



## **FACTUAL HISTORY**

OWCP accepted that on April 5, 1988 appellant, then a 39-year-old aircraft electrician, sustained an acute left shoulder sprain with fibrositis and left biceps tenosynovitis due to slipping while descending a ladder and hitting his left shoulder on an airplane hatch.<sup>2</sup> Appellant stopped work on April 8, 1988 and returned to work on May 9, 1988. He experienced periodic work stoppages until being totally disabled from employment beginning on October 25, 1989.

On April 18, 1991 appellant underwent a left rotator cuff repair and, on November 18, 1997, he had a left rotator cuff repair with lateral clavical resection. These procedures were authorized by OWCP. From May 1994 through January 1998, appellant worked in various temporary positions in the private sector. He stopped work in January 1998 and has not returned to any type of employment to date. On August 15, 2000 appellant underwent an authorized left rotator cuff repair and, on January 6, 2006, he had an authorized debridement for chronic left rotator cuff tear with bicep tenosynovitis.

In December 2007 appellant began to participate in vocational rehabilitation efforts. Doris Graessle, appellant's rehabilitation counselor, formulated a plan under which appellant would undertake education and training designed to prepare him for work as a computer security specialist or microcomputer support specialist. Appellant started participating in a training program at the New Horizons Computer Learning Centers, Ohio Valley. Initial reports prepared by Ms. Graessle showed that appellant was cooperating with vocational rehabilitation efforts.<sup>3</sup>

In a progress report covering the period May 6 to June 4, 2009, Ms. Graessle noted that Amy Matney, an official at the training center, had expressed concerns that appellant's attendance in computer training classes had become less regular. Appellant was notified that the vocational rehabilitation training would not be extended if he did not acquire all the necessary computer certifications and that he would need a medical excuse for nonattendance at school.<sup>4</sup>

On June 24, 2009 both appellant and Ms. Graessle signed a Rehabilitation Plan and Award which was designed to initiate training for job-seeking skills because the training segment of the vocational rehabilitation program was scheduled to terminate at the end of July 2009. Ms. Graessle noted that appellant had completed only one certificate of the two needed for the completion of training. She hoped that, once appellant took and passed the test for the second certificate, he could also complete the Microsoft Certificate Technology Specialist examination.

In her progress report for the period June 5 through June 30, 2009, Ms. Graessle reported that appellant had wanted the practice examination to be rescheduled during the previous week. When the examination was rescheduled, appellant failed to attend it. He stated that he forgot

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<sup>2</sup> Appellant's nonwork-related medical history included fibrositis, low back problems, cervical radiculitis and cervical and lumbar strains with recurrent myofascitis.

<sup>3</sup> It was noted that on May 31, 2008 appellant passed a practice test for computer certification and that teachers at the training center characterized him as an "extremely competent student."

<sup>4</sup> In a June 2, 2009 note, Dr. Donald W. Ames, an attending Board-certified orthopedic surgeon, indicated that appellant was following up on his left shoulder but that he had not seen appellant in nine months.

about the examination due to personal issues on his mind. Appellant advised that he had been diagnosed with depression and that the treating physician had prescribed anti-depressant medication. Ms. Graessle stated that she had advised appellant that he might seek mental health counseling due to inappropriate comments he made to her and the staff at New Horizons Computer Learning Centers and his negative attitude and demeanor.<sup>5</sup> She reported that, a week later, appellant declined such counseling as he indicated feeling better while on his anti-depressant medication. Appellant took a practice examination for certification and scored a 62 percent grade with an 80 percent grade being needed for passing. Ms. Graessle noted that on June 27, 2009 appellant provided her with a Form OWCP-17 that was inaccurate and incomplete and which included improper entries regarding the dates he attended training. When appellant was informed by Ms. Graessle that the form could not be accepted, he telephoned her to discuss his disagreement with her position on the matter. Ms. Graessle indicated that she then submitted a Form OWCP-44 obstruction notice.

In a telephone message to OWCP on July 2, 2009, appellant indicated having complaints about Ms. Graessle. An OWCP examiner returned the telephone call on July 7, 2009, leaving a message that directed appellant to put his concerns in writing. Appellant was advised that, if he did not continue cooperating in the vocational rehabilitation efforts, his compensation benefits would be suspended.

Appellant submitted a slip completed on July 8, 2009 by a medical assistant at Family Health Connections which indicated that he could not work from July 7 to 10, 2009. Ms. Graessle telephoned an OWCP rehabilitation specialist on July 10, 2009, noting that appellant reported that he would not be taking a scheduled certification examination or participating in job placement due to a vehicular accident and “hives.”

An OWCP claims examiner telephoned appellant on July 10, 2009 and advised him that there was no medical evidence on file that showed he was disabled from performing the required certification testing. Appellant was instructed to submit a report regarding the vehicular accident he sustained and to continue cooperating with the mandatory rehabilitation program by taking the testing needed for the completion of training and the acquisition of the computer certification.<sup>6</sup> He submitted a July 10, 2009 slip in which Dr. Patrick Jonas, an attending family practitioner, indicated that he could not work from July 10 to 16, 2009.

By letter dated July 14, 2009, OWCP advised appellant of its determination that he had failed to participate in vocational rehabilitation efforts. Such nonparticipation included his failure to take certification testing required to complete his computer training. Appellant was informed that the submitted evidence failed to provide a history of his vehicular accident and did not provide rationale as to why he was disabled from class attendance. OWCP further advised that he had been rated and trained to perform the job duties of a computer security specialist and a microcomputer support specialist and that, but for his obstruction, he would have successfully completed training for these positions. It informed appellant that an individual who refuses or impedes a vocational rehabilitation effort without good cause after testing has been accomplished

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<sup>5</sup> Ms. Graessle indicated that appellant accused her of being a liar.

<sup>6</sup> Appellant later submitted a police report of the July 7, 2009 accident.

will have his compensation reduced based on what would have been his wage-earning capacity had the training been successfully completed. OWCP directed him to make a good faith effort to participate in the rehabilitation effort within 30 days or, if he believed he had good cause for not participating in the effort, to provide reasons and supporting evidence of such good cause within 30 days. It stated that if these instructions were not followed within 30 days action would be taken to reduce appellant's compensation.

Factual evidence submitted by appellant consisted of a six-page critique of his relationship with Ms. Graessle. Appellant indicated that he had second thoughts about the "computer field" due to "the lack of need and the number of layoffs in the computer programming field." He claimed that Ms. Graessle yelled at him and threatened to cut off his compensation benefits. Ms. Graessle betrayed his "confidence" on "two things," and talked to him in a "voice sounds kind and understanding until even the smallest item does not go her way." Appellant indicated that he had no complaints about Ms. Graessle when he first began undergoing vocational rehabilitation. Ms. Graessle asserted that during the latter part of his training he experienced unbearable pain in his left shoulder attributed to "barometric pressure and/or a cold front" and indicated that the prior April "was a month that had storms most every other day," that he made it to school whenever he was able and that he "would stick with it as long as it was bearable."

Appellant submitted medical evidence in support of his claim that he could not continue with vocational rehabilitation efforts. In a July 15, 2009 note, Dr. Ames discussed appellant's July 7, 2009 vehicular accident. Subjective pain complaints were noted and Dr. Ames indicated that appellant reported missing school due to pain. Dr. Ames diagnosed sprain/strain of the rotator cuff, pain in shoulder joint and diabetes mellitus and treated appellant with a left shoulder injection. No discussion of appellant's vocational rehabilitation program or inability to participate in his schooling was provided. In a July 21, 2009 note, Dr. Jonas stated, "[Motor vehicle accident], multiple injuries, no class/learning encounters until August 7, 2009." In an August 4, 2009 note, he disabled appellant from work through September 1, 2009. On August 17, 2009 Dr. Ames discussed appellant's ongoing subjective pain complaints. He opined that new magnetic resonance imaging (MRI) testing revealed "no new injury seen." Dr. Ames recommended physical therapy and advised appellant to follow up as needed.

By decision dated August 24, 2009, OWCP 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. Appellant's compensation would be based on the difference between his pay rate as determined for compensation purposes and what his wage-earning capacity would have been if he had cooperated with vocational rehabilitation efforts, *i.e.*, his wage-earning capacity as a computer security specialist. OWCP discussed appellant's missing of classes and failure to take a computer certification test and found that these actions were not excused by his medical condition or any other reason.

Appellant submitted a September 4, 2009 office note in which Dr. Ames opined that appellant was unable to work due to pain exacerbated by his July 7, 2009 vehicular accident. Dr. Ames noted a prior physician's opinion regarding further surgery but he provided no opinion regarding whether he believed appellant needed this surgery. He recommended that appellant follow up as needed.

In November 2009 appellant began to visit Dr. Michael Herbenick, a Board-certified orthopedic surgeon. Narrative reports of November 12, 2009, February 11, April 13 and June 9, 2010 offered no discussion of appellant's vocational rehabilitation program or inability to participate in his schooling. These reports discussed further possible surgical intervention.

In November 2009 OWCP received a formal request for left shoulder surgery. As part of the process in determining whether this surgery should be authorized, all medical evidence of record was forwarded to an OWCP medical adviser for review. The purpose of the review by the OWCP medical adviser was to aide in determining whether the requested surgical procedure was warranted and medically necessary. On July 20, 2010 an OWCP medical adviser indicated that some form of joint reconstruction surgery for appellant's left shoulder was necessary, but he did not provide any opinion on the state of appellant's ability to function in mid 2009. On August 20, 2010 appellant requested reconsideration of the August 24, 2009 decision.

In a February 4, 2011 decision, OWCP affirmed its August 24, 2009 decision.

### **LEGAL PRECEDENT**

Once OWCP 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>7</sup> Section 8113(b) of FECA provides that if an individual, without good cause, fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of FECA, OWCP, "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 OWCP.<sup>8</sup>

Section 10.519 of Title 20 of the Code of Federal Regulations details the actions OWCP will take when 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. Section 10.519(a) provides, in pertinent part:

"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. OWCP will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings 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."<sup>9</sup>

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<sup>7</sup> *Betty F. Wade*, 37 ECAB 556, 565 (1986).

<sup>8</sup> 5 U.S.C. § 8113(b).

<sup>9</sup> 20 C.F.R. § 10.519(a).

## ANALYSIS

The Board finds that OWCP 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.

The record reflects that appellant obstructed vocational rehabilitation efforts by repeatedly missing training classes designed to qualify him to work in the computer field and by refusing to take computer certification tests required for him to work in that field. In particular, appellant refused to take a certification test in July 2009 which would have allowed him to complete his training program and start a job search.

Appellant was provided an opportunity to explain his failure to participate in vocational rehabilitation efforts. He indicated that he had second thoughts about the "computer field" due to "the lack of need and the number of layoffs in the computer programming field." The Board notes that claimants are rated as being able to perform certain positions based on past experience, training and job availability. Appellant's concerns about the computer field would not justify his failure to cooperate with rehabilitation efforts. He noted various complaints about his rehabilitation counselor, Ms. Graessle, indicating among other things that she yelled at him and threatened to cut off his compensation benefits. The Board notes, however, that appellant's complaints in this regard were vague and unsubstantiated.

Appellant claimed that a medical condition prevented him from participating in vocational rehabilitation efforts, but he did not submit probative medical evidence supporting this contention. In particular, he asserted that the effects of a July 7, 2009 vehicular accident prevented him from engaging in vocational rehabilitation efforts. The record contains a number of medical reports, dated beginning in early July 2009, indicating that appellant was disabled from work for various periods. Several attending physicians, including Dr. Ames, a Board-certified orthopedic surgeon, reported findings on physical examination and indicated that appellant reported increased symptoms after July 7, 2009. However, none of these physicians provided a rationalized opinion, supported by specific findings, clearly showing that appellant was disabled from all activity or that his medical condition prevented him from participating in vocational rehabilitation efforts, including attending classes or taking tests.<sup>10</sup> Moreover, the Board notes that these medical reports do not show a significant change in appellant's objective medical condition after his vehicular accident. Therefore, appellant's refusal to participate in rehabilitation efforts was not justified for medical reasons.

A review of the record indicates that appellant was offered repeated opportunities to complete the agreed upon vocational rehabilitation plan. With respect to the taking of the necessary computer certification test, he was provided with a number of opportunities to take the test. There is no evidence that appellant's failure to fully participate in the rehabilitation

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<sup>10</sup> For example, in a July 21, 2009 note, Dr. Jonas, an attending Board-certified family practitioner stated, "[Motor vehicle accident], multiple injuries, no class/learning encounters until August 7, 2009." However, this note does not contain any objective findings showing why appellant's condition rendered him unable to attend classes or engage in other rehabilitation efforts. Rather, Dr. Jonas' opinion appears to have been based on appellant's subjective complaints.

program was based on good cause.<sup>11</sup> For these reasons, OWCP 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. It noted appellant's successful training efforts up until his refusal to continue cooperation and properly concluded that, but for his obstruction, he would have been able to earn wages as a computer security specialist. Therefore, it properly adjusted his compensation based on the wages of this position.

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 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.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the February 4, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 27, 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

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<sup>11</sup> See *Michael D. Snay*, 45 ECAB 403, 410-12 (1994).