

FACTUAL HISTORY

On June 12, 2006 appellant, then a 49-year-old food inspector, pulled a muscle in his back when inspecting meat. OWCP accepted the claim for lumbar, thoracic and rib sprains, muscle spasm and displacement of lumbar internal disc at L4-5 and L5-S1. Appellant stopped work on June 12, 2006. He received wage-loss compensation for total disability on the periodic rolls.

On June 13, 2007 appellant was treated by Dr. Jeffrey L. Piccirillo, an osteopath, for the work injury. Dr. Piccirillo diagnosed lumbar degenerative disc disease with left leg radiculitis.

OWCP referred appellant to Dr. Peter Dwirtz, a Board-certified orthopedic surgeon, for a second opinion. In an October 10, 2007 report, Dr. Dwirtz reviewed appellant's history and noted findings that included no muscle spasm in the paravertebral muscle areas with palpation and no sensory deficit. He diagnosed myofascial back symptoms, multilevel degenerate disc disease of the lumbar spine, Graves disease and obesity. Dr. Dwirtz noted that appellant's June 12, 2006 work injury was an acute muscular strain that resolved and he had no current residuals of the injury. He opined that, due to deconditioning and overweight status, appellant was capable of returning to work to his preinjury job with a reconditioning program. Dr. Dwirtz opined that appellant was not disabled based on his employment-related injury.

On December 27, 2008 Dr. Piccirillo reviewed Dr. Dwirtz's report and disagreed with his diagnoses and noted that appellant's description of his injury was consistent with disc pathology and radiculitis. He opined that appellant was totally disabled.

OWCP found that a conflict in medical opinion between Dr. Piccirillo, who found appellant, had residuals of his work injuries and was totally disabled from work and Dr. Dwirtz, for OWCP, who determined that appellant's work-related conditions had resolved and he could return to work without restrictions. On March 19, 2008 it referred appellant to Dr. William R. Boulden, a Board-certified orthopedist, for an impartial referee examination regarding his work restrictions and residual disability.

In an April 15, 2008 report, Dr. Boulden reviewed the medical record and provided findings on examination. There was negative straight leg raising test on the right while active testing on the left caused buttock and thigh pain but, on passive straight leg raising, that was relieved. Deep tendon reflexes were equal and symmetrical in the knees and ankles. There was no motor weakness or sensory changes. Dr. Boulden diagnosed underlying degenerative disc disease, foraminal stenosis, narcotic addiction, reactive depression, deconditioned and chronic pain syndrome. He noted that appellant was off work for two years and he believed it would be difficult for him to get motivated to go back to work, detoxify from narcotics and get back into good physical working condition. Dr. Boulden advised that appellant could return to work in a sedentary position with adequate opportunity for him to stand, walk, sit and change positions every 15 to 30 minutes, no physical work that would entail bending or lifting with a lifting limitation of 10 pounds. He opined that appellant was presently totally disabled based on residual narcotic use and no aggressive rehabilitation approaches.

In a July 1, 2008 supplemental report, Dr. Boulden opined that appellant was totally disabled from his regular employment as a food inspector. Appellant could return to a sedentary job with alternative sitting, standing and walking every 15 to 30 minutes, no bending or lifting with a restriction of 10 to 20 pounds. He recommended an inpatient facility for narcotic detoxification and conditioning exercises.

Appellant submitted reports from Dr. Scott Piper, a Board-certified family practitioner, dated August 4 and September 3, 2008. Dr. Piper noted that it was unnecessary for appellant to be placed in an inpatient drug rehabilitation program and advised that he was weaned off narcotics. He referred appellant for physical therapy.

On July 28, 2008 OWCP referred appellant for vocational rehabilitation. An initial assessment was conducted on August 4, 2008. In rehabilitation reports dated October 1 to November 4, 2008, the rehabilitation counselor noted that appellant would not participate in a work hardening program based on his physician's recommendation. She further indicated that he did not want to work or believe he could return to work. Appellant advised that he would accept a cash settlement or he would obtain legal counsel.

Appellant was treated by Dr. Bojan Pavlovic, a Board-certified anesthesiologist, on October 15 and November 4, 2008 for bilateral knee and lumbar pain. He underwent bilateral knee steroid injections.

In reports dated December 31, 2008 to February 2009, the rehabilitation counselor advised that appellant's treating physician recommended and OWCP authorized physical therapy three times a week for six weeks.

In a March 11, 2009 report, the physical therapist recommended an additional six weeks of physical therapy due to appellant's deconditioning. In a March 26, 2009 report, Dr. Piper stated that appellant had mild improvement of abdominal musculature with physical therapy but his low back pain was persistent and not improving. He noted that appellant had difficulty standing or sitting for more than 30 minutes. On June 25, 2009 Dr. Piper diagnosed chronic lumbar pain and noted that appellant continued with physical therapy.

In progress reports for April and May 2009, the rehabilitation counselor noted that OWCP authorized an additional six weeks of physical therapy. On June 30, 2009 she advised that appellant was awaiting a Social Security Disability decision and if approved he would retire. In a July 2009 progress report, the rehabilitation counselor indicated that physical therapy ended on July 21, 2009; however, appellant continued to indicate that he was totally disabled.

In a September 18, 2009 statement, appellant indicated that the rehabilitation counselor was forcing him to find a job and lie about his injury. He asserted that he did everything that was asked of him and remained in constant pain. In a September 14, 2009 report, Dr. Piper noted that appellant continued to have back pain and stiffness which made it difficult for him to find employment because he could not stand more than 10 minutes, sit for more than 10 minutes or do any sort of physical activity. He noted that trying various medication regimens and a physical therapy regimen without success.

In an October 13, 2009 report, the rehabilitation counselor noted contacting appellant to discuss his job search. Appellant became very angry and stated that he was not permitted to talk and that she would probably be sued. He indicated that his Social Security claim was denied and, because he received workers' compensation benefits, he was ineligible for Social Security benefits. Appellant stated that he was in contact with his senator's office which instructed him not to apply for jobs or conduct a job search. He stated that he did not want to communicate further with the rehabilitation counselor and would proceed with legal action.

On November 24, 2009 OWCP requested that the rehabilitation counselor identify appropriate positions and proceed with a labor market survey. The rehabilitation counselor identified positions and provided job classifications for positions within appellant's educational abilities that were reasonably available in his local labor market. This included the position of debt collector, DOT # 241.367-026, sedentary position with a weekly wage of \$547.20. OWCP advised that the case would remain open for 30 days from and if appellant was not cooperating, or indicated that he would not cooperate, the file would be closed.

By letter dated November 30, 2009, OWCP proposed to reduce appellant's monetary compensation on the grounds that he failed to cooperate in rehabilitation efforts. Appellant was notified of the penalty provisions of 5 U.S.C. § 8113(b). He was afforded 30 days to participate in placement efforts or to provide good cause for not participating.

On December 28, 2009 appellant telephoned OWCP and disagreed with the proposed reduction of compensation. He asserted that he could not lie on a job application about his ability to perform a job. Appellant indicated that his physician provided a report advising that he could not work. OWCP asked him to submit evidence in writing. Appellant submitted a December 2, 2009 report from Dr. Piper, who disagreed with OWCP's finding that appellant failed to cooperate with vocational rehabilitation. Dr. Piper noted that appellant did everything that was asked of him and completed physical therapy despite continuing pain and reducing his narcotic use. He noted that appellant was unable to sit or stand for extended periods of time and he could not imagine an employing establishment being eager to hire him in his condition. Dr. Piper diagnosed unchanged chronic lumbar back pain.

In a December 31, 2009 OWCP 3 STATUS REPORT, the rehabilitation counselor noted that appellant did not cooperate with vocational rehabilitation efforts and had threatened her with legal action. Appellant did not search for work as he claimed he was disabled. After OWCP issued a proposed reduction of benefits, he did not ever indicate that he was willing to cooperate with the rehabilitation counselor. The rehabilitation counselor identified positions, including a debt collector, that were within appellant's vocational and educational abilities and reasonably available in appellant's local labor market.

By decision dated January 12, 2010, OWCP reduced appellant's compensation, based on his capacity to earn wages as a debt collector, because he failed to cooperate with vocational rehabilitation efforts.²

On April 9, 2010 appellant requested reconsideration, contending that he did everything he was asked to do for vocational rehabilitation and completed 12 weeks of physical therapy. He stated that the rehabilitation counselor expected him to immediately begin a job search after completing physical therapy but his condition worsened. Appellant reiterated that he would not lie on a job application about his injuries and the rehabilitation counselor was incorrect in her determination that he could work as a debt collector. He stated that the referee physician did not examine him but only reviewed tests and medical reports. Appellant submitted Dr. Dwirtz's October 10, 2007 second opinion report, a copy of OWCP's October 7, 2009 letter to his senator, and its January 12, 2010 proposal to reduce compensation, all previously of record. He submitted reports from Dr. Mark D. Kline, a Board-certified anesthesiologist, dated February 1 to May 25, 2010, for treatment of low back pain after a work injury. Dr. Kline diagnosed chronic low back pain, degenerative disc disease with disc herniation at L5-S1 and an annular tear at L4-5. He performed a transforaminal steroid injection on May 17, 2010. A February 25, 2010 lumbar spine MRI scan revealed paracentral subligamentous degenerative disc herniation at L5-S1, mild degenerative spinal stenosis at L4-5 with a broad-based disc bulge and facet joint osteoarthritis. Also submitted was an April 12, 2010 letter from appellant's senator to OWCP requesting a status on his reconsideration claim.

On May 5, 2010 OWCP responded to a senatorial inquiry providing a status of appellant's claim.

In a June 28, 2010 decision, OWCP denied modification of the January 12, 2010 decision.

LEGAL PRECEDENT

Section 8113(b) of FECA:

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 probably have 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

² OWCP noted appellant's pay rate on June 12, 2006, the date of injury, was \$774.36 and the current pay rate for the job and step when injured was \$851.41. It further noted that he was capable of earning \$547.20 a week as a debt collector and his adjusted wage-earning capacity a week was \$495.59. OWCP determined that appellant's net compensation every four weeks would be \$605.82.

³ 5 U.S.C. § 8113(b).

Section 10.519(a) of the implementing regulations provide in pertinent part:

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. It will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meeting with 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.⁴

Application of the principles set forth in *Albert C. Shadrick*⁵ will result in the percentage of the employee's loss of wage-earning capacity.⁶

ANALYSIS

OWCP accepted that on June 12, 2006 appellant sustained lumbar, thoracic and rib sprains, muscle spasm and displacement of lumbar internal disc at L4-5 and L5-S1. The Board finds that it properly reduced appellant's compensation benefits, based on his ability to earn wages as a debt collector, as he failed, without good cause, to participate in rehabilitation efforts.

In finding that appellant could perform the duties of a debt collector, OWCP properly relied on the opinion of Dr. Boulden, a referee physician.⁷ It found that a medical conflict existed between Dr. Piccirillo, who indicated that appellant was totally disabled from his work injury and Dr. Dwirtz, the referral physician, who found that appellant's work injury had resolved and he could work without restrictions. In reports dated April 15 and July 1, 2008, Dr. Boulden noted an essentially normal physical examination and diagnosed underlying degenerative disc disease, foraminal stenosis, narcotic addiction, reactive depression and deconditioned. He opined that appellant could return to work in a sedentary position with adequate opportunity for him to stand, walk, sit and change positions every 15 to 30 minutes, no physical work that would entail bending or lifting with a lifting limitation of 10 pounds. Dr. Boulden opined that appellant was presently disabled from his regular employment. In a

⁴ 20 C.F.R. § 10.519(a).

⁵ 5 ECAB 376 (1973). The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision, has been codified at 20 C.F.R. § 10.403. OWCP calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.

⁶ 20 C.F.R. § 10.403(d), (e).

⁷ 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

July 1, 2008 report, he opined that although appellant was disabled from his regular job he could return to a sedentary job with alternative sitting, standing and walking every 15 to 30 minutes, no bending or lifting with a restriction of 10 to 20 pounds.

The Board has carefully reviewed Dr. Boulden's opinion and notes that it has reliability, probative value and convincing quality with respect to his conclusions regarding the relevant issue in this case. Dr. Boulden's opinion is sufficiently rationalized and based on a proper factual and medical history in that he reviewed the medical record and statement of accepted facts, provided a thorough and factual medical history. His report is entitled to special weight with regards to establishing appellant's ability to work.⁸

Appellant submitted reports from Dr. Piper dated August 4, 2008 to June 25, 2009, who diagnosed chronic lumbar pain and noted that appellant had difficulty standing or sitting for more than 30 minutes. On September 14, 2009 Dr. Piper noted that appellant's back pain and stiffness made it difficult for him to work because he could not stand more than 10 minutes, sit for more than 10 minutes or do any sort of physical activity. However, he did not state that appellant could not perform the sedentary work or participate in vocational rehabilitation. Dr. Piper did not otherwise explain how appellant remained totally disabled from work. His reports are, therefore, insufficient to establish that appellant continued to be totally disabled or to establish a conflict in medical opinion. Other reports from Dr. Pavlovic dated October 15 and November 4, 2008, failed to address whether appellant was totally disabled from all work or if he could engage in vocational rehabilitation.

Based on Dr. Boulden's opinion that appellant could perform a sedentary job, OWCP referred him for vocational rehabilitation services on July 28, 2008. In rehabilitation reports dated October 1 to November 4, 2008, the rehabilitation counselor reported that appellant did not want to work and did not believe he could work and sought a cash settlement or would obtain legal counsel. In a July 2009 progress report, she noted that he completed 12 weeks of physical therapy but continued to indicate that he was totally disabled. In a progress report dated October 13, 2009, the rehabilitation counselor noted contacting appellant to discuss his job search and he became very angry and indicated that he was not permitted to talk to her and threatened litigation. Appellant refused to communicate further with her and advised that he would proceed with a legal action. The rehabilitation counselor then identified several sedentary positions, including that of a debt collector, DOT # 241.367-026 with a weekly wage of \$547.20 which is classified as sedentary in nature. A vocational rehabilitation specialist is an expert in the field of vocational rehabilitation and OWCP may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable.⁹ The Board finds that OWCP properly made a medical determination of partial disability and of specific work restrictions and referred appellant's case to a rehabilitation counselor who properly selected the debt collector position as within appellant's capabilities as outlined in the Department of Labor, *Dictionary of Occupational Titles* with regards to his limitations, education, age and prior experience. The

⁸ *Aubrey Belnavis*, 37 ECAB 206 (1985) (where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight).

⁹ *W.D.*, Docket No. 09-188 (issued August 21, 2009).

rehabilitation counselor determined that appellant was able to perform the position of debt collector.

In a November 30, 2009 letter, OWCP advised appellant that his compensation would be reduced if he did not participate in vocational rehabilitation efforts. Appellant was informed of the provisions of 5 U.S.C. § 8113(b) and given 30 days to resume good faith participation in vocational rehabilitation or to show good cause for not participating. In a December 28, 2009 telephone, OWCP disagreed with the proposed reduction and asserted that appellant could not work and would not lie on a job application. A December 2, 2009 report from Dr. Piper asserted that appellant cooperated and that he was unable to sit or stand for extended periods of time. Although, Dr. Piper noted appellant's physical limitations he did not indicate that appellant was unable to perform the duties of a debt collector or participate in vocational rehabilitation. On December 31, 2009 the rehabilitation counselor confirmed that appellant had not resumed cooperation with rehabilitation. Therefore, appellant did not participate in vocational rehabilitation efforts or provide good cause for not doing so within 30 days of the November 30, 2009 notice. In its January 12, 2010 decision, OWCP properly reduced his compensation under section 8113(b), based on the difference between his pay rate for compensation purposes and what his wage-earning capacity would have been as a debt collector had he cooperated with vocational rehabilitation efforts. Applying the principles set forth in *Shadrick*,¹⁰ it properly calculated appellant's new entitlement to wage-loss compensation.

After the January 12, 2010 decision, appellant requested reconsideration and asserted that he was compliant with vocational rehabilitation and completed 12 weeks of physical therapy. However, evidence from the rehabilitation counselor does not support appellant's assertion. Appellant also submitted reports from Dr. Kline, who diagnosed chronic low back pain, degenerative disc disease with disc herniation at L5-S1 and an annular tear at L4-5. However, Dr. Kline did not state that appellant was totally disabled from work or that he could not participate in vocational rehabilitation. As noted, the weight of the medical evidence rests with the opinion of Dr. Boulden, who advised that appellant could return to full-time sedentary work. Appellant did not provide medical evidence substantiating his inability to participate in vocational rehabilitation. OWCP properly declined to modify its January 12, 2010 decision.

CONCLUSION

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

¹⁰ *Albert C. Shadrick, supra* note 5; *see* 20 C.F.R. § 10.403.

ORDER

IT IS HEREBY ORDERED THAT the June 28, 2010 the Office of Workers' Compensation Programs' decision is affirmed.

Issued: September 16, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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