

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

M.D., Appellant)	
)	
and)	Docket No. 24-0239
)	Issued: June 27, 2024
DEPARTMENT OF THE ARMY, LEXINGTON)	
BLUEGRASS ARMY DEPOT, Richmond, KY,)	
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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On January 8, 2024 appellant filed a timely appeal from a December 18, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 appellant met his burden of proof to establish that his failure to cooperate with the early stages of vocational rehabilitation was justified.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On February 9, 1994 appellant, then a 42-year-old boiler operator, filed an occupational disease claim (Form CA-2) alleging that he sustained carpal tunnel syndrome causally related to factors of his federal employment. OWCP accepted the claim for bilateral carpal tunnel syndrome. It paid appellant wage-loss compensation for total disability beginning August 31, 1995.³

By decisions dated September 12, 2001 and May 7, 2002, OWCP reduced appellant's compensation benefits based on its finding that he had the capacity to work as a telecommunicator.

Appellant appealed to the Board. By decision dated January 29, 2003, the Board reversed OWCP's loss of wage-earning capacity determination after finding that the record contained a conflict of opinion regarding his work capacity.⁴

By decision dated June 4, 2013, OWCP terminated appellant's compensation and entitlement to a schedule award effective that date as he refused an offer of suitable employment under 5 U.S.C. § 8106(c)(2). By decision dated November 26, 2013, an OWCP hearing representative affirmed the June 4, 2013 decision. By decision dated April 23, 2014, OWCP denied appellant's request for a review of the written record as he had previously requested and received a telephonic hearing. By decisions dated January 14 and February 9, 2015, it denied his reconsideration requests as untimely and insufficient to demonstrate clear evidence of error.

On February 18, 2015 appellant appealed to the Board. By decision dated August 20, 2015, the Board set aside OWCP's January 14 and February 9, 2015 decisions.⁵ The Board found that appellant had timely requested reconsideration of the November 26, 2013 decision in correspondence received October 31, 2014. The Board remanded the case for OWCP to apply the standard applicable to timely reconsideration requests.

By decision dated September 30, 2015, OWCP denied modification of its November 26, 2013 decision terminating appellant's compensation for the refusal of suitable work under 5 U.S.C. § 8106(c)(2).

² Docket No. 23-2377 (issued June 5, 2023); Docket No. 02-1754 (issued January 29, 2003); Docket No. 15-0811 (issued August 20, 2015); Docket No. 16-0102 (issued March 11, 2016); and Docket No. 19-1500 (issued February 24, 2020).

³ Appellant underwent a right carpal tunnel release in January 1996 and a left carpal tunnel release in February 1997.

⁴ *Supra* note 2.

⁵ *Id.*

Appellant appealed to the Board. By decision dated March 11, 2016, the Board reversed the September 30, 2015 OWCP decision.⁶ The Board found that the medical evidence was insufficient to establish that appellant could work for 10 hours per day for 4 days a week and that, consequently, OWCP had failed to discharge its burden of proof to support termination of his wage-loss compensation under 5 U.S.C. § 8106(c)(2).

Following the Board's decision, OWCP reinstated appellant's wage-loss compensation.

On July 30, 2021 OWCP referred appellant, a copy of the case record, and a series of questions to Dr. Anbu K. Nadar, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding appellant's disability status.

In a report dated August 20, 2021, Dr. Nadar discussed appellant's history of injury and provided findings on examination. He diagnosed bilateral carpal tunnel syndrome due to the accepted employment injury. Dr. Nadar opined that appellant had continued residuals of his bilateral carpal tunnel syndrome based on his clinical examination. In a work capacity evaluation (Form OWCP-5c) of even date, he opined that appellant could work 8 hours per day with restrictions on performing repetitive movements of the wrists and elbows for no more than 2 hours and 40 minutes per day, and pushing, pulling, and lifting up to 10 pounds for no more than 2 hours and 40 minutes per day.

OWCP requested that the employing establishment provide appellant a job offer within the restrictions set forth by Dr. Nadar; however, it did not have a suitable position available.

On March 10, 2022 OWCP referred appellant to a vocational rehabilitation counselor for vocational rehabilitation.

In an April 11, 2022 report, the vocational rehabilitation counselor advised that she had contacted appellant on March 24, 2022 for a vocational interview. She noted that he worked as a boilermaker, had graduated high school, but did not possess significant computer skills.

On June 15, 2022 OWCP transferred appellant to a different vocational rehabilitation counselor.

On June 23, 2022 OWCP requested updated medical evidence from appellant's attending physician addressing his current condition and work limitations.

On July 8, 2022 appellant requested a copy of his case file. He further noted that a new vocational rehabilitation counselor had contacted him for a meeting.

In a vocational rehabilitation report dated July 26, 2022, the vocational rehabilitation counselor discussed appellant's employment and educational background. She indicated that she had scheduled vocational testing.

⁶ *Id.*

In an undated letter, the vocational rehabilitation counselor advised appellant that she had scheduled vocational testing for him on August 25, 2022 at 1:00 p.m. at a local library.

In an August 25, 2022 rehabilitation action report (Form OWCP-44), the vocational rehabilitation counselor indicated that appellant had appeared for the scheduled vocational testing, but refused to take the tests.

On September 9, 2022 OWCP notified appellant that he had refused to participate in rehabilitation efforts based on his failure to keep an appointment for vocational testing on August 25, 2022. It afforded him 30 days to make a good faith effort to participate with vocational rehabilitation or to submit additional evidence or argument substantiating that he was unable to participate. OWCP informed appellant that if he refused to cooperate without good cause his compensation would be reduced to zero.

In a September 21, 2022 vocational rehabilitation assessment, the vocational rehabilitation counselor set forth appellant's transferrable skills and again noted that he had refused to participate in vocational testing. She related that there was no sedentary work within his restrictions at his "educational level and skill set. Sedentary jobs require computer use at every level." The vocational rehabilitation counselor suggested that appellant had "no interest in retraining in order to obtain a better paying job."

In a vocational rehabilitation report dated September 22, 2022, the rehabilitation counselor noted that she had received an email from the vocational tester advising that appellant appeared for the test, but refused to take it. She attached a copy of the test with his signature and notes across the pages of the test.

On October 11, 2022 OWCP's vocational rehabilitation specialist related that appellant had refused to participate in vocational testing scheduled for September 21, 2022. Appellant instead wrote his name on the test pages.

By decision dated October 26, 2022, OWCP reduced appellant's compensation to zero for failure to participate in vocational rehabilitation. It found that he had failed to participate in the essential preparatory effort of vocational rehabilitation when he failed to cooperate with vocational testing. OWCP thus found that it was unable to determine what appellant's wage-earning capacity would have been had he undergone testing and vocational rehabilitation. It consequently reduced his compensation to zero under 20 C.F.R. § 10.519.

Appellant appealed to the Board. By decision dated June 5, 2023, the Board affirmed OWCP's October 26, 2022 decision. The Board found that the evidence established that appellant had failed to fully participate in the early, but necessary, stages of vocational rehabilitation without good cause.

On June 20, 2023 appellant requested forms to submit new evidence and request reconsideration. In a June 30, 2023 telephonic response, OWCP explained the reconsideration process.

Appellant submitted a November 13, 2020 Form OWCP-5c.

In statements dated July 7, 2023, appellant requested that OWCP accept the finding by Dr. Luis Pagani, a Board-certified neurosurgeon, in his November 13, 2018 report that he was disabled and the May 18, 2004 disability determination by the Social Security Administration (SSA).⁷ He also submitted a February 1, 2005 finding from the Department of Veterans Affairs (DVA) that he had a service-connected disability.

On July 17, 2023 appellant again requested the proper forms to request reconsideration. He advised that he wanted to submit evidence regarding vocational rehabilitation testing.

Appellant subsequently submitted evidence, including a favorable SSA decision dated May 18, 2004.

On July 18, 2023 appellant requested reconsideration.⁸ Appellant advised that he disagreed with the August 20, 2021 report from Dr. Nadar, the second opinion physician. He asserted that his attending physicians, the DVA, and SSA had found that he was totally disabled from work. Appellant submitted evidence regarding 2022 vocational rehabilitation efforts.

On August 24, 2023 appellant requested reconsideration. He asserted that OWCP failed to allow him to submit supporting medical evidence to Dr. Nadar, who he noted received payment for his examination. Appellant again asserted that the DVA, SSA, and his physicians found that he was disabled. He advised that he did not understand OWCP's September 9, 2022 warning letter or why his continued pain was not an acceptable reason for failing to cooperate. Appellant asserted that the vocational rehabilitation counselor told him his answers were incorrect on vocational testing and made racist comments. He noted that he had signed the vocational test. Appellant questioned whether there was proof that he had missed an appointment with the vocational rehabilitation counselor on September 21, 2022.

On October 19, 2023 appellant again requested reconsideration. He noted that he had submitted an initial reconsideration request on August 22, 2023. Appellant referenced his request for decisions in different case files and other correspondence to OWCP. He questioned why OWCP had denied adjudicating his request for reconsideration.

By decision dated December 18, 2023, OWCP denied modification.

LEGAL PRECEDENT

Once OWCP establishes that appellant's wage-loss compensation should be reduced to zero, pursuant to 5 U.S.C. § 8113(b), for failure to cooperate with the early stages of vocational

⁷ In a November 13, 2018 Form OWCP-5c, Dr. Pagani advised that appellant was unable to work.

⁸ Appellant also submitted letters to OWCP requesting that other file numbers be reopened.

rehabilitation without good cause, the burden shifts to the employee to show that the failure to cooperate was reasonable or justified.⁹

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that his failure to cooperate with the early stages of vocational rehabilitation was justified.

The Board previously affirmed OWCP's October 26, 2022 decision finding that appellant had failed to fully participate in the early, but necessary, stages of vocational rehabilitation without good cause. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.¹⁰

Consequently, following OWCP's reduction of his wage-loss compensation to zero, the burden shifted to appellant to establish that his failure to cooperate was justified.¹¹

Appellant maintained that SSA and the DVA had found that he was disabled from employment. However, it is well established that the findings of other government agencies are not dispositive regarding questions arising under FECA.¹²

Appellant further advised that his SSA and DVA physicians had found that he was disabled. He also expressed disagreement with the report of Dr. Nadar, the second opinion physician. Appellant's lay opinion, however, does not constitute probative medical evidence.¹³

As the medical evidence is insufficient to establish that his failure to cooperate with the early stages of vocational rehabilitation was justified, the Board finds that appellant has not met his burden of proof.

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.

⁹ See *E.C.*, Docket No. 21-1275 (issued March 21, 2023) (The Board found that, following OWCP's termination of appellant's wage-loss compensation and entitlement to schedule a ward benefits, appellant had not met her burden of proof to establish that her refusal of suitable work was justified); *K.P.*, Docket No. 19-1917 (issued October 5, 2021).

¹⁰ See *K.H.*, Docket No. 22-0399 (issued December 26, 2023); *M.H.*, Docket No. 21-1055 (issued March 30, 2022); *C.D.*, Docket No. 19-1973 (issued May 21, 2020); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

¹¹ *Id.*

¹² See *M.S.*, Docket No. 20-0166 (issued May 14, 2021); *A.B.*, Docket No. 10-2108 (issued July 13, 2011); *Ernest J. Malagrida*, 51 ECAB 287, 291 (2000).

¹³ See *K.D. (L.D.)*, Docket No. 22-0485 (issued December 6, 2022); *R.P.*, Docket No. 22-0686 (issued September 30, 2022); *E.C.*, Docket No. 13-1396 (issued January 17, 2014); *James A. Long*, 40 ECAB 538 (1989).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that his failure to cooperate with the early stages of vocational rehabilitation was justified.

ORDER

IT IS HEREBY ORDERED THAT December 18, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 27, 2024
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board