United States Department of Labor
Employees' Compensation Appeals Board

J.A., Appellant	)	
and	)	**Docket No. 10-1248**
	)	**Issued: April 21, 2011**
DEPARTMENT OF JUSTICE, FEDERAL CORRECTIONAL INSTITUTE, Edgefield, SC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On April 1, 2010 appellant filed a timely appeal from a March 16, 2010 decision of the Office of Workers' Compensation Programs concerning the reduction of his compensation. 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.

ISSUE

The issue is whether the Office properly reduced appellant's compensation under 5 U.S.C. § 8113(b) to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts.

On appeal, appellant contends his multiple conditions and constant pain adversely impacts his ability to work.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 26, 2003 appellant, then a 38-year-old total control officer, filed a traumatic injury claim alleging that on September 25, 2003 he sustained a right ankle fracture while involved in a traffic accident on the way to work scheduled overtime. The Office accepted the claim for right heel fracture and right ankle open subtalar dislocation, which was subsequently expanded to include ankle and foot traumatic arthropathy and tendon contracture.[2]

On February 18, 2008 Dr. J. William Thurmond, III, a treating physician, opined that appellant was totally disabled from his date-of-injury job because of an employment-related right ankle injury, diminished eye sight, bilateral hearing loss and a left hand injury. Physical restrictions include no walking more than 15 minutes at a time; no standing more than 15 to 30 minutes and lifting up to 10 to 15 pounds. Dr. Thurmond indicated that appellant had difficulty with bending, stooping, driving a car and running.

On April 21, 2008 Dr. James F. Bethea, a second opinion Board-certified orthopedic surgeon, diagnosed status post right open fracture calcis injury. In an attached work capacity evaluation form, he indicated that appellant was capable of returning to work, with no more than two hours of walking and standing, no squatting, kneeling, climbing, bending/stooping or operating a motor vehicle, two hours of pulling and pushing up to 20 pounds and two hours of lifting up to 20 pounds.

On June 10, 2008 the Office referred appellant to Dr. Kevin J. O'Shea, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Thurmond and Dr. Bethea on the issue of appellant's medical condition and work capacity.

On June 24, 2008 Dr. O'Shea, based upon a review of the medical record, statement of accepted facts and physical examination, diagnosed healed open calcaneus fracture with displacement, significant ankle joint and subtalar stiffness and post-traumatic talonavicular and subtalar joint arthritis. He opined that appellant was only capable of performing sedentary work as appellant was incapable of heavy lifting and prolonged walking or standing. In an attached work capacity evaluation form, Dr. O'Shea indicated that appellant was capable of one hour of walking and standing and no squatting, kneeling, climbing or operating a motor vehicle.

On November 3, 2008 the Office referred appellant to Sandra Atkinson, a vocational rehabilitation counselor, for development of a vocational rehabilitation program, including a skills assessment, vocational testing and a placement plan within Dr. O'Shea's restrictions. The rehabilitation counselor developed a rehabilitation plan on June 18, 2009. The counselor proposed clerical training and advised that appellant could begin a four-week clerical program class at Easter Seals of Savannah, which was scheduled for August 17 to September 25, 2009.

In an August 4, 2009 report, the vocational rehabilitation counselor conducted a labor market study for the identified position of appointment clerk. The Department of Labor, *Dictionary of Occupational Titles (DOT)* describes the position of appointment clerk, file

[2] By decision dated March 1, 2005, the Office granted appellant a schedule award for 20 percent permanent impairment of the right leg.

number xxxxxx010, as scheduling appointments by telephone, mail or in person and recording date and time of appointment in an appointment book; indicating when an appointment has been cancelled, may write or telephone to remind clients of their appointments, may receive payments for services provided and record them in a ledger, may operate a switchboard and may receive callers. The Department of Labor, *DOT* describes the physical requirements as sedentary exerting lifting, pushing, pulling or carrying up to 10 pounds occasionally, mainly sitting and possible brief periods of standing or walking. The vocational rehabilitation counselor noted that short-term training was required for the position. The rehabilitation counselor further reiterated her June 18, 2009 report findings that the position was available in sufficient numbers within a 50-mile driving radius from appellant's home. She noted an hourly rate of $8.00.

On August 6, 2009 the Office informed appellant that it approved the clerical training program for the position of appointment clerk. It noted that based on the labor market survey at the end of the training he would be capable of earning $8.00 per hour or $320.00 per week.

In a memorandum to file dated August 31, 2009, Georgiana Farmer, the rehabilitation specialist, indicated that appellant began his training on August 24, 2009 with Easter Seals. On September 2, 2009 the rehabilitation counselor telephoned the Office to advise that appellant attending training beginning September 24, 2009, left after a lunch break on September 25, 2009 and has not returned to the training program. Ms. Farmer recommended sanctions for obstructing vocational rehabilitation efforts.

On September 2, 2009 appellant indicated that he wanted to cancel the training program as it was an hour and a half away and that he would apply for disability retirement.

By letter dated September 3, 2009, the Office notified appellant that it proposed to reduce his compensation based on his capacity to earn wages as a receptionist, order clerk or appointment clerk earning $320.00 per week. It noted that his noncooperation in vocational rehabilitation and provided him 30 days within which he must undergo the approved training program or show good cause.

In a letter dated September 6, 2009, appellant stated that he was put on disability retirement by the Federal Employees' retirement system. He also contended that his post-traumatic stress disorder and right leg pain due to his arthritis made training difficult. Appellant stated that dealing with people makes him stressed, that he has trouble hearing with his hearing aid and that his medication makes him drowsy.

On October 19, 2009 Dr. Thurmond reiterated his findings and limitations noted in his prior report of February 18, 2008.

By decision dated March 16, 2010, the Office reduced appellant's compensation pursuant to section 8113(b) of the Act based on his capacity to earn wages as an appointment clerk. It noted that he impeded the rehabilitation effort without good cause. The Office reduced

appellant's wage-loss benefits because the evidence established that the constructed position of appointment clerk represented his wage-earning capacity.[3]

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.[4] Section 8113(b) of the Act provides that, if an individual, without good cause, fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of the Act (5 U.S.C. § 8104), the Office, 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 Office.[5]

Section 10.519 of Title 20 of the Code of Federal Regulations details the actions the Office 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(a) provides, in pertinent part:

> "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. [It] will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings 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]."[6]

ANALYSIS

The Office accepted that appellant sustained right heel fracture and right ankle open subtalar dislocation, ankle and foot traumatic arthropathy and tendon contracture as a result of his September 25, 2003 employment injury. On 24, 2008 Dr. O'Shea, the impartial Board-certified orthopedic surgeon, provided permanent work restrictions indicating that appellant was capable of performing sedentary work.

[3] The Office used the *Shadrick* formula (derived from *Albert Shadrick*, 5 ECAB 376 (1953), codified in 20 C.F.R. § 10.403) to calculate appellant's wage-earning capacity. This calculation included a figure for the amount appellant would have earned as an appointment clerk.

[4] *S.F.*, 59 ECAB 642 (2008); *Howard L. Miller*, 56 ECAB 697 (2005).

[5] 5 U.S.C. § 8113(b); *J.E.*, 59 ECAB 606 (2008); *Sean C. Dockery*, 56 ECAB 652 (2005).

[6] 20 C.F.R. § 10.519(a); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.17 (February 2011).

Appellant began participating in a vocational rehabilitation plan developed by his counselor, Ms. Atkinson.

The Board finds that appellant obstructed his vocational rehabilitation plan. Ms. Atkinson instructed him to attend a training program at the Easter Seals to provide him with the basic clerical and computer skills needed to perform the position of receptionist or similar jobs. On September 24, 2009 appellant began to attend the classes, but left after a lunch break on September 25, 2009. He informed the Office that he intended to take disability retirement instead of returning to the training program. The Office had a rehabilitation counselor prepare a labor market survey which confirmed the availability and wage rate of an appointment clerk. Following this, the Office on September 3, 2009 proposed to reduce his compensation due to his failure to participate in vocational rehabilitation.

The Board finds that appellant did not show good cause for obstruction of his vocational rehabilitation plan. Appellant claimed that his medical condition, particularly his post-traumatic stress disorder and leg arthritis, prevented him from sitting through the classes at Easter Seals and his inability to deal with people. He submitted a medical report from Dr. Thurmond, an attending physician, which reiterated the limitations he noted in a February 18, 2008 report. Dr. Thurmond, however, provided no opinion regarding appellant's inability to sit for vocational rehabilitation classes or that appellant was unable to work.

The Office properly found that the reduction of appellant's compensation should be based on the determination that he probably would have been able to earn wages as an appointment clerk if he had not failed to participate in his vocational rehabilitation program.[7] Under 5 U.S.C. § 8113(b) the Office properly reduced his compensation to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts.

On appeal, appellant contends that his constant pain impairs his mobility and ability to work. He also contends that his degenerative joint disease, arthritis, tendon contracture, post-traumatic arthritis, sciatic nerve and soft tissue dame of his nerve and fractures of his right leg and back trauma render him disabled from working. The record contains no medical evidence supporting appellant's contention that he is totally disabled. In the absence of any evidence that the position of appointment clerk is unsuitable or that he is totally disabled due to his medical conditions, he has not established that the position is unsuitable or that he is disabled from working.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation under 5 U.S.C. § 8113(b) to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts.

[7] The rehabilitation specialist found that the position of an appointment clerk was reasonably available in appellant's commuting area with weekly pay of $320.00. The Office properly applied the *Shadrick* formula to calculate appellant's compensation based on the new wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 16, 2010 is affirmed.

Issued: April 21, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board