

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

B.P., Appellant)	
)	
and)	Docket No. 11-208
)	Issued: October 20, 2011
DEPARTMENT OF AGRICULTURE, FOREST)	
SERVICE, Alturas, CA, Employer)	
)	

<i>Appearances:</i> Alan J. Shapiro, Esq., for the appellant Office of Solicitor, for the Director	<i>Case Submitted on the Record</i>
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DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 1, 2010 appellant, through his attorney, filed a timely appeal of the September 17, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) reducing his compensation for noncooperation with vocational rehabilitation efforts. Pursuant to the Federal Employees' Compensation Act (FECA)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 OWCP properly reduced appellant's compensation for failure to cooperate with vocational rehabilitation without good cause under 5 U.S.C. § 8113(b).

On appeal, counsel contends that OWCP's decision is contrary to fact and law.

FACTUAL HISTORY

OWCP accepted that on June 18, 2008 appellant, then a 26-year-old firefighter, sustained lumbar and lumbosacral strains and displacement of lumbar intervertebral disc without

¹ 5 U.S.C. § 8101 *et seq.*

myelopathy as a result of fighting a fire at work. Appellant stopped work on the date of injury. OWCP paid him appropriate compensation for temporary total disability.

On July 30, 2009 OWCP referred appellant, together with a statement of accepted facts and medical record, to Dr. Bunsri T. Sophon, a Board-certified orthopedic, for a second opinion. In an August 28, 2009 medical report, Dr. Sophon reviewed the history of the June 18, 2008 employment injuries and medical treatment. He advised that appellant had reached maximum medical improvement. Appellant was not able to return to his regular work duties due to residuals from his accepted conditions. Dr. Sophon found that he could work eight hours per day with physical restrictions.

By letter dated October 6, 2009, OWCP requested that the employing establishment offer appellant a light-duty position within the restrictions set forth by Dr. Sophon.

On November 5, 2009 OWCP informed appellant that he had been referred to a vocational rehabilitation counselor to assist him with a return to work. He was notified of his obligation to cooperate fully in all aspects of the return-to-work effort.

In a November 22, 2009 report, the vocational rehabilitation counselor stated that the employing establishment did not have an alternate or a modified position for appellant. The rehabilitation counselor stated that on November 12, 2009 she scheduled an initial meeting with him, which was held on November 17, 2009. Appellant stated that he had worked as a wildlife firefighter since 2006. His work duties involved direct and indirect attacks on fire activities and strenuous outside physical activities. Appellant was very attentive and eager to get involved in the vocational rehabilitation process to return to work. He noted his previous positions as a sales clerk, dishwasher, restaurant cashier and car washer. The rehabilitation counselor requested a change in appellant's rehabilitation plan from placement with the previous employer to plan development which was approved by OWCP on December 22, 2009.

In a December 11, 2009 report, the vocational rehabilitation evaluator provided the results of appellant's vocational testing. Appellant scored high on mechanical reasoning, above average on spatial relations and perceptual speed and accuracy, average on verbal reasoning, language usage, word knowledge and manual speed and dexterity and below average on numerical ability. Based on the test results, the rehabilitation counselor recommended further structured vocational exploration. She noted that appellant demonstrated an interest and abilities consistent with outdoor occupations. The test results reflected a strong probability of success in a higher level training program or on-the-job training.

In a report dated January 21, 2010, the vocational rehabilitation counselor stated that she performed labor market research and identified the positions of technical support specialist, user support analyst and microcomputer support technician as being within appellant's restrictions and commuting area. Appellant did not have any marketable transferable skills, but his work restrictions would allow him to pursue his interest in the computer technician and support field. The rehabilitation counselor recommended enrollment in a computer systems technician program.

By letter dated February 19, 2010, the vocational rehabilitation counselor advised appellant that she had tried to reach him during the past two weeks to discuss his pending vocational rehabilitation plan. She left numerous telephone messages at his parents' home and

spoke to his father, mother and an unidentified woman about her need to talk to him, but he did not return her call. The rehabilitation counselor informed appellant that it was critical that she hear from him or she would be forced to submit a Rehabilitation Action Report (OWCP-44) regarding his failure to participate in the rehabilitation process which could result in the termination of his compensation benefits by OWCP. She requested that he respond by February 25, 2010. In a Form OWCP-44, the rehabilitation counselor indicated again that she had unsuccessfully tried to contact appellant by telephone and left messages with his father, mother and a woman who may have been his sister on February 9, 11 and 16, 2010.

In another Form OWCP-44, the vocational rehabilitation counselor stated that on February 23, 2010 appellant's mother advised her that appellant was in jail and that he may be there for a few months.

By letter dated March 2, 2010, OWCP proposed to suspend appellant's compensation on the grounds that he failed to cooperate with rehabilitation efforts. It notified him that, pursuant to 5 U.S.C. § 8113(b) and its implementing regulations, his refusal to participate, without good cause, could result in the reduction of his compensation benefits prospectively based upon what probably would have been his wage-earning capacity had he not failed to cooperate in vocational rehabilitation efforts. Appellant was given 30 days to make a good faith effort to participate in the rehabilitation effort, or to show good cause for his noncompliance, together with supporting evidence.

In a March 8, 2010 letter, appellant's mother stated that appellant was unable to attend any classes since he was in a county jail awaiting a preliminary hearing.

In an April 6, 2010 decision, OWCP found that appellant, without good cause, failed to participate in vocational rehabilitation. It reduced his wage-loss compensation, based on his capacity to earn wages as a user support analyst.

On April 12, 2010 appellant, through his attorney, requested a telephone hearing. In a May 3, 2010 letter, counsel advised that appellant was incarcerated for a traffic misdemeanor.

During a June 29, 2010 telephone hearing, appellant testified that he was arrested on February 3, 2010 for excessive speed and evasion of a police officer and was jailed through April 2010. He was charged with a felony and currently free on bail. Appellant rejected an offer to accept a plea for a misdemeanor charge and preferred to go to trial. He did not perform any work, receive any training or have any contact with his vocational rehabilitation counselor while in jail. Appellant did not contact his rehabilitation counselor because her telephone number was in his cell phone which had been taken away from him. He did not think about writing a letter advising OWCP about his incarceration. Appellant noted that he was scheduled to attend a course at the time of his arrest. He contended that he did not intentionally refuse to participate in vocational rehabilitation. Appellant related that he had not been convicted of a crime and would have met with the rehabilitation counselor had she come to the jail. His attorney argued that appellant did not fail to cooperate with vocational rehabilitation efforts. Appellant should have contacted his rehabilitation counselor but, he did not know the person's identity. Counsel argued that the rehabilitation counselor should have inquired about appellant's whereabouts by sending a letter to his home address. He further argued that when OWCP finally learned that appellant was in jail, his benefits were reduced although he had not been found guilty of a felony and it made no attempt to continue the vocational rehabilitation process.

In a September 17, 2010 decision, an OWCP hearing representative affirmed the reduction of appellant's wage-loss compensation. She found that his failure to advise OWCP and instruct his family to inform it about his incarceration did not constitute good cause for failing to continue vocational rehabilitation.

LEGAL PRECEDENT

Section 8104(a) of FECA provides:

“[OWCP] 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.”²

Section 8113(b) of FECA 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.”³

Section 10.519 of the implementing regulations provide:

“Under 5 U.S.C. § 8104(a), [OWCP] 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, [OWCP] will act as follows:

(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. [OWCP] will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meeting with the [OWCP] 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 [OWCP].

² 5 U.S.C. § 8104(a).

³ *Id.* at § 8113(b).

(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 the [OWCP] nurse, interviews, testing, counseling, functional capacity evaluations, 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]."⁴

Chapter 2.814.8(g) of OWCP's procedure manual provides:

"g. Claimants in Prison. Pursuant to § 8148(b) of the FECA, benefits of individuals imprisoned as a result of a felony conviction shall be suspended as of the date of imprisonment. The implementing regulations (20 C.F.R. § 10.18) provide that the convicted individual forfeits all rights to compensation during the period of incarceration. *See Danny E. Haley*, 56 ECAB 393 (2005). However, during periods that a claimant's compensation is suspended under section 8148(b) for a felony conviction, the claimant's dependents are entitled to a percentage of his compensation. *See Cheri Cortinas, guardian of Savannah Speiser*, Docket No. 02-363 (issued April 21, 2003). *See also* [procedure manual] Chapter 2.1400.12.

"Claimants not convicted of felonies do not lose entitlement to compensation payments simply because they are imprisoned. Such cases are handled according to the same criteria as any other case, insofar as possible. Work performed in prison, and training received there, should be considered in assessing the claimant's physical capability to perform a job and his or her job skills along with other factors in the claimant's background to determine a suitable job on which to base an estimated earning capacity. Prison authorities should be asked to provide information on the claimant's work activities and training. The [rehabilitation specialist] should contact the claimant and prison officials to arrange any feasible training program. Since prison is not an open labor market and the claimant is considered to be confined as the result of a voluntary misdeed, job selection should be based on availability in the area which would apply if the claimant was not imprisoned."⁵

⁴ 20 C.F.R. § 10.519.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(g) (October 2009).

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁶ Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁷

ANALYSIS

The Board finds that OWCP improperly reduced appellant's compensation for failure to participate in vocational rehabilitation.

OWCP initiated rehabilitation efforts on November 5, 2009 based on the medical opinion of Dr. Sophon, an OWCP referral physician, who found that appellant could work eight hours per day within set physical limitations. Appellant initially cooperated with his vocational rehabilitation counselor, who first contacted him on November 12, 2009 and held a meeting with him on November 17, 2009. He underwent vocational testing which demonstrated his ability to succeed in a training program. On January 21, 2010 the rehabilitation counselor noted that appellant did not have any transferable skills, but his work restrictions allowed him to pursue his interest in the computer technician and support field. She identified three positions within his physical restrictions and commuting area and recommended enrollment in a computer technician program. By letter dated February 19, 2010, the rehabilitation counselor indicated that she had tried to contact appellant on numerous occasions, left telephone messages at his home and talked to his father, mother and sister about her need to talk to him about his vocational rehabilitation plan and he had not responded to her calls. On February 23, 2010 appellant's mother advised the rehabilitation counselor that appellant was incarcerated in the county jail and he would be there for a few months. By letter dated March 2, 2010, OWCP proposed to suspend appellant's compensation based on his failure to cooperate with the rehabilitation efforts. On March 8, 2010 appellant's mother again advised OWCP about appellant's incarceration and stated that he would be unable to attend any classes. At the June 29, 2010 hearing, appellant contended that he did not intentionally refuse to participate in vocational rehabilitation efforts as his incarceration prevented him from attending a scheduled class. He further contended that he would have met with the rehabilitation counselor if she had come to the jail.

The Board finds that the record does not establish appellant's nonparticipation in vocational rehabilitation. The evidence does not document a specific instance of noncooperation or nonparticipation in vocational rehabilitation. Appellant's hearing testimony indicated that he planned to attend the scheduled training class before being incarcerated. The rehabilitation counselor's February 19, 2010 letter directed him to contact her by February 25, 2010, and he complied with this direction. Appellant also complied with the March 2, 2010 OWCP letter which directed him to give reasons for his noncompliance with the rehabilitation effort within 30 days. Although he was charged with a felony, he was not convicted of this crime at the time OWCP reduced his compensation. The Board finds no probative evidence to support OWCP's finding that appellant failed to continue participation in vocational rehabilitation. In the absence

⁶ 5 U.S.C. § 8102(a).

⁷ *I.J.*, 59 ECAB 408 (2008); *Fermin G. Olacoaga*, 13 ECAB 102, 104 (1961).

of probative evidence, the Board finds that OWCP improperly reduced appellant's compensation under section 8113(b).⁸

CONCLUSION

The Board finds that OWCP improperly reduced appellant's compensation for failure to cooperate with vocational rehabilitation without good cause under 5 U.S.C § 8113(b).

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 20, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁸ Compare *Leonard I. Harrell*, Docket No. 97-1789 (issued April 1, 1999) and *Samuel L. Biers*, Docket No. 93-1496 (issued September 24, 1994) where appellant's incarceration was cause for finding noncooperation.