United States Department of Labor
Employees' Compensation Appeals Board

L.F., Appellant	)	
and	)	**Docket No. 10-1119**
	)	**Issued: February 1, 2011**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Goleta, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 5, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 9, 2009 merit decision reducing his compensation for failure to cooperate with vocational rehabilitation efforts and the December 18, 2009 nonmerit decision denying his request for merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.[1]

ISSUES

The issues are: (1) whether the Office properly reduced appellant's compensation for failure to cooperate with vocational rehabilitation efforts; and (2) whether it properly refused to reopen his case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

[1] The Board notes that appellant did not request a review of the Office's March 3, 2010 schedule award decision. Therefore, the Board will not address the merits of that decision.

FACTUAL HISTORY

On August 31, 2004 appellant, then a 49-year-old security screener, filed a traumatic injury claim alleging that he sustained injuries to his neck and left shoulder while pushing bags through an x-ray machine. The Office accepted his claim for cervical strain and adhesive capsulitis of the left shoulder and paid compensation for wage loss on the periodic rolls.[2] On February 1, 2008 it referred appellant for vocational rehabilitation services.

Appellant's treating physicians provided work restrictions relating to his accepted conditions. On April 22 , 2008 Dr. Gary Lieb, a Board-certified internist, restricted him from bending or stooping, driving, sitting for more than two hours at a time or lifting more than 10 pounds. On April 24, 2008 Dr. Charles Brenner, a Board-certified orthopedic surgeon, provided restrictions relating to appellant's accepted carpal tunnel and trigger finger conditions, including working no more than four hours a day, lifting a maximum of 10 pounds and no repetitive movements with the left hand.

On April 29, 2008 Dr. Robert M. Ruth, a Board-certified orthopedic surgeon, provided work restrictions, as requested by the Office. With respect to his left shoulder tendinitis, appellant was precluded from performing overhead activities with his left upper extremity or lifting more than 10 pounds. Regarding his right wrist and hand injuries, lifting, pulling and pushing was limited to 10 pounds, with no repetitive right hand gripping or grasping activities. Driving was limited to one hour a day, including commuting and driving at work.

The vocational rehabilitation counselor identified two positions through a labor market survey, which she deemed to be within appellant's work restrictions, namely, security supervisor and security dispatcher. Appellant was also placed in a custom learning program at Technology Development Center of Ventura, so that he could obtain computer skills training. The program was to run from May 12 to August 1, 2008 and appellant was to attend class daily from 10:00 a.m. to 3:00 p.m., with an hour break for lunch. The training program did not require any overhead lifting, heavy grasping or gripping, or lifting, pushing or pulling objects weighing over 10 pounds. Appellant was to perform keyboarding tasks. He would be permitted to take breaks during class if needed and "at no time would he be required to engage in repetitive hand movements for a period of greater than two hours during his training."

On May 8, 2008 the rehabilitation counselor forwarded copies of job descriptions for the targeted jobs of security guard dispatcher and security supervisor, as well as the school schedule for the proposed computer training program, to Dr. Ruth for his review. The counselor asked Dr. Ruth to provide an opinion on whether appellant was able to perform the duties of the proposed positions and to participate in the proposed training program. On May 8, 2008 Dr. Ruth opined that appellant could perform the duties of the positions of dispatcher and

[2] The Office accepted the following conditions under prior claims: groin strain under an April 22, 2005 traumatic injury claim; (File No. xxxxxx082) right wrist sprain, right carpal tunnel syndrome, right trigger finger with surgery and right secondary malignant neoplasm under a February 10, 2004 occupational disease claim; (File No. xxxxxx457) right cervical and right groin strains under a December 29, 2003 traumatic injury claim; and short form closure for lumbar strain, resolved under a March 29, 2003 traumatic injury claim. All of appellant's claims were consolidated for more efficient handling, with File No. xxxxxx159 serving as the master file.

superintendent for eight-hour workdays. He also opined that appellant could tolerate the training program with respect to his upper extremity limitations.

On May 14, 2008 the Office approved the vocational rehabilitation plan and informed appellant of its determination that the duties of dispatcher and security supervisor were within his medical restrictions. It would provide 90 days of placement services after any necessary training. The Office also approved the proposed training plan with Technology Development Center of Ventura. It further advised appellant that he was to cooperate fully with the prescribed rehabilitation plan, so that he could return to work as soon as possible, and that failure to cooperate would result in a reduction in his compensation benefits.

Appellant attended the vocational training program from May 12 to 30, 2008. On June 3, 2008 he alleged that he had experienced a change in his medical condition. Appellant complained of "keyboarding issues" and depression and informed his rehabilitation counselor that he would not attend school pending his referral to a therapist.

The Office advised appellant on June 5, 2008 that his actions constituted refusal to participate in the approved training program and that he had not provided a medical reason of his inability to participate. It directed him to contact both the Office and the rehabilitation specialist within 30 days to make a good faith effort to participate in the rehabilitation effort. The Office notified appellant of 5 U.S.C. § 8113(b) and the implementing regulations and gave him 30 days to show good cause for not participating in the effort.

Appellant submitted a June 16, 2008 report from Dr. Brenner who stated that appellant was depressed because he had been unable to complete his four-hour per day computer training course, which required two hours of typing. He complained of pain and swelling in his wrists and arms, as well as intermittent numbness and scar discomfort. On examination, there was tenderness around the left carpal tunnel release scar. Dr. Brenner found normal two-point discrimination to within six millimeters in all digits. Appellant lacked one centimeter touching from the tip of the thumb to the base of the little finger. Jaymar grip strengths were 45 and 25 on the right and left respectively; 3-point and lateral pinch strengths were 12/21 on the right and 10/14 on the dominant left. Dr. Brenner diagnosed status post left carpal tunnel release and left trigger thumb release. He recommended that appellant be restricted from lifting more than 10 pounds and from repetitive use of his hands. Dr. Brenner opined that any vocational rehabilitation should limit him to occasional keyboarding work, for no more than one hour per day.

On June 17, 2008 Dr. Lieb noted that appellant had been out of school since May 30, 2008 due to back pain. He stated that appellant was unable to sit long enough to participate, as "this exacerbates symptoms." On July 8, 2008 Dr. Lieb noted that appellant had complaints of vertigo. The record contains a report of a May 28, 2008 magnetic resonance imaging (MRI) scan of the lumbar spine, a report of a June 24, 2008 MRI scan of the cervical carotid artery and a report of a July 8, 2008 MRI scan of the brain.

In a decision dated July 9, 2008, the Office found that appellant had refused to participate in vocational rehabilitation. It determined that he would have been able to perform the duties of security guard at a rate of $540.00 per week had he completed his training program. Therefore,

the Office reduced appellant's compensation benefits based on 66 2/3 percent of the difference between his pay rate as determined for compensation purposes and what his wage-earning capacity would have been had he cooperated with vocational rehabilitation efforts. The claims examiner stated that Dr. Brenner's June 16, 2008 report was "not convincing" and that Dr. Lieb's June 17, 2008 report was not sufficient because "pain itself is not compensable."

On July 22, 2008 appellant requested reconsideration.

Appellant submitted notes and reports from Dr. Kent L. Coleman, a clinical psychologist, for the period June 9 to July 31, 2008. On June 9, 2008 Dr. Coleman diagnosed adjustment disorder; pain disorder with both medical and psychological factors. On July 31, 2008 he opined that appellant was temporarily disabled and "unable to seek employment" due to a mental health condition" from July 30 to August 30, 2008.

Appellant provided work excuses and disability slips from Dr. Lieb for the period March 20 to August 12, 2008. On March 20, 2008 Dr. Lieb diagnosed chronic lower back pain, herniated disc and ongoing vertigo. On May 19, 2008 he noted that physical therapy was not helpful regarding appellant's back pain. On August 12, 2008 Dr. Lieb stated that appellant was unable to participate in the computer training class until November 1, 2008 due to back pain, which was "worse when sitting."

In an August 4, 2008 report, Dr. Thomas R. Stephenson, a Board-certified physiatrist, stated that appellant had been experiencing radicular low back pain for a year, with increased symptoms with prolonged sitting. He noted the results of an MRI scan of the lumbar spine, which showed degenerative disc disease and stenosis. Appellant's pain was worse on the right side, suggesting probable bilateral L5 right impingement. Examination revealed lumbosacral spasm, tenderness to palpation over the right lumbosacral spine and discomfort with lateral tilts on range of motion examination. Dr. Stephenson diagnosed lumbar radiculopathy, spinal stenosis, degeneration of the lumbosacral intervertebral disc and chronic pain syndrome.

In a decision dated October 22, 2008, the Office denied modification of the July 9, 2008 decision. It found the evidence failed to demonstrate that appellant was unable to perform the duties of security guard dispatcher; nor did it provide any other reason to modify the wage-earning capacity determination. The claims examiner stated that conditions that arise subsequent to the date of a work-related injury cannot be considered in a modification of a wage-earning capacity determination.

On November 5, 2008 appellant again requested reconsideration.

In a September 19, 2008 report, Dr. Coleman reiterated his diagnoses of adjustment disorder and chronic pain disorder. He opined that appellant was unable to work and that "training probably needs to be in divided sessions due to pain." On March 2, 2009 Dr. Coleman stated that appellant was still unable to work and that training should be in divided sessions.

On February 2, 2009 Dr. Stephenson stated that appellant could participate in a modified work program beginning February 2, 2009 with restrictions. He recommended that appellant work no more than four hours per day, lift no more than 25 pounds, have one- to two-minute stretch breaks every hour and avoid bending and twisting at the waist.

By decision dated March 13, 2009, the Office denied modification of its prior decisions. It noted that appellant's lower back condition, which began in 2007, and his depression, which began in 2008, were irrelevant to the issue at hand.

On June 10, 2009 appellant requested reconsideration.

Appellant submitted an April 3, 2009 report from Dr. Christopher C. Kessler, a Board-certified psychiatrist, who diagnosed pain disorder associated with general medical conditions and adjustment disorder with mixed emotional factors. Dr. Kessler stated that appellant's current stressors were moderate to severe and together with his multiple medical problems, prevented him from working at his job.

On May 20, 2009 Dr. Coleman opined that appellant was totally disabled, due to the amount of time and treatment interventions. His prior recommendation that appellant could engage in divided training sessions was based on his belief at that time that the pain would be successfully treated, so that he would be able to concentrate. Based on test results and examination, Dr. Coleman found appellant to be manifesting "pain associated with psychological factors and medical condition."

In a May 26, 2009 report, Dr. Ruth reiterated his prior work restrictions. In a July 23, 2009 report, he provided examination findings, noting that appellant had ongoing intermittent left hand numbness. Noting that appellant had other permanent restrictions for other industrial claims, Dr. Ruth opined that appellant could return to modified duty, with no heavy or repetitive or forceful use of the left hand or wrist.

In a September 9, 2009 decision, the Office denied modification of its prior decisions. It found that the evidence was insufficient to establish that appellant was unable to participate in vocational rehabilitation or that the established wage-earning capacity should be modified.

On September 15, 2009 appellant again requested reconsideration. In support of his request, he submitted a July 20, 2009 report from Dr. Coleman, who reiterated his opinion that appellant was unable to work or attend training. On July 21, 2009 Dr. Lieb opined that appellant suffered from disabling, chronic back and leg pain, vertigo and depression. On August 31, 2009 Dr. Ruth reiterated his opinion that appellant could work with the restrictions previously provided. Appellant also submitted an undated document reflecting that he was receiving payments pursuant to a Veterans Administration disability pension for conditions relating to the cervical spine, bilateral wrists, lumbar spine, left shoulder hypertension and adjustment disorder.

By decision dated December 18, 2009, the Office denied appellant's request for merit review.

LEGAL PRECEDENT

Section 8104(a) of the Federal Employees' Compensation Act provides: The [Office] may direct a permanently disabled individual whose disability is compensable under this

subchapter to undergo vocational rehabilitation. The Secretary shall provide for furnishing the vocational rehabilitation services.[3]

Section 8113(b) of the Act provides:

> "If an individual without good cause fails to apply for and 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 have probably been his wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary."[4]

Title 20 of the Code of Federal Regulations section 10.519 of the implementing regulations provide in pertinent part:

> "Under 5 U.S.C. § 8104(a), [the Office] may direct a permanently disabled employee to undergo vocational rehabilitation. To ensure that vocational rehabilitation services are available to all who might be entitled to benefit from them, an injured employee who has a loss of wage-earning capacity shall be presumed to be permanently disabled, for purposes of this section only, unless and until the employee proves that the disability is not permanent. 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, [the Office] will act as follows:
>
> > (a) Where a suitable job has been identified, [the Office] 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. [The Office] will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meeting with the [Office] 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 [the Office]."[5]

Given the variety of reasons which claimants may offer for noncooperation, and the circumstances in which these reasons may be offered, it is impossible to establish a definitive list of acceptable and unacceptable reasons for lack of cooperation. In general, however, a claimant is expected to treat the vocational rehabilitation effort as seriously as employment and reasons for lack of cooperation should be considered in this light. A situation which would be

[3] 5 U.S.C. § 8104(a).

[4] *Id.* at § 8113(b).

[5] 20 C.F.R. § 10.519.

considered a valid reason for absence from work (*e.g.*, an illness) may be considered good cause for failure to cooperate with vocational rehabilitation for a reasonable period of time.[6]

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[7] Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[8]

ANALYSIS

The Board finds that appellant established good cause for his failure to participate in vocational rehabilitation. Therefore, the Office improperly reduced his compensation for failure to cooperate with vocational rehabilitation efforts.

The Office approved the vocational rehabilitation plan on the basis of the May 8, 2008 note from Dr. Ruth, which reflected that appellant could tolerate the training program with respect to his upper extremity limitations. Appellant attended the training program from May 12 to 30, 2008. On June 3, 2008 he alleged that he had experienced a change in his medical condition. Appellant complained of "keyboarding issues" and depression and informed his rehabilitation counselor that he was unable to attend school.

Appellant submitted medical evidence supporting his inability to continue his participation in the computer training program. On June 16, 2008 Dr. Brenner stated that appellant was depressed because he had been unable to complete his four-hour per day computer training course, which required two hours of typing. He provided examination findings reflecting reduced grip strength, reduced range of motion and tenderness around the left carpal tunnel release scar. Dr. Brenner recommended that appellant be restricted from lifting more than 10 pounds and from repetitive use of his hands and opined that any vocational rehabilitation should limit him to occasional keyboarding work, for no more than one hour per day. The Board notes that requirements of the four-hour training program, which included up to two hours of repetitive hand movements, exceeded these restrictions.

On March 20, 2008 Dr. Lieb diagnosed chronic lower back pain, herniated disc and ongoing vertigo, based on examination and test results. On June 17, 2008 he opined that appellant was unable to participate in his training classes because sitting for extended periods of time exacerbated his lower back pain. He provided work excuses and disability slips reflecting that appellant was unable to work from March 20 to August 12, 2008. On August 12, 2008 Dr. Lieb stated that appellant was unable to participate in the computer training class until November 1, 2008 due to back pain, which was "worse when sitting." Appellant's inability to remain in a seated position for a period of time is relevant to his ability to attend and participate in a keyboarding class. As noted, a situation which would be considered a valid reason for

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.12.a (November 1996).

[7] 5 U.S.C. § 8102(a).

[8] *Harold S. McGough*, 36 ECAB 332 (1984).

absence from work may be considered good cause for failure to cooperate with vocational rehabilitation.[9]

On August 4, 2008 Dr. Stephenson stated that appellant had been experiencing radicular low back pain for a year, with increased symptoms with prolonged sitting. He noted the results of an MRI scan of the lumbar spine, which showed degenerative disc disease and stenosis. Dr. Stephenson provided examination findings and diagnosed lumbar radiculopathy, spinal stenosis, degeneration of the lumbosacral intervertebral disc and chronic pain syndrome. While his report does not contain an opinion that appellant was unable to participate in vocational rehabilitation, it strongly suggests that he would be unable to sit for the four-hour period of time required for daily computer classes.

On June 9, 2008 Dr. Coleman diagnosed adjustment disorder and pain disorder with both medical and psychological factors. On July 31, 2008 he opined that appellant was temporarily disabled and "unable to seek employment" due to a mental health condition" from July 30 to August 30, 2008. On September 19, 2008 and March 2, 2009 Dr. Coleman opined that appellant was unable to work due to diagnoses of adjustment disorder and chronic pain disorder and that training should be in divided sessions due to pain. Ultimately, on May 20, 2009 he opined that appellant was totally disabled, due to the amount of time and treatment interventions. Dr. Coleman prior recommendation that appellant could engage in divided training sessions was based on his belief at that time that the pain would be successfully treated, so that he would be able to concentrate. While his reports are insufficient to establish total disability for work, they support appellant's claim that he was unable to attend training due to chronic pain.[10]

The Office found that the medical evidence supported appellant's ability to participate in the vocational rehabilitation program. The Board finds, however, that appellant has submitted evidence that he was unable to participate in the designated vocational rehabilitation program.[11] The Office has the burden of proof to justify any modification of appellant's compensation for wage loss, including any reduction under section 8113(b) of the Act.[12] Appellant submitted probative medical evidence supporting his position. The Office took no further steps to develop the medical evidence or to clarify appellant's ability to attend training. As such, the Board finds that the Office did not meet its burden to justify the penalty under section 8113(b).

[9] *Supra* note 6.

[10] On April 3, 2009 Dr. Kessler diagnosed pain disorder associated with general medical conditions and adjustment disorder with mixed emotional factors and stated that appellant's current stressors were moderate to severe and, together with his multiple medical problems, prevented him from working at his job. His report does not establish disability in July 2008; it does, however, support appellant's continued pain disorder.

[11] *See Yusuf D. Amin*, 47 ECAB 804 (1996) (where a psychiatrist and a clinical psychologist substantiated that the employee's headaches, as well as his accepted emotional condition, caused marked interference with his ability to comprehend and follow instructions and marked impairment of other skills, such as the ability to make generalizations or decisions, necessary to carry out vocational testing activities, the Board held that, as appellant did substantiate his allegation of inability to participate in vocational rehabilitation with medical evidence, he did establish good cause for his failure to fully cooperate with vocational rehabilitation).

[12] *James B. Christenson*, 47 ECAB 775, 778 (1996); *Patricia A. Keller*, 45 ECAB 278 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992). *Harold S. McGough*, 36 ECAB 332 (1984).

CONCLUSION

The Board finds that the Office improperly reduced appellant's compensation for failing to cooperate with vocational rehabilitation efforts.[13]

ORDER

IT IS HEREBY ORDERED THAT the September 9, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 1, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[13] In light of the Board's ruling on the first issue, it is unnecessary to address the second issue.