

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

R.S., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
SHIPYARD, Long Beach, CA, Employer**

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**Docket No. 14-1484
Issued: November 10, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 19, 2014 appellant filed a timely appeal from February 6 and April 14, 2014 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 participate in vocational rehabilitation efforts without good cause; (2) whether OWCP properly suspended appellant's compensation for failing to submit a Form EN-1032, as requested.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 3, 1978 appellant, a 27-year-old equipment cleaner, caught his foot on a plank and twisted his right ankle. He filed a claim for benefits, which OWCP accepted for right ankle sprain, right ankle traumatic arthritis, postarthrotomy for osteochondral fracture of the right talus, and tendinitis of the posterior tibial and peroneal tendons. Appellant was placed on the periodic rolls and submitted regular EN-1032 forms.

In a March 6, 2012 report, Dr. Carol C. Frey, a specialist in orthopedic surgery, advised that appellant could return to work as of January 24, 2012 in a sedentary capacity with restrictions on walking and standing more than 2 hours or for more than 30 minutes at one time. She opined that he would be able to work at a job where he was not required to walk or stand for more than four hours. Dr. Frey also restricted appellant from climbing ladders or working at unprotected heights.

In a report dated January 2, 2013, Dr. G.B. Ha'Eri, Board-certified in orthopedic surgery, stated that appellant continued to suffer objective residuals from the February 3, 1978 injury including the surgeries he underwent in August 1981, October 1982 and September 2008. Appellant continued to demonstrate abnormal findings on his magnetic resonance imaging (MRI) scans. Dr. Ha'Eri advised that appellant's conditions of chondromalacia in his right ankle and subtalar joints were gradually progressive conditions and necessitated future medical care. He found that appellant could work an eight-hour day with restrictions. Appellant was instructed to avoid walking and standing for more than two hours; pushing and pulling exceeding 40 pounds for more than two hours; lifting exceeding 20 pounds for more than two hours; and climbing or operating a motor vehicle at work.

On February 14, 2013 OWCP referred appellant for vocational rehabilitation services, based on Dr. Ha'Eri's restrictions.

In a labor market survey dated April 9, 2013, and in a report dated April 24, 2013, the rehabilitation counselor found that there were two positions for appellant listed in the Department of Labor's *Dictionary of Occupational Titles* which were within appellant's indicated restrictions and reasonably reflected his ability to earn wages, customer complaint clerk, DOT No. 241.367.014, with a \$538.80 weekly wage-earning capacity, and receptionist, DOT No. 237.367.038, with a \$426.80 weekly wage-earning capacity. She advised that both jobs were being performed in sufficient numbers to make them reasonably available within appellant's commuting area.

Amy Koellner, the rehabilitation counselor, further found that appellant was interested in seeking jobs as a security guard in light of his experience in that field. She stated, however, that he was having difficulty finding jobs as a security guard within his restrictions on operating a motor vehicle and on standing and walking for no more than two hours. The rehabilitation counselor related that, with regard to his computer skills, appellant was familiar with Microsoft Office 2010 Word and Excel but was not a fast typist. She recommended that appellant enroll in a computer training course; he was receptive to this suggestion. The rehabilitation counselor stated that she had obtained approval for enrolling appellant in a training course with the Institute of Network Technology, consistent with the intent to place him in the positions of customer

complaint clerk or receptionist, with training dates of April 29 to July 19, 2013. She indicated that appellant had disagreed with the plan and had declined to sign the plan documents and to start training.

By notice of proposed reduction dated April 30, 2013, OWCP advised appellant that it had been informed that he had failed to attend the three-month computer skills training program at the Institute of Network Technology which began on Monday, April 29, 2013. Appellant preferred a six-month training program. Results of the tests and evaluations performed by the rehabilitation counselor, however, showed that the plan objectives of receptionist and customer complaint clerk required only three months of computer skills enhancement. OWCP stated that Section 8113(b) of FECA² provides that, if an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed, and OWCP finds that in the absence of the failure the individual's wage-earning capacity would probably have increased substantially, it may reduce the compensation prospectively based on what probably would have been the individual's wage-earning capacity had he or she not failed to apply for and undergo vocational rehabilitation. OWCP therefore directed appellant to complete the approved three-month training program at Institute of Network Technology by July 19, 2013 and to make up all time lost due to his nonparticipation. It advised him that, if he believed he had sufficient reason or justification for not participating in the training program, he should provide his reasons in writing along with any supporting documentation. OWCP informed him the rehabilitation effort would be terminated and his compensation would be reduced if he failed to cooperate.

In a letter received by OWCP on May 3, 2013, appellant stated that he went to visit the Institute of Network Technology but was not given the opportunity to enroll in courses of his choosing. He indicated that he did not start the program because he was not comfortable with the rehabilitation counselor and did not trust her intentions.

In a May 6, 2013 letter, appellant reiterated the allegations he made in his May 3, 2013 letter.

In a May 24, 2013 report, the rehabilitation counselor reiterated that appellant had refused to begin the computer training program as planned on April 29, 2013. She stated that she sent an e-mail to appellant on May 20, 2013 in which she advised him that he had not returned her telephone call, that she was attempting to resolve his concerns about the approved plan, and that he had been provided with 30 days to address his concerns. The rehabilitation counselor advised that she left a telephone message with appellant stating that if she did not hear back from him by May 28, 2013 she would notify OWCP on May 30, 2013 that he did not begin the approved plan.

In a June 6, 2013 report, Dr. Frey stated that appellant could work in a sedentary capacity with no walking or standing for more than 2 hours per day or for more than 30 minutes at one time.

In a June 17, 2013 decision, OWCP reduced appellant's compensation based upon what would have been his wage-earning capacity as a customer complaint clerk under 5 U.S.C.

² 5 U.S.C. § 8113(b).

§ 8113(b) to reflect his wage-earning capacity had he continued to participate in vocational rehabilitation efforts. It determined that he had failed, without good cause, to undergo vocational rehabilitation as directed. OWCP advised appellant that the factual and medical evidence established that he was no longer totally disabled and had the capacity to earn wages as a customer complaint clerk, DOT No. 241.367.014,³ at the rate of \$538.80 per week, in accordance with the factors outlined in 5 U.S.C. § 8115.⁴ It calculated that appellant's compensation rate should be adjusted to \$638.00 using the *Shadrick*⁵ formula.⁶

On July 8, 2013 appellant requested an oral hearing, which was held on November 21, 2013.

In a July 8, 2013 letter, appellant stated that he was willing to enroll in the Microsoft Windows 7 and Microsoft Office 2010 training program but reiterated that he wanted to work with another rehabilitation counselor.

At the hearing, appellant alleged that the original training course was not the one to which he was assigned; he asserted that based on their discussions he had expected to be entered into another program which was more tailored to his skills, education and background. He asserted that the rehabilitation counselor was "nasty" to him and placed him in a program that was totally different from the one for which he felt qualified without any input from him. Appellant testified that there was a communication problem between him and the rehabilitation counselor which affected their work relationship. He also asserted that she failed to give him an examination to determine his computer skills.

³ The job description stated: "Investigates customer complaints about merchandise, service; billing, or credit rating; Examines records, such as bills, computer printouts, microfilm, meter readings, bills of lading, and related documents and correspondence, and converses or corresponds with customer and other company personnel, such as billing, credit, sales, service, or shipping, to obtain facts regarding customer complaint. Examines pertinent information to determine accuracy of customer complaint and to determine responsibility for errors. Notifies customer and designated personnel of findings adjustments and recommendations, such as exchange of merchandise, refund of money, credit of customer's account, or adjustment of customer's bill. May recommend to management improvements in product, packaging, shipping methods, service, or billing methods and procedures to prevent future complaints of similar nature. May examine merchandise to determine accuracy of complaint. May follow up on recommended adjustments to ensure customer satisfaction. May key information into computer to obtain computerized records. May trace missing merchandise and be designated Tracer Clerk (clerical). May investigate overdue and damaged shipments or shortages in shipments for common carrier and be designated over-short-and-damage clerk (clerical). May be designated according to type of complaint adjusted as bill adjuster (clerical); merchandise; adjustment clerk (retail trade); service investigator (utility tel. & tel.)."

⁴ 5 U.S.C. § 8115.

⁵ *Albert C. Shadrick*, 5 ECAB 376 (1953); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.2 (April 1995).

⁶ OWCP indicated that appellant's salary as of February 3, 1978, the date he stopped working, was \$254.40 per week, that his current adjusted pay rate for his job on the date of injury was \$756.54, and that appellant was currently capable of earning \$538.80 per week, the rate of a customer complaint clerk. It therefore determined that he had a 71 percent wage-earning capacity, an adjusted wage-earning capacity of \$180.62, and that his current adjusted compensation rate, per four-week period, was \$638.00.

By decision dated February 6, 2014, an OWCP hearing representative affirmed the June 17, 2013 decision. She found that the rehabilitation counselor performed a thorough assessment of appellant's skills and confirmed that the proposed customer complaint clerk job was appropriate for appellant. OWCP hearing representative further found that she sufficiently documented her repeated attempts to contact appellant regarding the start date for the six-month computer training program after he failed to begin the course on April 29, 2013. She therefore found that OWCP properly reduced his compensation under Section 8113(b) based on his failure to cooperate and show good cause for failing to attend the training program.

On March 11, 2014 OWCP informed appellant, as it had informed him regularly since 1979, that federal regulations required him to submit an affidavit of any earnings and employment during the previous year and that a Form EN-1032 was enclosed for that purpose. It advised him to fully answer all questions on the Form EN-1032 and return the statement within 30 days or his benefits would be suspended. The letters were sent to appellant's address of record. Appellant did not respond.

By decision dated April 14, 2014, OWCP suspended appellant's compensation benefits, effective May 4, 2014, for failing to submit the Form EN-1032 as requested. It noted that, if he completed and returned an enclosed copy of the form, his compensation benefits would be restored retroactively to the date they were suspended.

LEGAL PRECEDENT -- ISSUE 1

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.⁷

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 the [office] nurse and the employer. The reduction will remain in

⁷ 5 U.S.C. § 8113(b).

effect until such time as the employee acts in good faith to comply with the direction of [OWCP].”⁸

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.⁹

ANALYSIS -- ISSUE 1

Appellant was referred to vocational rehabilitation after Dr. Frey reported on March 6, 2012 that he could return to work in a sedentary capacity with restrictions on walking and standing, and Dr. Ha’Eri reported on January 2, 2013 that appellant could work an eight-hour day, with restrictions. The vocational rehabilitation counselor properly identified the positions of customer complaint clerk and receptionist as within appellant’s medical restrictions and recommended a three-month training program to vocationally prepare appellant for these positions.

The record establishes that appellant was offered repeated opportunities to complete the proposed vocational rehabilitation plan; *i.e.*, attend the training course with the Institute of Network Technology, but he did not attend the scheduled start of class on April 29, 2013 and refused to either sign the plan documents or begin training. OWCP instructed appellant in its April 30, 2013 letter to contact the rehabilitation counselor to make the necessary arrangements to start and complete the approved three-month training program at the Institute of Network Technology by July 19, 2013 and to make up all time lost due to his nonparticipation. It also advised him that, if he believed he had sufficient reason or justification for not participating in the training program, he should provide his reasons in writing along with any supporting documentation within 30 days.

Appellant initially indicated that he wanted to pursue jobs as a security guard, but the vocational rehabilitation counselor properly determined that appellant’s medical restrictions regarding walking and standing and operating a motor vehicle effectively ruled out such work. He asserted that he declined to start the course because he was not given the opportunity to enroll in courses of his choosing when he visited the Institute of Network Technology and he believed he had communication difficulties with the rehabilitation counselor. However, appellant did not provide sufficient reason or justification for not participating in the training program. The rehabilitation counselor stated in her May 24, 2013 report that appellant did not return her e-mails and telephone messages in which she attempted to resolve his concerns and place him in the recommended training course. There is no evidence that appellant’s failure to fully participate in the rehabilitation program, particularly in his failure to participate in the training course, was based on “good cause.”¹⁰ The reduction of appellant’s compensation was based on a determination of what appellant’s income would have been if he had fully participated in vocational rehabilitation efforts. For these reasons, OWCP properly reduced appellant’s

⁸ 20 C.F.R. § 10.519(a).

⁹ *Betty F. Wade*, 37 ECAB 556, 565 (1986).

¹⁰ *See Michael D. Snay*, 45 ECAB 403, 410-12 (1994).

compensation under 5 U.S.C. § 8113(b) to reflect his loss of wage-earning capacity based on the customer complaint position.

OWCP properly applied the principles set forth in the *Shadrick*¹¹ decision to determine that appellant's compensation rate should be adjusted to \$638.00 based on his wage-earning capacity.

OWCP properly found that appellant was no longer totally disabled as a result of his accepted conditions, and it followed established procedures for determining appellant's employment-related loss of wage-earning capacity. The Board therefore finds that OWCP met its burden of justifying a reduction in appellant's compensation, because he failed to participate in vocational rehabilitation.

LEGAL PRECEDENT -- ISSUE 2

FECA authorizes the Secretary of Labor to require a partially disabled employee to report his or her earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies.¹²

Under section 10.528 of OWCP's implementing federal regulations, an employee in receipt of compensation benefits must complete an affidavit as to any work or activity indicating an ability to work which the employee has performed for the prior 15 months.¹³ 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 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.¹⁴

ANALYSIS -- ISSUE 2

On March 11, 2014 OWCP provided appellant with a Form EN-1032 the same form he has regularly received since 1979, and advised him that federal regulations required him to answer all questions concerning his employment and earnings. It properly notified him that, if he did not completely answer all questions and return the statement within 30 days, his benefits would be suspended. Appellant did not respond prior to the April 14, 2014 OWCP decision.

Based on the evidence of record, the Board finds that OWCP properly suspended appellant's compensation benefits effective May 11, 2014 pursuant to 20 C.F.R. § 10.528.¹⁵

¹¹ *Albert C. Shadrick*, 5 ECAB 376 (1953).

¹² 5 U.S.C. § 8106(b).

¹³ 20 C.F.R. § 10.528.

¹⁴ *Id.*; see also 20 C.F.R. § 10.525.

¹⁵ *J.J.*, Docket No. 09-1724 (issued March 1, 2010). See also *James A. Igo*, 49 ECAB 189 (1997).

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. The Board further finds that OWCP properly suspended appellant's compensation benefits for failing to submit information on a Form EN-1032, as required.

ORDER

IT IS HEREBY ORDERED THAT the April 14 and February 6, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 10, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board