, 2017 is affirmed.

Issued: July 24, 2018
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