

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

K.R., Appellant

and

**DEPARTMENT OF JUSTICE, DRUG
ENFORCEMENT ADMINISTRATION,
Tucson, AZ, Employer**

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**Docket No. 11-1911
Issued: April 6, 2012**

Appearances:
Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On August 17, 2011 appellant, through his representative, filed a timely appeal from the June 10, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 wage-loss compensation on the grounds that he failed without good cause to undergo vocational rehabilitation as directed.

FACTUAL HISTORY

On February 26, 1988 appellant, a 32-year-old criminal investigator, sustained a traumatic injury in the performance of duty while lifting weights. OWCP accepted his claim for

¹ 5 U.S.C. § 8101 *et seq.*

cervical strain with posterior C3-4, C4-5 foraminotomy, right C6 discectomy and consequential left shoulder impairment. It later expanded its acceptance to include permanent aggravation of foraminal stenosis, C3-6 and C6 radiculopathy, left.

On March 15, 2010 an impartial medical specialist found that appellant was “certainly qualified” to perform the duties of a semi-sedentary position. Appellant’s only limitations were to avoid repeated heavy lifting or bending, repeated overhead work or lifting objects weighing more than 25 pounds above his shoulders. On June 5, 2010 the impartial medical specialist completed a work capacity evaluation indicating that appellant could return to his usual job with limitations.

On November 1, 2010 OWCP directed appellant to undergo and cooperate with vocational rehabilitation. It identified an online university program that prepared individuals for an entry-level position in the field of human resources.

On February 15, 2011 appellant notified his rehabilitation counselor that he had no interest in human resources. He had been through an internship in human resources in 2001 and had no interest in it. Appellant stated that he would not be able to do human resource work due to his neck, back and left hip problems, but when asked how that work would be different from work in which he had expressed an interest (public relations, communication and writing), he explained that it would not be different as far as the job goes, but the difference would be his interest. He stated that he did not want to meet with someone at the university. The rehabilitation counselor reported obstruction.

OWCP informed appellant that he appeared to be impeding rehabilitation efforts. It notified him of the penalty for obstruction, advising that it would assume vocational rehabilitation would have resulted in a return to work with no loss of wage-earning capacity and that it would reduce his wage-loss compensation to zero. OWCP explained that this reduction would continue until he complied in good faith. Appellant thereafter met with his rehabilitation counselor and signed an application for admission to the online university program.

The rehabilitation counselor prepared a vocational rehabilitation plan for formal training and direct placement for two identified jobs: personnel manager and personnel clerk. Based on the medically determinable residuals of the injury and taking into consideration all significant preexisting impairments and pertinent nonmedical factors, she found that appellant would be able to perform the job of personnel manager. The rehabilitation counselor explained how he would meet the specific vocational preparation for the position once he completed the online university program. She researched the job market and found that the position was reasonably available within appellant’s commuting area and she confirmed the pay rate for an entry level position.

On April 18, 2001 the rehabilitation counselor reported further obstruction. Appellant advised that his neck was bothering him, he had worked on homework all weekend and he was taking Codeine. He advised that he “can’t keep doing this” in terms of school; his health came first. Appellant stated that he had problems sleeping and that he would obtain statements from his physician. He stated that his books had not yet arrived and if they did, he would return them.

On April 29, 2011 OWCP informed appellant that he once again appeared to be impeding rehabilitation efforts. It notified him of the penalty for obstruction, advising that it would assume vocational rehabilitation would have resulted in a return to work with no loss of wage-earning capacity and that it would reduce his wage-loss compensation based on what he probably would have earned had he undergone vocational rehabilitation. OWCP asked appellant to demonstrate compliance by calling both the rehabilitation counselor and OWCP within 30 days to advise that he was willing to participate with vocational rehabilitation efforts or to show good cause for not undergoing the training program or participating in vocational rehabilitation. Otherwise, the rehabilitation effort would be terminated and his compensation reduced.

The university notified OWCP that appellant had dropped his courses.

Appellant's representative advised OWCP that there was no obstruction. He explained that appellant contacted him after experiencing significant medical problems as a result of the computer work required by the courses. The representative told appellant to stop the activity and be examined by a physician. He submitted appellant's statement, which was substantially similar to the rehabilitation counselor's account of their conversation. The representative also submitted medical reports from Dr. Bruce M. Pederson, a Board-certified family physician.

Dr. Pederson, who had been on one side of a conflict resolved by the impartial medical specialist,² examined appellant on March 15, 2001 and found that his physical examination had not changed. He stated that appellant's injuries and disabilities had caused a progressive decline of function. The right C6 radiculopathy and disabling neck pain and stiffness were progressive, permanent and directly caused by the February 26, 1988 employment injury.

Dr. Pederson examined appellant again on April 20, 2011 with complaints of pain radiating down his right arm for one week. He related the history of appellant starting online courses in human resources for vocational rehabilitation, working on the computer all weekend and using Acetaminophen with Codeine. Dr. Pederson noted that the representative told appellant to stop the computer work and document his neck flair. He noted that appellant was trying to comply with vocational rehabilitation, but his neck had flared with the right arm radicular pain. Dr. Pederson reported decreased neck motion and a positive Spurling maneuver to the right. He diagnosed cervical radiculopathy, right, chronic, due to work injury, flaring with recent computer work. Dr. Pederson also diagnosed chronic neck pain flaring with recent computer work. He advised rest, warm compresses and daily low-dose aspirin.

The rehabilitation counselor notified OWCP that she had not heard from appellant in response to the April 29, 2011 warning letter.

In a decision dated June 10, 2011, OWCP reduced appellant's wage-loss compensation on the grounds that he failed without good cause to undergo vocational rehabilitation as directed.

² A conflict arose between a multidisciplinary second-opinion examination and Dr. Pederson on the extent of appellant's disability due to the February 26, 1988 work injury. The second-opinion examination concluded that appellant could be gainfully employed in light to medium work with restrictions. After initially agreeing that he could perform light work with restrictions, Dr. Pederson reported that appellant was incapable of any work. To resolve the conflict, OWCP referred appellant to Dr. John F. Burns, a Board-certified orthopedic surgeon who served as the impartial medical specialist.

It found that Dr. Pederson did not provide a thorough explanation with clinical objective findings demonstrating that the accepted condition had materially worsened such that he was incapable of continuing the rehabilitation program. OWCP reduced appellant's compensation by what he would have earned as an entry-level personnel manager had he completed his training.³

Appellant's representative argues, as he did before OWCP, that there was no obstruction that he advised appellant to stop his computer work to be examined by his physician. He argues that Dr. Pederson's reports established appellant's inability to perform the computer work associated with the vocational training program. The representative also argues that the impartial medical specialist's opinion on March 15, 2010 had become stale by the time of the reduction, citing *Ruth Churchwell*, Docket No. 02-792 (issued October 17, 2002).

LEGAL PRECEDENT

Section 8104(a) of FECA provides: "The Secretary of Labor [*i.e.*, 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."⁴

Section 8113(b) 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."⁵

Section 10.519 of OWCP's regulations provide:

"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

³ OWCP found that appellant had an 84 percent wage-earning capacity and would continue to receive compensation for partial disability.

⁴ 5 U.S.C. § 8104(a).

⁵ *Id.* at § 8113(b).

planning process, which includes meeting with OWCP[’s] 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.”⁶

ANALYSIS

OWCP directed appellant to undergo and cooperate with vocational rehabilitation. After starting his online university program, however, appellant advised that he could not keep doing it. He stated that he had worked on homework all weekend, that his neck was bothering him and that he was taking Codeine. Appellant also advised that his books had not yet arrived and that he would return them if they did. The university thereafter notified OWCP that he had dropped his courses. Appellant made no contact with his rehabilitation counselor following OWCP’s April 29, 2011 letter of warning.

The Board finds that appellant obstructed vocational rehabilitation. Appellant refused to continue to participate in a rehabilitation effort when so directed. The question for determination is whether he showed good cause.

Appellant claimed that working on homework all weekend bothered his neck. To support this claim, he submitted two reports from Dr. Pederson, the family physician, whose March 15, 2001 report did not address the issue. On April 20, 2011, however, Dr. Pederson noted appellant’s complaints of pain radiating down his right arm for one week. He related the history of starting online courses in human resources for vocational rehabilitation, working on the computer all weekend and using acetaminophen with Codeine. Dr. Pederson diagnosed chronic cervical radiculopathy, right, flaring with recent computer work. He advised rest, warm compresses and low-dose aspirin, but he did not specifically prohibit appellant from continuing the vocational rehabilitation effort. Dr. Pederson did not directly address the issue or explain how appellant’s prescription was inconsistent with taking an online course.

Medical conclusions unsupported by rationale are of little probative value.⁷ The Board thus finds that Dr. Pederson’s reports did not show good cause for appellant’s obstruction. As appellant, without good cause, failed or refused to apply for, undergo, participate in or continue to participate in a vocational rehabilitation effort when so directed, OWCP, having identified a suitable job, properly reduced his future monetary compensation based on the amount that would likely have been his wage-earning capacity had he undergone vocational rehabilitation. The Board will affirm OWCP’s June 10, 2011 decision.

Appellant’s representative argues that there was no obstruction. Appellant announced that he would no longer do his coursework. He dropped his classes. Appellant did not contact his rehabilitation counselor as instructed. Given an opportunity to comply, he gave no indication that he was willing to continue his participation in the vocational rehabilitation effort. That was obstruction. Had appellant shown good cause for his obstruction, he would have avoided the purely provisional reduction of his compensation under 5 U.S.C. § 8113(b).

⁶ 20 C.F.R. § 10.519.

⁷ *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954).

Appellant's representative also argues that Dr. Pederson's reports established appellant's inability to perform the computer work associated with the vocational training. Dr. Pederson did not make that finding. The representative's conclusion cannot be drawn without making medical assumptions. Appellant reported a single episode of neck pain following an entire weekend of computer work (he did not report radiculopathy when he first mentioned the episode to his rehabilitation counselor). Dr. Pederson accepted the history appellant provided and without offering a rationalized opinion on the matter, effectively allowed appellant to self-certify an aggravation. He did not conclude that appellant's cervical condition prevented him from pursuing any kind of online training.

Appellant's representative further argues that the impartial medical specialist's opinion on March 15, 2010 had become stale by the time OWCP reduced compensation. He cites the Board's opinion in *Ruth Churchwell*, Docket No. 02-792 (issued October 17, 2002), but that case involved a refusal of suitable work and the permanent termination of entitlement under 5 U.S.C. § 8106(c). This case involves a suspension of compensation under 5 U.S.C. § 8113(b). When the impartial medical specialist found that appellant was not totally disabled for work, OWCP directed him to undergo vocational rehabilitation later that same year, while the weight of the medical evidence was still reasonably fresh. Further, and more to the point, once appellant obstructed the vocational rehabilitation effort, it became his burden to show good cause, which he failed to do.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly reduced appellant's wage-loss compensation on the grounds that he failed without good cause to undergo vocational rehabilitation as directed.

ORDER

IT IS HEREBY ORDERED THAT the June 10, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 6, 2012
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