

FACTUAL HISTORY

On October 10, 2002 appellant, then a 44-year-old video coding specialist, sustained a left shoulder strain, left impingement syndrome and left rotator cuff tear as a result of pulling a plug to reboot the computer system.² The Office authorized left shoulder arthroscopy with debridement, which occurred on April 10, 2003, July 27, 2004 and November 7, 2006. Appellant stopped work on October 30, 2002 and was placed on the periodic rolls for temporary total disability effective February 23, 2002.

In a September 3, 2008 report, Dr. Rajiv Puri, a treating Board-certified orthopedic surgeon, diagnosed left shoulder tendinitis and rotator cuff tear. On physical examination, he reported diminished left shoulder range of motion. A functional capacity evaluation prepared by Dr. Puri indicated that appellant was capable of working with restrictions. Restrictions included walking less than eight hours a day; no lifting or carrying more than 10 pounds; sitting less than eight hours a day; no pushing or pulling more than 10 pounds; occasional reaching; and limited overhead activities. Dr. Puri indicated that appellant was capable of performing activities requiring frequent handling and fingering.³

The Office referred appellant for vocational rehabilitation services on January 29, 2009. It stated that he could return to work with restrictions and directed the counselor to start vocational rehabilitation. In a letter dated January 29, 2009, the Office informed appellant that a rehabilitation counselor, Esther Carcamo, had been assigned to him and informed him that he should cooperate fully with the counselor.

Ms. Carcamo scheduled appellant to see a vocational rehabilitation evaluator on May 7, 2009 in order to determine what type of work he could perform. The evaluator determined that he was physically and vocationally able to perform several positions, including network control technician, technical support specialist, shipping and receiving clerk and computer support specialist.

Ms. Carcamo reported on June 10, 2009 that appellant appeared angry with her during a June 9, 2009 conversation discussing vocational goals for information clerk and customer service representative. Appellant informed her that he could not perform the identified jobs and that he required a voice recognition program. Lastly, he stated he could not work.

² This was assigned claim File No. xxxxxx200. Under claim File No. xxxxxx767, the Office accepted the conditions of right rotator cuff tear, right shoulder arthroscopy and right chest osteotomy.

³ On May 8, 1997 appellant filed a traumatic injury claim alleging that on May 8, 1997 he injured his right shoulder as a result of pulling a pin on a tractor while disconnecting it. The Office assigned this claim File No. xxxxxx767 and accepted the claim for right rotator cuff tear and authorized right shoulder arthroscopy, which occurred on April 29, 1998, and right chest osteomy, which occurred on December 2, 2008. On May 21, 2008 Dr. Puri provided work restrictions based on a functional capacity evaluation he conducted and provided work restrictions for appellant's right shoulder which included: no lifting more 20 pounds; occasional lifting and carrying up to 20 pounds; standing and walking less than six hours a day; no sitting for more than six hours a day; limited pushing and pulling; and occasional reaching. He indicated that appellant was capable of performing activities requiring frequent handling and fingering using his right upper extremity.

On June 10, 2009 Ms. Carcamo provided the Office with a plan detailing vocational objectives for the positions of information clerk, Department of Labor's *Dictionary of Occupational Titles* (DOT) No. 237.367-022, and customer service representative.⁴ She recommended appellant receive a training plan for computer skills at Westech College.

On July 13, 2009 the Office approved a computer training program at the Westech College to provide appellant with computer skills needed for competitive employment in his commuting area. Appellant was scheduled to start attending remedial classes at Westech College on July 24, 2009. During a July 17, 2009 telephone conversation, he yelled at Ms. Carcamo and informed her he could not perform keyboarding as it was repetitive work. Ms. Carcamo attempted to provide appellant with the school's information, but he would not accept the information and hung up on her. On July 27, 2009 Westech College informed her of appellant's attending 1.2 days of classes out of 3 possible days and his lack of interest in attending class. Westech College informed Ms. Carcamo that he related that his physical abilities prevented him from operating a computer and that no assignments were completed.

In a letter dated July 28, 2009, the Office informed appellant that if he continued to fail to participate in the approved training program in computerized administration, it could reduce his compensation. It informed him of the consequences of failing to undergo vocational training as directed. Appellant was directed to undergo the computerized training program at Westech College or his compensation would be reduced in accordance with 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.

In an August 5, 2009 form medical report, Dr. Puri checked that appellant was unable to perform computer work and he could only work four hours a day.

On August 12, 2009 Westech College stated that appellant had not attended any classes and that he was being dropped from their attendance rolls.

By decision dated August 31, 2009, the Office finalized the proposed reduction of appellant's compensation effective that day to reflect his loss of wage-earning capacity pursuant to 5 U.S.C. §§ 8106 and 8115 as he continued to fail to participate in the directed vocational training.

On October 1, 2009 the Office issued an amended decision as the prior decision contained an error of law. It finalized the proposed reduction of appellant's compensation to reflect his loss of wage-earning capacity pursuant to 5 U.S.C. §§ 8113(b) and 8104 as he failed, without good cause, to undergo the directed vocational training. With respect to his wage-earning capacity, the Office further found that, if appellant had participated in good faith in vocational rehabilitation, he would have been able to perform the position of information clerk. It reduced his compensation on what his wage-earning capacity would have been if he had cooperated with vocational rehabilitation efforts. Based upon the residuals of his injury and considering all significant preexisting impairments and pertinent nonmedical factors, the Office

⁴ The positions of information clerk and customer service operator were reasonably available in appellant's commuting area with a weekly pay of \$487.00 for information clerk and \$586.00 for customer service operator.

found that, if appellant had participated in good faith in vocational rehabilitation, he would have been able to perform the position of information clerk.⁵

On October 30, 2009 appellant requested an oral hearing before an Office hearing representative, which was held on February 17, 2010.

On November 16, 2009 the Office received Dr. Puri's August 5, 2009 report. Dr. Puri stated he had treated appellant for both shoulders since 2004. He stated that appellant was disabled due to his shoulders and was unable to do any heavy lifting. Dr. Puri related that appellant has had persistent bilateral shoulder pain and that he is unable "to do any computer work as it seems to aggravate the pains in the shoulders." He noted that appellant expressed an interest in becoming a house appraiser for four hours a day and that "[t]his is the most gainful employment he is willing to [do]." In concluding, Dr. Puri recommended the house appraiser position for appellant and stated any further modifications, if necessary, can be determined at a later date.

By decision dated April 23, 2010, an Office hearing representative found that the Office properly reduced appellant's monetary compensation because he failed to undergo the directed vocational training.

LEGAL PRECEDENT

Section 8104(a) of the Act provides that the Office may direct a permanently disabled employee to undergo vocational rehabilitation.⁶ 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.⁷

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.⁸ Under these circumstances, in the absence of evidence to the contrary, the Office will assume that the

⁵ The Office used the *Shadrick* formula (derived from *Albert Shadrick*, 5 ECAB 376 (1953)) to calculate appellant's wage-earning capacity. This calculation included a figure for the amount appellant would have earned as an information clerk.

⁶ 5 U.S.C. § 8104(a). See *R.C.*, Docket No. 09-2095 (issued August 4, 2010); *J.E.*, 59 ECAB 606 (2008); *C.V.*, 58 ECAB 648 (2007); *Marilou Carmichael*, 56 ECAB 451 (2005).

⁷ *Id.* at § 8113(b); see *R.C.*, *supra* note 6; *Freta Branham*, 57 ECAB 333 (2006).

⁸ 20 C.F.R. § 10.519; see *J.O.*, Docket No. 10-85 (issued July 27, 2010); *Marilou Carmichael*, *supra* note 6.

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.⁹

Office procedures provide that specific instances of noncooperation include a failure to appear for the initial interview, counseling sessions, a functional capacity evaluation, other 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.¹⁰

ANALYSIS

Appellant sustained a left shoulder strain, left impingement syndrome and left rotator cuff tear as a result of pulling a plug to reboot the computer system. Under claim File No. xxxxxx200, the Office accepted the conditions of right rotator cuff tear and authorized surgery for right shoulder arthroscopy and right chest osteotomy due to an April 30, 1997 employment injury. On September 3, 2008 Dr. Puri, an attending Board-certified orthopedic surgeon, prepared a functional capacity evaluation and provided work restrictions for appellant. These restrictions included: walking less than eight hours a day; no lifting or carrying more than 10 pounds; sitting less than eight hours a day; no pushing or pulling more than 10 pounds; occasional reaching; and limited overhead activities. There were no restrictions on performing activities requiring frequent handling and fingering.

The Board finds that appellant failed to cooperate with his vocational rehabilitation plan. Ms. Carcamo instructed him to attend a training program at Westech College to provide him with the computer skills needed to perform the position of information clerk or similar jobs. Appellant was scheduled to start attending remedial classes at Westech College on July 24, 2009. He attended 1.2 days of class and did no assignments.

The Board further finds that appellant did not show good cause for failure to cooperate with his vocational rehabilitation plan. Appellant claimed that his medical condition precluded him from doing any computer work due to the repetitive nature. Dr. Puri, in his August 5, 2009 report, recommended appellant be trained as a house appraiser as it appeared to be the only gainful employment he was interested in. However, in his September 3, 2008 report, he noted no restrictions on frequent handling and fingering or computer work. No medical rationale was provided by Dr. Puri explaining why appellant was incapable of performing computer work other than no shoulder work or heavy lifting. Furthermore, Dr. Puri does not explain why computer work was precluded in his August 5, 2009 report or it was not precluded in the September 3, 2008 report, which found no restrictions were required for fine manipulation and frequent

⁹ *Id.*

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11(a) (November 1996). See *J.O.*, *supra* note 8; *Sam S. Wright*, 56 ECAB 358 (2005).

handling. His August 5, 2009 reports are of limited probative value because they contain insufficient medical rationale regarding appellant's ability to undergo computer training.¹¹

Appellant's failure, without good cause, to cooperate with vocational training constitutes a failure to participate in the early but necessary stages of a vocational rehabilitation effort.¹² The Office properly found that the reduction of his compensation should be based on the determination that he probably would have been able to earn wages as an information clerk receptionist if he had not obstructed his vocational rehabilitation program.¹³ For these reasons, it 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.

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.

¹¹ See *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006) (medical report which are unsupported by medical rationale and merely contain a conclusion are of diminished probative value).

¹² *Carolyn M. Leek*, 47 ECAB 374 (1996).

¹³ See notes 6 and 7 and accompanying text. Ms. Carcamo found that the position of information clerk was reasonably available in appellant's commuting area with weekly pay of \$487.00. The Board notes that the evidence shows that appellant was vocationally and physically capable of working as an information clerk. 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 April 23, 2010 is affirmed.

Issued: May 24, 2010
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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