United States Department of Labor
Employees' Compensation Appeals Board

J.T., Appellant	)	
and	)	**Docket No. 19-1978**
	)	**Issued: September 1, 2020**
DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT, Chaparral, NM, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 30, 2019 appellant filed a timely appeal from a July 8, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that following the July 8, 2019 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 has met its burden of proof to reduce appellant's compensation to zero, effective July 8, 2019, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, due to his failure to cooperate with vocational rehabilitation, without good cause.

FACTUAL HISTORY

On May 14, 2012 appellant, then a 37-year-old deportation officer, filed a traumatic injury claim (Form CA-1) alleging that on May 11, 2012 he sustained a lower left back condition with sharp pain down his left leg when he lost his balance and fell off an office chair, landing on his left side, while in the performance of duty. OWCP initially accepted the claim for aggravated spondylolisthesis, later expanding acceptance of the claim to include thoracic or lumbosacral neuritis or radiculitis and a closed fracture of the lumbar vertebrae without spinal cord injury. On October 23, 2013 appellant underwent OWCP-authorized surgical procedures of open reduction and internal fixation of L5-S1 spondylolisthesis, L5 and S1 laminectomy, nonsegmental posterior instrumentation of L5-S1, posterior lateral fusion of L5 through S1, and intervertebral cage placement of L5-S1. OWCP paid him wage-loss compensation on the supplemental rolls from July 1 through August 25, 2012 and on the periodic rolls from August 26, 2012 through June 22, 2019. It paid appellant wage-loss compensation on the supplemental rolls for the period June 23 through July 7, 2019.

On June 26, 2018 appellant advised OWCP of a change in his address.

On August 23, 2018 OWCP referred appellant for a second opinion examination regarding his work capacity. In a report dated September 11, 2018, Dr. Adam J. Bevevino, a Board-certified orthopedic surgeon, diagnosed L5-S1 lumbar spondylolisthesis, lumbar spondylosis, and chronic low back pain due to the accepted work-related injury of May 11, 2012. He released appellant to return to work in a full-time light-duty capacity with restrictions of avoidance of prolonged standing/walking no more than two hours a day, no repetitive heavy lifting/pushing/pulling and limited bending, twisting, kneeling, climbing and stooping. Dr. Bevevino also completed a work capacity evaluation (Form OWCP-5c) indicating that appellant could perform light work, with restrictions of 20 pounds of pushing, pulling, and lifting, each for two hours a day; walking and standing for two hours a day; and one hour a day each of squatting, kneeling, climbing, twisting, and bending/stooping.

By letter dated October 25, 2018, the employing establishment notified OWCP that it did not have any available positions within appellant's work restrictions and requested that appellant be referred to vocational rehabilitation.

On January 10, 2019 OWCP referred the case to a vocational rehabilitation counselor based on Dr. Bevevino's work restrictions.

By letter dated January 17, 2019, OWCP requested that appellant complete a return to work assignment timeline and a work and educational history questionnaire. It advised that the counselor would contact appellant in the near future to arrange a meeting. This letter was sent to appellant's former address. By letter dated January 23, 2019, the vocational rehabilitation

counselor informed appellant that she had attempted to contact him using his telephone number of record, but that it was not in service. She requested that appellant contact her at her telephone number and proposed an initial interview meeting on January 28, 2019. The vocational rehabilitation counselor further requested that appellant bring his complete vocational and educational history forms to this meeting. This letter was sent to appellant's former address. By letter dated January 28, 2019, the vocational rehabilitation counselor informed appellant that she had waited at their meeting place on that date for 20 minutes, but that he did not attend. She requested that he call her when he received the letter in order to supply her with a working telephone number. The vocational rehabilitation counselor stated that she would not schedule a further meeting until she heard from appellant. This letter was also sent to appellant's former address.

On February 28, 2019 OWCP acknowledged appellant's change of address request and updated his address of record.

In an e-mail dated February 28, 2019, a vocational rehabilitation specialist informed appellant's assigned vocational rehabilitation counselor that appellant's address had been updated and requested that she contact him using the updated information.

OWCP, in a letter dated March 26, 2019, notified appellant of the penalties under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 for failing to cooperate with vocational rehabilitation without good cause. It noted that he had not responded to his vocational rehabilitation counselor's letters and requested that he contact her at her telephone number. OWCP advised appellant that the initial stages of vocational rehabilitation included interviews, testing, counseling, guidance, and work evaluations. It further advised him that, if he failed or refused to participate in vocational rehabilitation without good cause, his compensation benefits would be reduced to zero and that this reduction would continue until he complied with OWCP's directions concerning rehabilitation. OWCP afforded appellant 30 days to contact OWCP and his rehabilitation counselor to make a good faith effort to participate in the rehabilitation effort designed to return him to gainful employment. It informed him that, if he believed he had a good reason for not participating in the rehabilitation effort, he should respond within 30 days, with reasons for noncompliance, and submit evidence in support of his position. OWCP noted that, if appellant did not comply with the instructions contained in the letter within 30 days, the rehabilitation effort would be terminated and action would be taken to reduce his compensation under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519. This letter was sent to appellant's newly updated address of record. No response was received.

By decision dated July 8, 2019, OWCP reduced appellant's compensation to zero, effective that date, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, due to his failure to cooperate with vocational rehabilitation, without good cause.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.[3] Section 8104(a) of FECA

[3] *E.W.*, Docket No. 19-0963 (issued January 2, 2020); *Betty F. Wade*, 37 ECAB 556, 565 (1986).

provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.[4] Section 8113(b) of FECA provides that 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 his wage-earning capacity in the absence of the failure," until the individual in good faith complies with the direction of OWCP.[5]

OWCP's 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 follow--
>
> > (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 reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP."[6]

OWCP's procedures state 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.[7]

[4] 5 U.S.C. § 8104(a).

[5] *Id*. at § 8113(b).

[6] 20 C.F.R. § 10.519.

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.17(b) (February 2011).

ANALYSIS

The Board finds that OWCP has not met its burden of proof to reduce appellant's compensation to zero, effective July 8, 2019, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 due to his failure to cooperate with vocational rehabilitation, without good cause.

Upon receiving medical evidence that appellant was capable of performing light-duty work with permanent restrictions, OWCP properly referred the case to vocational rehabilitation services on January 10, 2019. The vocational rehabilitation counselor reported that appellant had failed to respond to her letters of January 17, 23, and 28, 2019 requesting that he contact her to provide an updated telephone number and to schedule an initial interview. She also reported that appellant did not attend a scheduled meeting on January 28, 2019. The Board notes that appellant had requested a change of address on June 26, 2018, which was only processed as of February 28, 2019. The January 17, 23, and 28 2019 letters from the vocational rehabilitation counselor were sent to appellant's prior address of record.

In a warning letter dated March 26, 2019, sent to appellant's newly updated address of record, OWCP advised appellant of the need to participate in vocational rehabilitation and the consequences of not participating under section 8113(b) of FECA and section 10.519 of its regulations.[8] It afforded him 30 days to either participate in vocational rehabilitation services or provide good cause for his noncompliance.

The Board finds that when OWCP issued its warning letter on March 26, 2019 appellant had not impeded or refused to cooperate in vocational rehabilitation because he had not received the prior letters from the vocational rehabilitation counselor since they were sent to his prior address. At that time there had been no action planned or scheduled, of which appellant had been properly advised, in which he failed to participate.

OWCP's regulations contemplate that a warning letter will be sent if the claimant is not cooperating.[9] Its procedures explain that the rehabilitation counselor must fully document any noncooperation on the part of the injured worker and submit reports to the rehabilitation specialist for immediate handling. The rehabilitation specialist will then inform the claims examiner of the claimant's noncooperation. When an injured worker refuses or impedes the rehabilitation process, the claims examiner must then intervene by issuance of warning letter, conference call, or both.[10]

The initial correspondence from the rehabilitation counselor was not sent to appellant's proper address of record. As such, the Board finds that appellant did not fail to cooperate with vocational rehabilitation prior to OWCP's preliminary warning letter dated March 26, 2019. OWCP therefore improperly reduced appellant's compensation benefits to zero.

[8] 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, respectively.

[9] *Supra* note 6.

[10] *Supra* note 7.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to reduce appellant's compensation to zero, effective July 8, 2019.

ORDER

IT IS HEREBY ORDERED THAT the July 8, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 1, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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