

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

L.O., Appellant)	
)	
and)	Docket No. 13-1578
)	Issued: January 9, 2014
DEPARTMENT OF THE AIR FORCE, AIR)	
NATIONAL GUARD, Newington, CT, Employer)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 21, 2013 appellant filed a timely appeal from May 20 and June 11, 2013 merit decisions 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.

ISSUES

The issues are: (1) whether OWCP properly reduced appellant's compensation under 5 U.S.C. § 8113(b) for failure to continue participation in vocational rehabilitation; and (2) whether OWCP properly determined appellant's compensation should be suspended for failure to provide requested information.

FACTUAL HISTORY

On January 28, 2010 appellant, then a 49-year-old aircraft equipment repairer, filed a traumatic injury claim (Form CA-1) alleging that he sustained a low back injury in the

¹ 5 U.S.C. § 8101 *et seq.*

performance of duty on January 25, 2010. He alleged that he was pulling a life raft from an aircraft and he pulled a muscle in his lower back. On March 8, 2010 OWCP accepted a herniated L3-4 disc. Appellant began receiving wage-loss compensation for total disability. On April 5, 2011 he underwent lumbar surgery.

Appellant was referred for a second opinion evaluation by Dr. Balazs Somogyi, a Board-certified orthopedic surgeon. In a report dated September 17, 2012, Dr. Somogyi opined that appellant could work four hours per day with restrictions. On October 11, 2012 appellant was referred for vocational rehabilitation services with a rehabilitation counselor (RC). The RC submitted reports dated October 24, November 23 and December 21, 2012. In a report dated January 22, 2013, the RC indicated that appellant had been encouraged to report to the veteran's specialist at the employing establishment's Career Center. In a report dated February 12, 2013, the RC stated that a home visit had been scheduled for January 29, 2013, but appellant was not at home for the scheduled meeting and he did not respond to telephone messages requesting that he contact her. According to the RC, appellant was contacted on January 31, 2013 and stated that he had forgotten the scheduled appointment. He reported having some personal problems and indicated that he is exploring his options regarding obtaining some form of disability. The RC requested that he schedule an appointment with the veterans employment coordinator at the cancer center and to contact her when he had done so.

The record indicates that on December 12, 2013 the RC prepared a Form OWCP-66 for the position of procurement clerk. The position was a sedentary position with a weekly wage reported as \$403.40 for 20 hours per week, based on state employment information. On February 15, 2013 the RC completed an OWCP Form-44 (rehabilitation action report) noting that appellant had not appeared for the scheduled appointment on January 29, 2013 and did not contact the RC to explain his absence. The RC also indicated that she had requested that appellant contact the veteran's specialist at the Career Center but had not heard from appellant.

By letter dated February 28, 2013, OWCP stated that it had been advised by the RC that appellant had refused to cooperate in the continued development of the vocational rehabilitation effort. It noted that the RC indicated that appellant had the ability to earn \$403.40 per week as a procurement clerk. In addition, OWCP stated that under 5 U.S.C. § 8113(b) an employee who without good cause fails to apply or undergo vocational rehabilitation when so directed may have his compensation reduced based on what would have been his wage-earning capacity had he completed vocational rehabilitation. Appellant was advised to contact OWCP or the RC within 30 days to make a good faith effort regarding participation in vocational rehabilitation, or action would be taken to reduce compensation based on wage-earning capacity.

On March 1, 2013 OWCP requested that appellant complete an EN-1032 form with respect to employment activity. Appellant was advised that failure to submit the requested information would result in suspension of compensation.

By report dated March 8, 2013, the RC reported that appellant had not responded and the case closure was indicated. On April 15, 2013 appellant submitted a form indicating that he was electing to receive retirement benefits instead of compensation benefits. Appellant indicated that the effective date of his election was August 31, 2013. On May 14, 2013 the employing establishment provided pay rate information for appellant as of February 13, 2013. The employing establishment indicated that appellant's current date-of-injury pay was \$31.60 per hour plus \$486.76 per month in military pay.

In a decision dated May 20, 2013, OWCP reduced appellant's compensation on the grounds that he had failed to continue participation in vocational rehabilitation. It found that, if appellant had continued, his wage-earning capacity would be \$403.40 per week based on part-time work as a procurement clerk. The reduction in compensation was based on a current weekly pay rate of \$1,374.11 and wage-earning capacity on \$403.40 per week.

By decision dated June 11, 2013, OWCP determined that appellant's compensation would be suspended effective June 30, 2013. It found that appellant had not submitted the EN-1032 form regarding employment activity and earnings as required by its regulations.

LEGAL PRECEDENT -- ISSUE 1

Pursuant to 5 U.S.C. § 8104(a), a claimant may be directed to undergo vocational rehabilitation. According to 5 U.S.C. § 8113(b):

“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.”

OWCP regulations indicate that where a suitable job has been identified, compensation will be reduced based on the amount that would have likely been the employee's wage-earning capacity had he undergone vocational rehabilitation as directed.² The reduction remains in effect until such time as the employee in good faith complies with the direction of OWCP.³

ANALYSIS -- ISSUE 1

In the present case, appellant was referred for vocational rehabilitation in October 2012, following the report of Dr. Somogyi indicating that appellant could work part time. He did not attend a scheduled meeting on January 29, 2013 or complete requested tasks with respect to the vocational rehabilitation effort. A February 15, 2013 report from the RC assigned to the case noted that appellant was not cooperating with vocational rehabilitation. OWCP advised appellant in a February 28, 2013 letter that he must contact OWCP or the RC and establish a good faith effort to continue participation.

Appellant did not respond until April 15, 2013 when he submitted an election form indicating that he had elected to receive retirement benefits as of August 31, 2013. This does not establish good cause for failure to participate in a scheduled meeting on January 29, 2013. A claimant must continue to cooperate with vocational rehabilitation until it is established that he is

² 20 C.F.R. § 10.519(b).

³ *Id.*

no longer entitled to compensation based on his election of retirement benefits.⁴ In this case, the RC closed the case due to appellant's noncooperation in vocational rehabilitation. The stated intent on April 15, 2013 to select retirement benefits as of August 31, 2013 is not good cause for a failure to participate in vocational rehabilitation commencing January 29, 2013.⁵

Based on the evidence of record, OWCP properly found that appellant had, without good cause, failed to participate in vocational rehabilitation as directed. The RC had identified the position of procurement clerk as suitable to appellant based on his vocational and physical capabilities. The wages for a 20-hour-per-week position, based on available wage information, were \$403.40. Pursuant to its regulations noted above, OWCP may reduce appellant's compensation based on his wage-earning capacity in the position of procurement clerk.

An employee's wage-earning capacity is determined by comparison of the earning capacity and the current pay rate for the date of injury and application of the formula provided in *Albert C. Shadrick*.⁶ OWCP determined appellant's current pay rate based on the evidence provided by the employing establishment and reduced appellant's compensation based on a wage-earning capacity of \$403.40 per week. The Board finds that OWCP properly reduced appellant's compensation in this case.

LEGAL PRECEDENT -- ISSUE 2

OWCP regulations provide:

"OWCP periodically requires each employee who is receiving compensation benefits to complete an affidavit as to any work or activity indicating an ability to work, which the employee has performed for the prior 15 months. If an employee who is required to file such a report fails to do so within 30 days of the date of the request, his or her right to compensation for wage loss under 5 U.S.C. [§] 8105 [total disability] or 8106 [partial disability] is suspended until OWCP receives the requested report. At that time, OWCP will reinstate compensation retroactive to the date of suspension if the employee remains entitled to compensation."⁷

⁴ See *M.M.*, Docket No 10-2216 (issued July 11, 2011) (appellant continued to cooperate with vocational rehabilitation until the RC closed the case in October 2009 because appellant had elected retirement benefits effective October 31, 2009).

⁵ The Board notes that the record indicates that OWCP continued to pay compensation for wage loss based on wage-earning capacity without interruption past the stated election date. It is not clear whether this was based on evidence not available to the Board. On appeal the Board reviews the final decisions issued within 180 days of the filing of the appeal and reviews evidence that was before OWCP at the time of the final decisions. 20 C.F.R. § 501.2(c)(1).

⁶ 5 ECAB 376 (1953); see also 20 C.F.R. § 10.403.

⁷ 20 C.F.R. § 10.528.

ANALYSIS -- ISSUE 2

In the present case, appellant sent appellant a letter dated March 1, 2013 and enclosed an EN-1032 form with respect to earnings and employment activity. He was advised that he must submit the requested evidence or his compensation would be suspended.

There is no indication in the record that appellant provided the requested information. As noted above, OWCP may suspend compensation until OWCP receives the requested evidence. The Board finds that OWCP properly suspended compensation effective June 30, 2013 based on the evidence of record. 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 pursuant to 5 U.S.C. § 8113(b) for failure to continue participation in vocational rehabilitation. The Board further finds OWCP properly suspended compensation for failure to provide the requested information.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 11 and May 20, 2013 are affirmed.

Issued: January 9, 2014
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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