

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

E.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Diego, CA, Employer**

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**Docket No. 13-1396
Issued: January 17, 2014**

Appearances:

*Alan J. Shapiro, 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 May 28, 2013 appellant, through his attorney, filed a timely appeal from the April 1, 2013 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 to review this decision.²

ISSUE

The issue is whether appellant showed good cause for failing to cooperate with vocational rehabilitation when so directed.

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant has filed a separate appeal from OWCP's April 8, 2013 decision denying his claim for a psychiatric condition. The Board will review that decision under Docket No. 13-1485.

FACTUAL HISTORY

On April 9, 2003 appellant, a 47-year-old mail processing clerk, filed an occupational disease claim alleging that the pain on the bottom of his feet was a result of repetitive activities at work, including standing, walking and lifting. OWCP accepted his claim for aggravation of bilateral plantar fasciitis. Appellant received a schedule award for permanent impairment of his lower extremities.³

In April 2006, appellant accepted a reassignment offer and was able to work until he received notice in September 2008 that work was no longer available for him as a result of the National Reassessment Process (NRP). He thereafter received compensation for wage loss on the periodic rolls.

Dr. David J. Terry, the attending Board-certified podiatrist, continued to find that appellant was capable of working modified duty. Dr. Scott D. Renslow, a Board-certified internist, imposed limitations for chronic low back pain.

In 2009, Dr. Bernard L. Frankel, a psychiatrist, diagnosed moderate major depressive disorder, recurrent, together with spouse relational problem and adjustment disorder with anxiety due to worsening financial stressors. He found that appellant's depression, the self-endorsed symptoms of which included impaired concentration, marked fatigue, impaired insight and judgment and impaired confidence in his abilities, precluded work in a formal employment setting. Further, Dr. Frankel reported that appellant was suffering from major depression so difficult that he was unable to complete his classes in vocational rehabilitation:

“[Appellant’s] depressive symptoms include little interest or pleasure in doing things, feeling down, depressed or hopeless, he has trouble falling or staying asleep, feeling tired or having little energy, poor appetite, feeling bad about himself, trouble concentrating on things, such as reading the newspaper or watching television. His symptoms associated with his anxiety and/or his adjustment disorder include: Feeling nervous, anxious or on edge, not being able to stop or control worrying, worrying too much about different things, trouble relaxing, being so restless that it is hard to sit still, becoming easily annoyed or irritable, feeling afraid as if something awful might happen and finding it difficult to get along with other people.”

Dr. Frankel would explain that appellant's symptoms started in 1986 with the death of his mother, followed by his youngest brother's suicide in 1991 and his father's death in 2001. Appellant was more or less continually depressed during these 15 years but was never evaluated until 2002 and 2003. After he lost his job in 2008, his symptoms worsened. Dr. Frankel

³ Other work injuries included left wrist/thumb de Quervain's tenosynovitis as a result of repetitive work activities in 1994 (OWCP File No. xxxxxx878), cervical strain, right shoulder strain and right trapezius strain as a result of repetitive work activities in 1998 (OWCP File No. xxxxxx932) and an acute exacerbation of preexisting lumbar degenerative disc disease as a result of prolonged standing during a week of training in June 2006 (OWCP File No. xxxxxx563). Appellant was awarded Veterans Affairs benefits for a number of medical conditions.

indicated that appellant would be referred to a cognitive behavioral therapy depression group, as well as marital counseling and individual therapy.

Dr. Terry continued to find that appellant was capable of working modified duty. Dr. Renslow noted that appellant had a 40 percent service-connected disability for intervertebral disc syndrome. He added that appellant's chronic low back pain had exacerbated his underlying depression and that the prognosis for significant improvement in his low back pain was poor. Dr. Frankel opined that the severity of appellant's psychiatric disorders, together with the severity of his chronic pain, precluded any work in any employment setting.

Dr. William P. Curran, a Board-certified orthopedic surgeon and OWCP second-opinion physician, examined appellant in May 2012. He diagnosed postoperative right shoulder rotator cuff repair and excision of distal right clavicle; resolved de Quervain's tenosynovitis involving the left wrist and hand; degenerative disc and joint disease at lower levels of the lumbar spine; bilateral plantar fasciitis; and osteoarthritis of both hips. Dr. Curran found no nonindustrial or preexisting disability. He found that appellant was able to work eight hours a day with restrictions.

OWCP provided Dr. Renslow with a copy of Dr. Curran's report and asked whether he disagreed. Dr. Renslow replied that appellant's low back condition was exacerbated by prolonged sitting, standing, bending forward and lifting and therefore he was not capable of working eight hours a day even with permanent restrictions.

OWCP directed appellant to undergo vocational rehabilitation. Appellant disagreed with Dr. Curran's work restrictions, however, and advised that it was impossible for him to work or attend a training program. The rehabilitation counselor developed a rehabilitation plan nonetheless, one that included a training program beginning August 20, 2012. Appellant did not appear.

On August 21, 2012 OWCP advised appellant of the penalty for not cooperating with vocational rehabilitation. It explained that the medical evidence established that he was able to work based on the accepted injury and any preexisting medical condition and that his disabling psychiatric condition arose after the date of injury and was therefore immaterial. OWCP directed appellant to begin the training program and gave him 30 days to comply or face a reduction in his compensation.

In a decision dated October 1, 2012, OWCP reduced appellant's wage-loss compensation on the grounds that he failed, without good cause, to undergo vocational rehabilitation as directed. It found that, if he had participated in good faith, he would have been able to perform the position of medical clerk.

At a telephonic hearing before an OWCP hearing representative, appellant testified that he had no psychological problems prior to his most recent injury. He confirmed that he was working and did not have any problems. Appellant added that losing his job, being sent home from work because they could no longer accommodate him, caused him to become depressed. Having his job taken away was the reason his psychological problem became acute and active.

Appellant confirmed that NRP was the factor of employment that caused his psychological condition.

The campus director of the institute offering the rehabilitation training program advised that he had reviewed documents relating to appellant's overall mental and physical condition. Appellant had indicated that he did not wish to be enrolled in school due to the severity of his condition. After reviewing Dr. Frankel's opinion that appellant's psychiatric disorders, together with the severity of his chronic pain, precluded any work in any employment setting, the campus director concurred with appellant that it would not appear to be in his best interest to pursue training.

In a decision dated April 1, 2013, the hearing representative affirmed the reduction of appellant's wage-loss compensation. Dr. Curran, who considered all of the conditions OWCP had accepted, established that appellant could perform sedentary duties with some limited standing and walking. Dr. Renslow did not support total disability, as the selected position did not require prolonged sitting, standing, bending forward or lifting. The hearing representative found that appellant's psychiatric condition, which developed after the work injuries, was not a factor in determining his wage-earning capacity. He further found that appellant failed, without good cause, to cooperate with vocational rehabilitation. The hearing representative did not present substantial or rationalized medical evidence to show that appellant could not complete his training.

LEGAL PRECEDENT

OWCP may direct a permanently disabled individual whose disability is compensable to undergo vocational rehabilitation. It shall provide for furnishing the vocational rehabilitation services.⁴

If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed, OWCP, on review 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 OWCP.⁵

When determining wage-earning capacity based on a constructed position, OWCP is responsible for determining whether the medical evidence establishes that the claimant is able to perform the job, taking into consideration medical conditions due to the accepted work-related injury or disease and any preexisting medical conditions. Medical conditions arising subsequent to the work-related injury or disease will not be considered.⁶

⁴ 5 U.S.C. § 8104(a).

⁵ *Id.* at § 8113(b); 20 C.F.R. § 10.519.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8.d (October 2009).

ANALYSIS

OWCP directed appellant to undergo vocational rehabilitation. Appellant failed to cooperate. The issue is whether he had good cause.

The Board's analysis begins with appellant's acceptance of a reassignment offer in April 2006. Appellant's 2003 employment injury, which had caused an aggravation of bilateral plantar fasciitis, was no longer totally disabling. He was able to return to work with restrictions. Appellant did so successfully for the next couple of years, notwithstanding previous employment injuries, service-connected disabilities and untreated symptoms of depression.

The only reason appellant stopped work in September 2008 was an administrative or personnel action taken under NRP. The employing establishment advised that productive work was no longer available for him. Appellant received compensation for wage loss because his limited duty was withdrawn.

This did not mean, of course, that appellant was totally disabled for work. He still had the capacity to perform limited duty, as he had successfully demonstrated since 2006. Dr. Terry, the attending podiatrist, continued to find that appellant was capable of working with limitations. Dr. Renslow, the internist treating appellant's chronic low back pain, also found that he could work with limitations. Neither appellant's accepted employment injury in 2003 nor his previous employment injuries nor his service-connected disabilities prevented him from performing some kind of work with appropriate limitations.

Dr. William P. Curran, a Board-certified orthopedic surgeon and OWCP's second-opinion physician, confirmed this in 2012. He found that appellant had no preexisting or nonindustrial disability and was able to work eight hours a day with restrictions. Appellant disagreed with Dr. Curran's work restrictions and advised that it was impossible for him to work or attend a training program. The issue is a medical one. Appellant's lay opinion is not probative nor is that of the campus director of the institute offering the training classes. Dr. Renslow responded to Dr. Curran's opinion by advising that appellant's low back condition would be exacerbated by prolonged sitting, standing, bending forward and lifting.⁷

The only real dissenting voice belonged to Dr. Frankel, the attending psychiatrist. It was his opinion that the loss of appellant's job in 2008 had worsened his psychiatric symptoms, for which he now needed medication. Dr. Frankel found that appellant's resulting depression precluded any work in any employment setting. Further, he found that appellant was suffering from a major depression so difficult that he was unable to complete his classes in vocational rehabilitation.

With respect to the issue of attending class, Dr. Frankel did not directly explain. Notwithstanding his symptoms, appellant was functional enough to attend medical appointments and functional enough for Dr. Frankel to refer him to a cognitive behavioral therapy depression

⁷ For employment that did not require prolonged sitting, standing, bending forward and lifting, Dr. Renslow's comment that appellant was therefore incapable of working eight hours a day even with permanent restrictions did not follow.

group, marital counseling and individual therapy. How he would be able to attend and participate in such organized sessions, but would not be able to attend class -- something that would help him regain the very thing he had lost, something that would directly address the cause of his psychiatric disability -- Dr. Frankel did not elaborate. For this reason, the Board finds that Dr. Frankel's opinion on appellant's inability to attend class is not well rationalized and is insufficient to justify appellant's failure to cooperate with vocational rehabilitation as directed.⁸

OWCP explained to appellant that the medical evidence established that he was able to work based on the accepted injury and any preexisting medical condition and that his disabling psychiatric condition was immaterial because it arose after the 2003 employment injury.⁹ It directed him to begin the training program and gave him 30 days to comply or face a reduction in his compensation. Appellant failed to appear.

The Board finds that appellant failed, without good cause, to undergo vocational rehabilitation as directed. OWCP therefore properly reduced his wage-loss compensation in accordance with what would have probably been his wage-earning capacity had he cooperated. The Board will affirm OWCP's April 1, 2013 decision.

The reduction of appellant's compensation will continue until he complies in good faith with the direction of OWCP. Individuals directed to undergo vocational rehabilitation by OWCP shall, while undergoing such rehabilitation, receive compensation at the rate of total disability, less the amount of any earnings received from remunerative employment, other than employment undertaken pursuant to such rehabilitation.¹⁰

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 appellant did not show good cause for failing to cooperate with vocational rehabilitation when so directed.

⁸ Medical conclusions unsupported by rationale are of little probative value. *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954).

⁹ As noted earlier, medical conditions arising subsequent to the work-related injury or disease will not be considered, as appellant's entitlement to compensation is based on the loss of wage-earning capacity caused by the work injury. See 20 C.F.R. § 10.5(f) ("disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury).

¹⁰ 5 U.S.C. § 8104(b).

ORDER

IT IS HEREBY ORDERED THAT the April 1, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 17, 2014
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