United States Department of Labor
Employees' Compensation Appeals Board

M.P., Appellant	)	
and	)	**Docket No. 19-1364**
	)	**Issued: February 4, 2020**
U.S. POSTAL SERVICE, POST OFFICE, Fort Dearborn, IL, Employer	)	

Appearances:
Larrissa Parde, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 7, 2019 appellant, through her representative, filed a timely appeal from a December 14, 2018 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.[3]

[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.*

[3] The Board notes that, following the December 14, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly reduced appellant's wage-loss compensation to zero pursuant to 5 U.S.C. § 8113(b), effective November 17, 2014, for failing to cooperate with vocational rehabilitation.

FACTUAL HISTORY

This case has previously been before the Board.[4] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On October 28, 2011 appellant, then a 60-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that repetitive activity at work resulted in injury to her hands. She first realized her condition and its relation to her federal employment on February 1, 2006.[5] OWCP accepted the claim for disorder of bursae and tendons in the left shoulder and aggravation of bilateral primary osteoarthritis of both hands. Appellant underwent OWCP-authorized trapeziectomy and carpometacarpal (CMC) arthroplasty with flexor carpi radialis tendon interposition of the left thumb on December 21, 2011, and trapeziectomy and flexor carpi radialis tendon arthroplasty of basilar joint of right thumb on February 29, 2012. She did not return to work following her February 29, 2012 right thumb surgery. Effective September 10, 2013, appellant elected to receive FECA benefits. On April 7, 2012 she was placed on the supplemental rolls and was later transferred to the periodic rolls commencing July 1, 2012.

OWCP assigned appellant to a vocational rehabilitation program from May 22 through December 3, 2013 and, again, beginning September 10, 2014. The September 10, 2014 referral to vocational rehabilitation services noted that the weight of the medical opinion rested with the January 7, 2014 opinion of Dr. Kenneth Sander, a Board-certified orthopedic surgeon and impartial medical specialist, that appellant was able to work within the limitations outlined in a February 6, 2013 functional capacity evaluation (FCE).[6] The referral also noted that the employing establishment was unable to accommodate appellant's restrictions. As the February 6, 2013 FCE was considered outdated, the claims examiner instructed the rehabilitation counselor to obtain an updated FCE.

On October 3, 2014 appellant underwent an FCE conducted by a licensed/registered occupational therapist, who found that a true demand level could not be determined due to inconsistent effort. In an October 8, 2014 letter, OWCP made note of appellant's inconsistent

[4] Docket No. 18-0302 (issued August 13, 2018).

[5] Under OWCP File No. xxxxxx888, date of injury February 1, 2006, appellant has an accepted occupational disease claim for bilateral carpal tunnel syndrome. She underwent a right carpal release on September 26, 2007 and a left carpal tunnel release on December 12, 2007. OWCP determined that appellant had reached maximum medical improvement (MMI) on March 4, 2008. It granted her a schedule award for eight percent permanent impairment of her bilateral upper extremities.

[6] OWCP selected Dr. Sanders to resolve a conflict in the medical opinion evidence between appellant's attending physician, Dr. Florian Miranzadeh, an osteopath Board-certified in family practice, and a second opinion physician, Dr. Theodore J. Suchy, an osteopath Board-certified in orthopedic surgery, as to the extent and degree of any continuing employment-related disability or residuals.

effort on the October 3, 2014 FCE and warned her that, if she did not participate with the vocational rehabilitation effort, her compensation could be reduced. Appellant was provided the opportunity to comply or show good cause for not complying.

On November 5, 2014 appellant underwent another FCE. The physical therapist who conducted the FCE noted that, while appellant had demonstrated the ability to perform minimally at the light physical demand category, her performance was "questionable secondary to varied effort."

By decision dated November 17, 2014, OWCP reduced appellant's compensation to zero, as of November 16, 2014, based upon its finding that she had failed to cooperate during the early stages of vocational rehabilitation. It explained that, because she had failed to undergo the preparatory vocational testing, it assumed that she either would have returned to her date-of-injury position or would have earned higher wages. OWCP advised that the reduction in benefits would continue until appellant in "good faith" either underwent vocational testing or showed good cause for not complying.

In a November 24, 2014 letter, appellant requested that OWCP schedule her for another FCE, noting that she intended to comply with the examination to the best of her abilities.

On November 25, 2014 OWCP received appellant's November 22, 2014 election to receive retirement benefits through the Office of Personnel Management (OPM), effective November 17, 2014.

On November 25, 2014 appellant requested a telephonic hearing before an OWCP hearing representative, which was held on April 6, 2015. By decision dated July 1, 2015, OWCP's hearing representative affirmed OWCP's November 17, 2014 decision. The hearing representative determined that OWCP had properly found that there was sufficient basis to reduce appellant's compensation benefits as she had failed to cooperate with the early stages of vocational rehabilitation by putting forth an inconsistent, suboptimal effort in both the October and November 2014 FCE's.

On June 20, 2016 appellant, through her representative, requested reconsideration of the July 1, 2015 decision. By decision dated June 2, 2017, OWCP denied her request for reconsideration of the merits of the claim. It found that the representative's argument regarding putting forth maximum effort during an FCE did not apply to the rules of evaluating medical evidence and thus was not relevant and was therefore insufficient to warrant a merit review.

On November 27, 2017 appellant, through her representative, filed an appeal with the Board. By decision dated August 13, 2018, the Board set aside OWCP's June 2, 2017 decision.[7] The Board found that appellant's representative had advanced a relevant legal argument not previously considered by OWCP, when he had argued that the opinion of the licensed/registered occupational therapist and physical therapist lacked probative value and was thus an insufficient

[7] *See supra* note 4.

basis to terminate compensation benefits. The case was remanded for OWCP to review the merits of the claim and to address appellant's November 24, 2014 request that another FCE be scheduled.

Since OWCP's June 2, 2017 decision, OWCP received physical therapy notes from May 24 through September 2018, a July 11, 2018 authorization request for physical therapy, and a June 1, 2018 x-ray of the left shoulder.

OWCP referred appellant to Dr. Allan Brecher, a Board-certified orthopedic surgeon, for a second opinion examination, to determine, amongst other matters, whether she had put forth a maximum effort during the two prior FCE's, whether he could determine her physical capacity to perform work and whether she should undergo an additional FCE.

In an October 23, 2018 report, Dr. Brecher noted his review of the records and the statement of accepted facts (SOAF) and presented examination findings. He provided an assessment of decreased grip strength after appellant's interpositional arthroplasty of the CMC joints and adhesive capsulitis from rotator cuff problems, which he opined were permanently aggravated by her employment factors. Dr. Brecher also provided comments on her prior FCE's and noted that the conclusions drawn regarding the FCE's were correct. He indicated that appellant had not cooperated with the administration of the FCE's as the comments about her inconsistencies made it appear that she had not given 100 percent effort. Dr. Brecher additionally noted that her physicians, Drs. Sanders and Miranzadeh, had placed her at MMI and each had provided work restrictions which were consistent with each other both before and after the October 3, 2014 FCE. He also noted that, when appellant underwent a June 12, 2014 FCE for a schedule award, both Dr. Sanders and Dr. Miranzadeh had indicated that appellant had standing grip and span grip inconsistencies. Dr. Brecher indicated that, when she underwent the November 5, 2014 FCE, it was noted that she exhibited bilateral grip inconsistencies as well as inconsistencies in static push, static arm, and static leg differences. He opined that appellant was able to perform a full-time sedentary job with restrictions on lifting, pushing, and pulling of no more than 10 pounds and no reaching above her shoulders. Dr. Brecher noted that she was not at MMI as additional treatment was noted for the left shoulder condition. He further opined, if appellant followed his prescribed treatment plan of steroid injections to the shoulders, therapy, and possibly surgery, then, within six months, she would be able to perform her date-of-injury position. Dr. Brecher indicated that there was nothing more that could be done for her hands.

In a letter dated December 14, 2018, OWCP notified appellant that it had approved her request to undergo an updated FCE with a physician or medical facility of her own choosing.

By decision dated December 14, 2018, OWCP denied modification of its November 17, 2014 suspension decision. It found that Dr. Brecher's second opinion evaluation supported the opinion of the therapists and physicians who had treated appellant that sub-minimal effort was

given when undergoing the FCEs and thus she failed to cooperate with the vocational rehabilitation effort when undergoing the FCEs of October 3 and November 5, 2014.

LEGAL PRECEDENT

Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.[8] 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.[9]

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, [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 reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP."[10]

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.[11]

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[8] 5 U.S.C. § 8104(a); *see also J.E.*, 59 ECAB 606 (2008).

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

[10] 20 C.F.R. § 10.519; *see R.H.*, 58 ECAB 654 (2007).

[11] 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).

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."[12] (Emphasis in the original.)

ANALYSIS

The Board finds that OWCP properly reduced appellant's wage-loss compensation to zero pursuant to 5 U.S.C. § 8113(b), effective November 17, 2014, for failing to cooperate with the early stages of vocational rehabilitation.

In an October 23, 2018 second opinion report, Dr. Brecher reviewed a SOAF and the medical record and responded to a series of questions. He commented on the FCEs that appellant had undergone and concluded that she had set forth minimal effort in undergoing both FCEs. In support of his conclusion, Dr. Brecher discussed the comments that her attending physicians had made regarding her inconsistencies, as well as her restrictions contemporaneous to the FCEs. He also noted that appellant's physicians had found her at MMI at the time of the first FCE. As Dr. Brecher's report was sufficiently rationalized and based on an accurate factual history and the complete medical record, his opinion constitutes the weight of the medical evidence.[13]

Thus, based on Dr. Brecher's findings, the Board finds that appellant failed to cooperate with the vocational rehabilitation effort when undergoing the FCE's of October 3, 2014 and November 5, 2014. Accordingly, OWCP properly reduced appellant's wage-loss compensation to zero pursuant to 5 U.S.C. § 8113(b), effective November 17, 2014, for failing to cooperate with the early stages of vocational rehabilitation.

The Board further finds that OWCP properly issued its sanction determination. On November 25, 2014 OWCP received appellant's November 22, 2014 election to receive retirement benefits through OPM, effective November 17, 2014. As set forth above, OWCP procedures provide that, if a warning letter was issued while in receipt of FECA benefits, and prior to receipt of officially-elected benefits from OPM, she was required to cooperate with vocational rehabilitation until the time of the election.[14] Herein, OWCP had issued its warning letter to appellant on October 8, 2014. It did not receive her election of retirement benefits until November 25, 2014. Thus, it is found that OWCP properly issued its sanction determination. The

[12] *Id.* at Chapter 2.813.18(c) (February 2011).

[13] *Id.*

[14] *See supra* note 12; *see also R.L.*, Docket No. 17-0670 (issued July 14, 2017); *L.O.*, Docket No. 13-1578 (issued January 9, 2014).

sanction 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 wage-loss compensation to zero pursuant to 5 U.S.C. § 8113(b), effective November 17, 2014, for failing to cooperate with the early stages of vocational rehabilitation.

ORDER

IT IS HEREBY ORDERED THAT the December 14, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 4, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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