

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

J.O., Appellant

and

**DEPARTMENT OF THE ARMY, PINE BLUFF
ARSENAL, Pine Bluff, AR, Employer**

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**Docket No. 10-85
Issued: July 27, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 13, 2009 appellant filed a timely appeal from a September 24, 2009 decision of the Office of Workers' Compensation Programs. Pursuant to 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 to zero, effective September 27, 2009, on the grounds that he failed to cooperate with vocational rehabilitation efforts without good cause.

FACTUAL HISTORY

On August 6, 2003 appellant, then a 47-year-old chemical plant operator, sustained lumbar, sacroiliac and right hip and thigh strains and a displaced lumbar disc at L5-S1 when he was injured lifting a 60-pound can. He was placed on the periodic compensation rolls. Appellant was removed by the employing establishment effective October 6, 2005 because he did not have the physical ability to perform the duties of his position. On October 31, 2006

Dr. Scott M. Schlesinger, a Board-certified neurosurgeon, performed decompression surgery at L5-S1.¹

In August 2007, the Office referred appellant to Dr. Robert Holladay, IV, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a September 27, 2007 report, Dr. Holladay reviewed the medical evidence and provided findings on physical examination. He diagnosed disc herniation at L5-S1, postoperative discectomy and nonwork-related multiple myeloma. Dr. Holladay advised that appellant was physically deconditioned due to a combination of the disc herniation and radiculopathy and treatment for the myeloma. He could not return to his former duties as a plant operator but, after approximately four months of rehabilitation, could return to limited work activity.

By letter dated October 24, 2007, the Office asked Dr. Schlesinger to comment on Dr. Holladay's report. In an undated response, Dr. Schlesinger recommended a functional capacity evaluation (FCE) that was performed on December 14, 2007. Tim Atkinson, who administered the evaluation, advised that appellant gave an unreliable effort throughout the evaluation process on 25 of 52 consistency measures. He stated that appellant demonstrated minimal, inconsistent effort and self-limiting behavior and described specific examples. By report dated December 14, 2007, Dr. Schlesinger advised that, due to appellant's inconsistent, unreliable effort, the FCE could not quantify his limitations; however, he advised that appellant could at least do sedentary physical activity. He released appellant from further care.

On May 26, 2009 the Office referred appellant to Stephanie Ford, a vocational rehabilitation counselor, who scheduled a second FCE on July 10, 2009. Mr. Atkinson conducted the evaluation and again advised that appellant gave unreliable effort on 30 of 54 consistency measures. He stated that appellant's true functional abilities remained unknown due to unreliable effort throughout the evaluation process. Mr. Atkinson again provided specific examples of appellant's inconsistent effort. He stated that appellant demonstrated the ability to perform work at least at the light physical demand classification. By letter dated July 10, 2009, Dr. Schlesinger noted the results of the July 10, 2009 FCE, stating that he had "really nothing else I can base his limitations on."

By letter dated July 30, 2009, the Office proposed to suspend appellant's monetary compensation on the grounds that he failed to cooperate in rehabilitation efforts as he did not demonstrate a maximum effort during two FCEs. Appellant was notified of the penalty provisions of section 8113(b) of the Federal Employees' Compensation Act² and afforded 30 days to respond. He advised that he would retake the FCE which was conducted on September 18, 2009. Charles Davidson conducted the evaluation and advised that appellant again completed the testing with unreliable results.³ He stated that appellant gave unreliable

¹ Appellant briefly returned to work in September 2003. By decision dated August 31, 2005, the Office terminated appellant's compensation benefits. In a November 3, 2005 decision, the August 31, 2005 decision was reversed and appellant was returned to the periodic rolls. In a May 10, 2007 decision, the Office found that an overpayment in compensation in the amount of \$6,368.58 had been created because deductions were not made for appellant's health benefit premiums for the period October 5, 2003 to April 14, 2007.

² 5 U.S.C. § 8113(b).

³ Mr. Atkinson and Mr. Davidson are certified disability analysts.

effort with 40 of 54 consistency measures and that the data collected during the evaluation indicated that there were too many inconsistencies for the evaluation to be considered consistent and reliable. Testing included range of motion discrepancies and inconsistent testing for low back pain. Mr. Davidson advised that appellant demonstrated the ability to perform work in at least the light classification but exhibited numerous inconsistencies which were sufficient to invalidate the entire evaluation, concluding that appellant's current functional status remained unknown. By report dated September 21, 2009, Dr. Schlesinger noted that, as the latest FCE was unreliable, he could not provide any permanent limitations for appellant. He advised that, at a minimum, appellant should be on light duty but that there was no objective evidence that he could not perform full duty and that it would require reliable effort on an FCE to make this determination.

By decision dated September 24, 2009, the Office finalized the reduction in compensation, effective September 27, 2009, under 5 U.S.C. § 8113(b) on the grounds that appellant did not fully cooperate with the FCE on September 18, 2009.

LEGAL PRECEDENT

Section 8104(a) of the Act provides that the Office may direct a permanently disabled employee to undergo vocational rehabilitation.⁴ Section 8113(b) provides that, if an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under 8104, the Secretary, on review under section 8128 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 or her wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary.⁵

Section 10.519 of Office regulations state that where a suitable job has not been identified because the failure or refusal of the employee occurred in the early but necessary stages of a vocational rehabilitation effort (that is, meetings with the Office nurse, interviews, testing, counseling, functional capacity evaluations and work evaluations), the Office cannot determine what would have been the employee's wage-earning capacity.⁶ Under these circumstances, in the absence of evidence to the contrary, the Office will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity and the Office will reduce the employee's monetary compensation to zero. This reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of the Office.⁷

Office procedures provide that specific instances of noncooperation include a failure to appear for the initial interview, counseling sessions, a functional capacity evaluation, other

⁴ 5 U.S.C. § 8104(a); *see J.E.*, 59 ECAB ____ (Docket No. 07-1577, issued July 3, 2008).

⁵ *Id.* at § 8113(b); *see Freta Branham*, 57 ECAB 333 (2006).

⁶ 20 C.F.R. § 10.519; *see Marilou Carmichael*, 56 ECAB 451 (2005).

⁷ *Id.*

interviews conducted by the rehabilitation counselor, vocational testing sessions and work evaluations, as well as lack of response or inappropriate response to directions in a testing session after several attempts at instruction.⁸

ANALYSIS

The Board finds that the Office properly reduced appellant's monetary compensation to zero because he failed, without good cause, to cooperate with vocational rehabilitation efforts. The record establishes that appellant was referred for three FCEs, on December 14, 2007, July 10 and September 18, 2009. Mr. Atkinson and Mr. Davidson, who performed the evaluations, each advised that appellant gave an unreliable effort such that his true functional abilities could not be determined. Following each of the evaluations, appellant's attending neurosurgeon, Dr. Schlesinger, advised in reports dated December 14, 2007, July 10 and September 18, 2009, that he could not assess appellant's physical capabilities due to his inconsistent and unreliable efforts. He advised that, at a minimum appellant should be on light duty but lacking objective evidence, he could not perform full duty absent a reliable effort on an FCE to make this determination.

There is no medical evidence of record documenting that appellant could not put forth a reliable effort in the FCEs. Dr. Schlesinger first ordered an evaluation in 2007 and, in his subsequent reports, he did not find that appellant could not complete such testing for medical reasons. Absent such medical evidence, the Board can only conclude that appellant did not cooperate in any of the evaluations.

Appellant's failure, without good cause, to cooperate with the FCEs constitutes a failure to participate in the "early but necessary stages of a vocational rehabilitation effort."⁹ Office 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.¹⁰ Appellant failed, without good cause, to participate in FCEs recommended by his attending physician. The Office properly reduced his monetary compensation to zero effective September 27, 2009.¹¹

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation under section 8113(b) of the Act for failing, without good cause, to cooperate with vocational rehabilitation.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11(a) (November 1996). See *Sam S. Wright*, 56 ECAB 358 (2005).

⁹ *Carolyn M. Leek*, 47 ECAB 374 (1996).

¹⁰ *Supra* note 5.

¹¹ See *Carolyn M. Leek*, *supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 24, 2009 be affirmed.

Issued: July 27, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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