

**United States Department of Labor
Employees' Compensation Appeals Board**

S.H., Appellant

and

**U.S. POSTAL SERVICE, MID-CAPE CARRIER
ANNEX, Cape Coral, FL, Employer**

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**Docket No. 16-1827
Issued: March 12, 2018**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

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 September 15, 2016 appellant, through counsel, filed a timely appeal from a September 7, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 October 14, 2015 for failure to cooperate with vocational rehabilitation.

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.*

FACTUAL HISTORY

On February 9, 2009 appellant, then a 54-year-old rural carrier associate, was involved in a work-related motor vehicle accident. OWCP initially accepted his traumatic injury claim (Form CA-1) for lumbar sprain, and later expanded the accepted conditions to include lumbar spinal stenosis and grade 1 spondylolisthesis -- unstable. On June 12, 2009 appellant underwent OWCP-authorized lumbar (L4-5) discectomy, decompression, and interbody fusion. OWCP continuously paid appellant wage-loss compensation for temporary total disability dating back to April 25, 2009.³

In a March 2, 2015 report, Dr. Victoria M. Langa, a Board-certified orthopedic surgeon and OWCP referral physician, diagnosed chronic lumbar post-laminectomy syndrome.⁴ She attributed appellant's current condition to the surgery performed in June 2009, which was related to his February 9, 2009 employment injury. Dr. Langa indicated that appellant had long since reached maximum medical improvement following surgery. She further noted that appellant's lower back condition was both chronic and permanent in nature which required ongoing pain management. Dr. Langa advised that appellant was permanently disabled from performing his prior duties as a rural carrier associate. However, he was capable of performing sedentary work activities. Appellant's permanent work restrictions included a one-hour limitation on walking, standing, twisting, and bending/stooping. She also imposed a two-hour limitation on pushing, pulling, and lifting, which included a 10-pound weight restriction.

On March 24, 2015 OWCP advised appellant that, based on Dr. Langa's March 2, 2015 findings, it had referred him for vocational rehabilitation services. It also advised him of his responsibility under FECA of participating in vocational rehabilitation, and the consequences of his failure/refusal to fully participate. OWCP also advised appellant that he would soon be contacted by a vocational rehabilitation counselor to arrange an initial interview.

The vocational rehabilitation counselor met with appellant for an initial interview on April 20, 2015. Appellant was scheduled for initial vocational testing and evaluation on June 24, 2015.

Appellant, however, reported that he had a heart attack on July 1, 2015 and emergency hospital admission and he cancelled a meeting with the vocational rehabilitation counselor scheduled for July 20, 2015. By letter dated July 13, 2015, the meeting was rescheduled for August 11, 2015.

OWCP received medical documentation which supported that appellant was hospitalized from July 15 to 18, 2015. It also received the results of a May 14, 2015 lumbar spine computerized tomography (CT) scan, which revealed multilevel degenerative changes.

³ The employing establishment terminated appellant's employment for cause, effective April 24, 2009. OWCP placed appellant on the periodic compensation rolls beginning May 10, 2009.

⁴ Dr. Langa also diagnosed diabetic peripheral neuropathy -- bilateral lower extremities.

On August 11, 2015 appellant met with the vocational rehabilitation counselor. He informed the evaluator that he believed he was unable to work given chronic low back pain symptoms and his worsening heart condition.

In a September 10, 2015 report, the vocational rehabilitation counselor explained that appellant was deferring vocational rehabilitation services. He also noted that medical clearance regarding appellant's unrelated heart condition from July 15, 2015 remained pending.

By letter dated September 11, 2015, an OWCP claims examiner informed appellant that he was not appearing at scheduled meetings with OWCP's specialist and failed to carry out agreed upon actions. OWCP explained that he was asked to provide the cardiologist's release for participation in vocational rehabilitation services or medical documentation supporting that he could no longer participate in the program. However, no medical documentation was received. OWCP explained that it constituted a refusal to undergo vocational rehabilitation. It notified him that 5 U.S.C. § 8113(b) provides that, if an individual, without good cause, fails to apply for and undergo vocational rehabilitation when so directed and it finds that, in the absence of the failure the individual's wage-earning capacity would probably have substantially increased, it may reduce prospectively the compensation based on what probably would have been the individual's wage-earning capacity had he not failed to apply for and undergo vocational rehabilitation. Appellant was informed that the case would be held open for 30 days to afford him the opportunity to contact OWCP and/or the assigned rehabilitation specialist to make a good faith effort to participate in the rehabilitation effort. OWCP further advised appellant that if he believed he had a good reason for not participating he should so advise it within 30 days, providing reasons for noncompliance and any supporting evidence. It advised him that after any evidence submitted was evaluated, and that further action would be taken without additional notice to him. If appellant did not comply with the instructions contained within the letter within 30 days, the vocational rehabilitation effort would be terminated and his compensation reduced in accordance with 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.

The September 11, 2015 letter was returned and resent to appellant on September 23, 2015 at the updated address. Appellant was advised that he would have 30 days to submit the requested documentation in the September 11, 2015 letter.

Appellant was contacted by the vocational rehabilitation counselor on September 17, 2015 and indicated that he was unable to perform full-time work. The vocational rehabilitation counselor noted that appellant was attempting to obtain documentation.

By decision dated October 14, 2015, OWCP reduced appellant's compensation to zero, effective, that date under the provisions of 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519. It found that appellant failed to participate in vocational rehabilitation efforts, and that he did not show good cause for failing to fully comply. OWCP noted that attempts were made to contact him at both addresses listed, as he had reported a heart attack on July 15, 2015 and could not participate in the vocational rehabilitation program. It noted that his mail was returned and they did not have a valid address for him. The evidence revealed that appellant was afforded the opportunity to participate in a vocational rehabilitation program to return to employment based on his medical restrictions, education, experience, and other factors, but that he had declined to participate. Furthermore, it explained that in the letter dated September 11, 2015, appellant was

directed to make a good faith effort to participate in the rehabilitation effort and he was provided the opportunity to comply or show good cause for not complying. Appellant was also notified of the actions that could be taken under provisions of section 8113(b) of FECA and section 10.519 of Title 20 of the Code of Federal Regulations. He was advised that the reduction would continue until he in good faith provided the evidence and documentation required, and if medically possible, underwent the directed vocational testing, or showed good cause for not complying.

On October 20, 2015 appellant requested a telephonic hearing, which he subsequently changed to a request for review of the written record. In his request, he disagreed with OWCP's decision. Appellant indicated that, since seeing Dr. Langa in March 2015, he had a new lumbar CT scan and suffered a major heart attack on July 15, 2015. He explained that he received a stint and he was not able to do any type of procedure for one year from his surgery. Appellant also indicated that he did not refuse to participate in vocational rehabilitation and had developed a severe neuropathy since the injury.

OWCP received returned mail on November 2 and 19, 2015.

On November 25, 2015 OWCP received documentation from appellant, which included a meeting attendance report from the vocational counselor, Brett Salkin, confirming appellant's attendance at the initial interview on April 20, 2015 and his meeting on August 11, 2015. Appellant also provided a copy of a September 23, 2015 disability certificate from Dr. Sanjay Shankar, a Board-certified cardiologist, which revealed that appellant could not stop antiplatelet drugs for at least a year, due to his recent cardiac stents.

On August 8, 2016 appellant provided OWCP with an updated address.

On September 2, 2016 OWCP received an August 25, 2015 statement from appellant, who indicated that he did not miss a scheduled meeting with the rehabilitation counselor. Appellant explained that he had been diagnosed with blood clots in his lungs and had daily pain. He also described his functional deficits. Appellant indicated that his physician informed him that his condition and pain level would never resolve and would worsen as he aged. Furthermore, he noted that he had notified OWCP of his address change three weeks prior and restated his new address.

By decision dated September 7, 2016, OWCP's hearing representative affirmed the October 14, 2015 decision. She found that Dr. Langa's opinion represented the weight of the medical evidence regarding appellant's ability to work. The hearing representative further noted that although appellant claimed to be totally disabled, there was no documentation from a qualified physician supporting appellant's alleged inability to continue with the vocational rehabilitation effort.

LEGAL PRECEDENT

FECA provides that the Secretary of Labor may direct a permanently disabled individual whose disability is compensable to undergo vocational rehabilitation.⁵ If an individual, without good cause, fails to apply for and undergo vocational rehabilitation when so directed, 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 his or her wage-earning capacity in the absence of the failure.⁶

Where the failure or refusal occurred in the early, but necessary stages of the process, 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).⁷

The reduction of compensation remains in effect until the individual in good faith complies with OWCP's directive.⁸

ANALYSIS

On March 24, 2015 OWCP referred appellant to vocational rehabilitation based on Dr. Langa's March 2, 2015 opinion that he was capable of performing sedentary work. Appellant initially met with his rehabilitation counselor on April 20, 2015. On May 6, 2015 appellant received additional counseling regarding planned vocational services. At the time, appellant expressed concerns about heart problems, and noted that he planned to follow-up with his cardiologist. He and his assigned rehabilitation counselor also discussed necessary vocational testing. The testing occurred on or about June 24, 2015. As a result of his heart attack, appellant on July 15, 2015, cancelled his vocational rehabilitation meeting scheduled for July 20, 2015. He was discharged from the hospital on July 18, 2015 and his vocational rehabilitation meeting was rescheduled for August 11, 2015. When he met with his rehabilitation counselor on August 11, 2015, appellant indicated that he was unable to work given his chronic low back pain, and worsening heart condition. In subsequent conversations with his rehabilitation counselor, appellant reiterated his belief that he was unable to work on a full-time basis. He was afforded the opportunity to submit additional medical evidence regarding his lumbar and unrelated cardiac conditions, but appellant did not avail himself of the opportunity.

After twice notifying appellant of the possible sanctions for refusing to cooperate with vocational rehabilitation, by decision dated October 14, 2015, OWCP reduced appellant's

⁵ 5 U.S.C. § 8104(a).

⁶ *Id.* at § 8113(b).

⁷ 20 C.F.R. § 10.519(c).

⁸ 5 U.S.C. § 8113(b).

compensation to zero pursuant to 5 U.S.C. § 8113(b). In a September 7, 2016 decision, an OWCP hearing representative affirmed its October 14, 2015 decision adjusting appellant's compensation to zero effective October 14, 2015.

The Board finds that appellant failed to participate in vocational rehabilitation. The record reflects that by letter dated September 11, 2015, OWCP's claims examiner informed appellant that he was not appearing for scheduled meetings. OWCP explained that the evidence revealed that appellant was afforded the opportunity to participate in a vocational rehabilitation program to return to employment based on his medical restrictions, education and experience, and other factors, and that he declined to participate. Furthermore, it noted that appellant was directed to make a good faith effort to participate in the rehabilitation effort and he was provided the opportunity to comply or show good cause for not complying. Appellant was also notified of the actions that could be taken under provisions of section 8113(b) of FECA and section 10.519 of Title 20 of the Code of Federal Regulations. He was advised that the reduction would continue until appellant in good faith provided the evidence and documentation required, and if medically possible, underwent the directed vocational testing, or showed good cause for not complying.

The record reflects that the vocational rehabilitation counselor was contacted by appellant and he rescheduled the meeting to August 11, 2015. He informed that vocational rehabilitation counselor that he believed he was unable to work due to his chronic back pain and his worsening heart condition. In a letter dated September 10, 2015, the vocational rehabilitation counselor explained that appellant was deferring his vocational rehabilitation services, and medical clearance regarding appellant's unrelated heart condition from July 15, 2015, was pending. As noted above, the September 11, 2015 letter was sent to appellant advising him of the opportunity to comply or show good cause for not complying. Appellant was also notified of the actions that could be taken under provisions of section 8113(b) of FECA and section 10.519 of Title 20 of the Code of Federal Regulations.

The vocational rehabilitation counselor contacted appellant on September 17, 2015, and appellant indicated that he was unable to perform full-time work. The vocational rehabilitation counselor noted that appellant was attempting to obtain documentation. However, no further documentation was received before OWCP issued its October 14, 2015 decision.

Thereafter, on October 20, 2015 appellant requested a telephonic hearing, which he subsequently changed to a request for review of the written record. In his request, he disagreed with OWCP's decision. Appellant indicated that the last time he saw Dr. Langa he had a CT scan of the lower back and a major heart attack on July 15, 2015. He explained that he received a stent and he was unable to do any type of procedure for one year from his surgery. Appellant also indicated that he did not refuse to participate in vocational rehabilitation and had developed a severe neuropathy since the injury. He also provided a September 23, 2015 disability certificate from Dr. Shankar, a Board-certified cardiologist, which revealed that appellant could not stop antiplatelet drugs for at least a year, due to his recent cardiac stents. However, Dr. Shankar did not provide any information with regard to whether appellant was able to return to work. He did not offer any explanation to support that appellant was unable to participate in vocational rehabilitation.

As appellant did not comply with the vocational rehabilitation efforts, the Board finds that OWCP properly reduced his monetary compensation to zero. Accordingly, the reduction will remain in effect until such time as appellant acts in good faith to comply with the direction of OWCP.⁹

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation to zero effective October 14, 2015 for failure to cooperate with vocational rehabilitation.

ORDER

IT IS HEREBY ORDERED THAT the September 7, 2016 decision of the Office of Workers' Compensation Programs is affirmed.¹⁰

Issued: March 12, 2018
Washington, DC

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

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

⁹ See *supra* note 6.

¹⁰ Colleen Duffy Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.