



lumbar disc and lumbar radiculopathy on July 2, 2003. It accepted the additional conditions of displacement of lumbar intervertebral disc with myelopathy and thoracic or lumbar neuritis or radiculitis on July 17, 2009.

In a report dated May 26, 2009, appellant's attending physician, Dr. Richard Feldman, a Board-certified orthopedic surgeon, found that appellant was capable of working within restrictions. The Office entered appellant on the periodic rolls on July 17, 2009. On that date, it referred her for vocational rehabilitation services. The vocational rehabilitation counselor completed a report on August 29, 2009 stating that the employing establishment was unable to accommodate appellant's restrictions.

In a report dated September 7, 2009, the vocational rehabilitation counselor determined the positions available to appellant based on her education and skills.

Appellant telephoned the Office on September 29, 2009 and stated that she was currently totally disabled and unable to cooperate with vocational rehabilitation efforts. In a letter dated October 2, 2009, the Office informed her of her obligation to comply with vocation rehabilitation efforts, and afforded her 30 days to contact the vocational rehabilitation counselor.

Dr. Feldman completed a note on November 9, 2009 and indicated that appellant must be able to sit and stand as needed, could not lift over 10 pounds and could not perform constant bending and stooping.

The vocational rehabilitation counselor completed a report on November 10, 2009 and noted that appellant had investigated enrolling in Concorde Career College and that goal selection was the medical-clerical field.

The Office noted that appellant was to begin school on November 23, 2009 as part of her vocational rehabilitation plan. It directed her to attend class or sanctions would be enforced.

On December 2, 2009 the Office informed appellant that she could receive maintenance compensation such as transportation, meals, etc., provided she maintained average progress and attendance at the American Pacific College; ARISE Associates. This training had been designed to prepare her for positions as either an insurance clerk; a receptionist, doctor's office; or an administrative assistant, according to an October 22, 2009 labor market survey. In a separate letter dated December 2, 2009, the Office noted approving the plan to return to work in one of these capacities and noted that appellant would earn approximately \$22,360.00 per year in these positions.

By letter dated December 14, 2009, the Office requested a report from Dr. Feldman addressing appellant's ability to participate in vocational rehabilitation efforts, noting that she alleged that she was unable to participate in classroom instruction because of her back pain. In a report dated December 18, 2009, Dr. Feldman examined her and diagnosed lumbar spinal stenosis with increasing right leg radiculopathy. He noted that appellant had increasing discomfort in her back radiating down her right leg and that she was having difficulty attending school for her vocational rehabilitation. Dr. Feldman noted that prolonged sitting was a risk factor for the development of back pain and suggested that she be allowed to alternate sitting and

standing. He stated that he was altering appellant's anti-inflammatory medication, that if this failed he would then consider epidural corticosteroid injection or surgical intervention.

In a report dated January 9, 2010, the vocational rehabilitation counselor stated that appellant attended trial training classes through November 20, 2009, but left early due to complaints of pain. On December 2, 2009 appellant focused on her physical concerns, but ultimately agreed to try the full-time schedule.

The Office informed appellant on January 12, 2010 that she had refused to participate in a training program as she had missed four days of school due to an upper respiratory infection. It directed her to comply with the approved training plan within 30 days or her rehabilitation effort would be terminated and her compensation reduced.

On March 22, 2010 Dr. Feldman stated that on March 23, 2010 appellant could work only four hours a day with no constant sitting or standing.

The vocational rehabilitation counselor completed a report on March 31, 2010 and stated that appellant had completed half of her training program. He noted that beginning in April she planned to reduce her hours to four hours a day in accordance with Dr. Feldman's report.

By decision dated April 19, 2010, the Office reduced appellant's compensation benefits as she failed to undergo vocational rehabilitation based on her capacity to earn wages as a doctor's receptionist.

### **LEGAL PRECEDENT**

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>2</sup> Disability means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.<sup>3</sup> 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.<sup>4</sup>

The Office may direct a permanently disabled employee to undergo vocational rehabilitation.<sup>5</sup> If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed, the Office, on review under 5 U.S.C. § 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

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<sup>2</sup> 5 U.S.C. § 8102(a).

<sup>3</sup> 20 C.F.R. § 10.5(f).

<sup>4</sup> *S.F.*, 59 ECAB 642, 646 (2008); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

<sup>5</sup> 5 U.S.C. § 8104(a).

in the absence of the failure, until the individual in good faith complies with the direction of the Office.<sup>6</sup>

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.<sup>7</sup>

### ANALYSIS

Upon receiving medical evidence that appellant was not totally disabled for all work, but was capable of working four hours a day with restrictions, the Office properly referred her to vocation rehabilitation services. Appellant generally cooperated with the early and necessary stages of the vocational rehabilitation effort as she met with the rehabilitation counselor and underwent vocational testing. She also enrolled in and began classes as part of her vocational rehabilitation. After attending classes in December 2009, appellant began to report that she was incapable of remaining in class for the entire day.

Appellant submitted reports from Dr. Feldman dated December 18, 2009 and March 22, 2010 addressing her physical condition. Initially, Dr. Feldman stated that she had increasing discomfort in her back radiating into her right leg and noted that prolonged sitting was a risk factor for the development of back pain. He suggested that appellant be allowed to alternate sitting and standing, but did not provide additional restrictions. However, on March 22, 2010 Dr. Feldman found that she could work only four hours a day with no constant sitting or standing.

The Office found that the medical evidence supported appellant's ability to participate in the vocational rehabilitation program. The Board finds, however, that she has submitted sufficient evidence that she was unable to participate in the designated vocational rehabilitation program on a full-time basis.<sup>8</sup> 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.<sup>9</sup> Appellant submitted probative medical evidence supporting her position that full-time

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<sup>6</sup> *Id.* at § 8113(b).

<sup>7</sup> 20 C.F.R. § 10.519(a).

<sup>8</sup> 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).

<sup>9</sup> *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); *L.F.*, Docket No. 10-1119 (issued February 1, 2011).

vocational rehabilitation efforts were beyond her physical abilities. The Office did not explore the possibility of a part-time academic schedule. It took no further steps to develop the medical evidence or to clarify appellant's ability to attend training. For example, the Office does not dispute that appellant missed four days of class because of a legitimate upper respiratory infection. As such, the Board finds that the Office did not meet its burden to justify the penalty under section 8113(b).

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 19, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 6, 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