

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

A.L., Appellant)	
)	
and)	
)	Docket No. 22-0316
DEPARTMENT OF THE ARMY, U.S. ARMY)	Issued: January 10, 2023
INSTALLATION MANAGEMENT)	
COMMAND, U.S. ARMY GARRISON, FOOD)	
SERVICE BRANCH, Wiesbaden, Germany,)	
Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On December 28, 2021 appellant, through counsel, filed a timely appeal from a December 6, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP).

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 an 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.

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.³

ISSUE

The issue is whether OWCP has met its burden of proof to reduce appellant's compensation, effective June 18, 2021, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 for failure to cooperate with vocational rehabilitation without good cause.

FACTUAL HISTORY

On October 16, 2009 appellant, then a 38-year-old food service operations technician, filed a notice of recurrence (Form CA-2a) claiming a recurrence of disability commencing June 22, 2009.⁴ OWCP developed the claim as a new injury because he described new work factors such as cold temperature in the refrigerators while downloading dry and frozen rations, and prolonged standing which allegedly caused his disability. On December 2, 2010 it accepted the claim for aggravation of right internal knee compartment degenerative osteoarthritis, aggravation of right lateral meniscus tear and subluxation, and aggravation of right medial meniscus tear. OWCP paid appellant wage-loss compensation benefits on supplemental rolls as of March 31, 2010 and on the periodic rolls as of January 26, 2011.

On August 12, 2020 OWCP referred appellant, together with a statement of accepted facts, list of questions, and medical record, to Dr. Joseph McGowin, III, a Board-certified orthopedic surgeon, to determine the extent and degree of any remaining work-related disability and the possibility of a return to work. In a September 9, 2020 report, Dr. McGowin diagnosed abnormal gait, right thigh disuse atrophy, status post-traumatic anterior cruciate ligament medial meniscal tear with subsequent right knee lateral meniscal tear, right knee post-traumatic osteoarthritis, and postsurgical right lower extremity neuroma and cutaneous anesthesia. In an attached work capacity evaluation (Form OWCP-5c), he indicated that appellant was capable of performing sedentary work. Dr. McGowin provided work restrictions of up to two hours of walking and standing; up to one hour of bending/stooping and operating a motor vehicle; up to two hours of pushing no more than 22 pounds; up to two hours of lifting and pulling no more than 20 pounds; and no squatting, kneeling, or climbing.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the issuance of the December 6, 2021 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.*

⁴ OWCP assigned the current claim OWCP File No. xxxxxx113. Appellant had previously filed a traumatic injury claim (Form CA-1) for an injury on April 9, 2007. OWCP assigned this claim OWCP File No. xxxxxx999, which was accepted on October 24, 2008 for right knee medial meniscus tear. On December 2, 2010 OWCP administratively combined OWCP File Nos. xxxxxx113 and xxxxxx999, with the latter file designated as the master file.

On October 23, 2020 OWCP referred appellant for vocational rehabilitation services based on Dr. McGowin's restrictions. It advised him that participation in vocational rehabilitation was mandatory and that failure to comply could endanger his benefits.

In reports beginning November 16, 2020, appellant's rehabilitation counselor reported her interactions with appellant. She indicated that in attempting to contact him by telephone she reached his voicemail, which was full.

On January 19, 2021 OWCP informed the rehabilitation counselor that the case had been transitioned to plan development for placement with a new employer as the employing establishment had not provided a job offer.

The rehabilitation counselor, in a January 25, 2021 report, related that she had some difficulty reaching appellant by telephone, that his voicemail was full, and that he did not respond to an e-mail she sent to him. She requested that he provide a résumé, but he did not respond. The rehabilitation counselor noted that she had been able to obtain a limited work history from E.H., Injury Compensation Specialist at Fort Riley, Kansas. She further noted that appellant did not have any interest in returning to work because he was focused on medical issues for medical conditions OWCP had not accepted as work related.

On February 26, 2021 the rehabilitation counselor noted that she had conducted an interview over the telephone with appellant. She noted that initially he had been receptive to the idea of returning to work, but became increasingly resistant to a return to work as the case progressed. Based on a review of appellant's work history and medical conditions, the rehabilitation counselor recommended scheduling a basic computer skills assessment and typing test to determine if appellant would benefit from pre vocational training.

On March 7, 2021 the rehabilitation counselor noted that appellant did not attend a scheduled computer skills assessment due to dizziness from a new medication. Appellant informed her that he was relocating back to Germany and would not commit to keeping a new appointment if one was scheduled.

On March 16, 2021 the rehabilitation counselor noted in a rehabilitation action report (Form OWCP-44) that appellant had obstructed the rehabilitation process by failing to appear at a scheduled basic computer skills test on March 1, 2021 and at a rescheduled appointment on March 15, 2021. She indicated that he had not responded to her request to contact her by March 12, 2021 if he was unable to keep the March 15, 2021 appointment for any reason.

In a March 26, 2021 report and e-mail correspondence dated March 29, 2021, the rehabilitation counselor informed OWCP that appellant advised her that he felt any testing should be performed on a military base or community college since he is a federal employee. She stated that the bottom line was that appellant did not plan on cooperating with vocational rehabilitation, and that he became more argumentative each time they spoke. Appellant had related that he retained the services of an attorney and planned on returning to Germany at some point after April 15, 2021.

In a letter dated April 7, 2021, OWCP 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 refused to participate in an OWCP-approved basic computer skills assessment and typing test recommended by the vocational rehabilitation counselor. OWCP provided appellant 30 days to undergo the basic computer skills and typing that OWCP had approved. 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.

In a memorandum of telephone call (Form CA-110) dated May 7, 2021, appellant left a voicemail stating that he had attempted to contact his rehabilitation counselor and had not heard back from her. He stated that he was willing to take the basic computer skills test. In e-mail correspondence dated May 10, 2021, the rehabilitation counselor denied receiving any calls or messages from appellant. She indicated that she would contact him to confirm his willingness to take the computer skills test.

On May 17, 2021 the rehabilitation counselor noted in a Form OWCP-44 that appellant had been contacted on May 11, 2021. She scheduled appellant for a computer assessment on May 24, 2021 at the Goodwill Training Center in Pensacola, Florida.

The rehabilitation counselor, in a May 26, 2021 Form OWCP-44, noted that appellant arrived at the Goodwill Training Center on May 24, 2021 and informed them he was not feeling well. Appellant did not take the training assessment and did not contact his rehabilitation counselor to reschedule the testing.

By decision dated June 17, 2021, OWCP reduced appellant's compensation to zero, effective June 18, 2021 pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, for his failure to cooperate with vocational rehabilitation without good cause.

In a letter dated June 23, 2021, appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In a report dated August 16, 2021, Dr. Ricky L. Bellard, a Board-certified family medicine physician, diagnosed chronic nonmalignant pain in the back and knee. He advised that appellant was limited in his ability to sit or stand for prolonged periods of time due to the diagnosed conditions. Appellant told Dr. Bellard that he had attended the mandated vocational rehabilitation assessment in good faith, but due to an exacerbation of his low back pain that he was unable to sit or stand both prior to and through the assessment. Dr. Bellard requested that appellant be provided with a reasonable accommodation for the vocational rehabilitation testing.

On September 16, 2021 OWCP received a July 30, 2021 Form OWCP-5c from Dr. Bellard in which he diagnosed right knee meniscus tear, degenerative disc disease exacerbation, and lower back pain. Dr. Bellard found appellant capable of working four hours per day in a sedentary job with restrictions. The restrictions included one to four hours of interrupted sitting, up to two hours of walking, up to one hour of standing, and no twisting, bending/stooping, pushing, pulling, lifting, squatting, kneeling, or climbing.

A telephonic hearing before an OWCP hearing representative was held on November 3, 2021.⁵

By decision dated December 6, 2021, an OWCP hearing representative affirmed the June 17, 2021 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to establish that the disability has ceased or lessened before it may terminate or modify compensation benefits.⁶ Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.⁷

Section 8113(b) of FECA⁸ provides:

“If an individual without good cause fails to apply for an undergo vocational rehabilitation when so directed under section 8104 of this title, the Secretary, on review under section 8128 of this title 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.”⁹

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 provides:

“(a) 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 or her wage-earning capacity had he or she undergone vocational rehabilitation. [It] will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with the OWCP nurse and the [employing establishment]. The reduction will remain in

⁵ On August 31, 2021 OWCP again referred appellant for vocational rehabilitation. However, a ppellant again failed to participate.

⁶ *S.B.*, Docket No. 19-0781 (issued February 2, 2022); *S.C.*, Docket No. 19-1680 (issued May 27, 2020); *Betty F. Wade*, 37 ECAB 556 (1986).

⁷ 5 U.S.C. § 8104(a).

⁸ *Supra* note 2.

⁹ 5 U.S.C. § 8113(b).

effect until such time as the employee acts in good faith to comply with the direction of OWCP.

“(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.”¹⁰

ANALYSIS

The Board finds that OWCP met its burden of proof to reduce appellant’s compensation, effective June 18, 2021, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 for his failure to cooperate with vocational rehabilitation without good cause.

Upon receiving medical evidence that appellant was not totally disabled for all work, but was capable of performing sedentary work with permanent restrictions, OWCP properly referred him to vocational rehabilitation services on October 23, 2020. Initially, the rehabilitation counselor reported of her difficulty reaching appellant by telephone and that he did not respond to an e-mail she had sent. She noted that he did not attend a scheduled basic computer skills test on March 1, 2021, or attend the rescheduled March 15, 2021 appointment. On March 27, 2021 the rehabilitation counselor noted that it did not appear that appellant would cooperate with vocational rehabilitation, and that he became more argumentative each time they talked.

In an April 7, 2021 letter, 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. It afforded him 30 days to participate in vocational rehabilitation services or provide good cause for his noncompliance. On May 17, 2021 the rehabilitation counselor noted that she had contacted appellant on May 11, 2021 and computer assessment had been scheduled for May 17, 2021. On May 26, 2021 she advised that he appeared at the testing site, but did not take the test stating he felt unwell. The rehabilitation counselor noted that appellant had not contacted her to reschedule the assessment.

Appellant’s failure without good cause to participate in a basic computer and typing test, as recommended by his rehabilitation counselor and approved by OWCP, to help in determining whether prevocational training would be beneficial and in developing his rehabilitation plan constitutes a failure to participate in the early, but necessary, stages of a vocational rehabilitation

¹⁰ 20 C.F.R. § 10.519.

effort.¹¹ OWCP's 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 in the absence of evidence to the contrary, that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity.¹² Appellant did not submit evidence to refute such an assumption, and OWCP had a proper basis upon which to reduce his disability compensation to zero.

Appellant did not submit any evidence that he was medically unable to participate in the two-hour vocational rehabilitation testing on May 17, 2021. The only evidence submitted was a July 30, 2021 Form OWCP-5c and August 16, 2021 report from Dr. Bellard. Dr. Bellard provided work restrictions on the July 30, 2021 Form OWCP-5c. In his August 16, 2021 report, he noted that appellant attended the mandated assessment, but appellant had related that he was unable to complete it due to an aggravation of his back pain. Dr. Bellard requested that appellant be provided an accommodation for taking the vocational rehabilitation testing. He did not, however, offer any opinion that appellant was unable to participate in the basic computer skills and the typing test on May 17, 2021. Dr. Bellard restricted appellant to sedentary work, with one to four hours of interrupted sitting. The rehabilitation counselor indicated that while the computer skills and typing test could take up to two hours to complete, appellant could sit or stand as needed, and he could also leave the test site as soon as he had completed the test.

Appellant was given appropriate notification of the sanctions for continuing to refuse to cooperate with the rehabilitation program in the early stages, but failed, without good cause, to comply with these rehabilitation efforts. The Board finds, therefore, that OWCP properly reduced his compensation benefits to zero for his failure to cooperate with vocational rehabilitation without good cause. Accordingly, the reduction will remain in effect until such time as appellant acts in good faith to comply with the direction of OWCP.¹³

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(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP has met its burden of proof to reduce appellant's compensation, effective June 18, 2021, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 for his failure to cooperate with vocational rehabilitation without good cause.

¹¹ 20 C.F.R. § 10.519(b). *See also* *E.W.*, Docket No. 19-0963 (issued January 2, 2020); *R.M.*, Docket No. 16-0011 (issued February 11, 2016); *Conard Hightower*, 54 ECAB 796 (2003).

¹² *Id.* at § 10.519(c).

¹³ *Supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the December 6, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 10, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board