

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

D.A., Appellant)

and)

DEPARTMENT OF THE AIR FORCE,)
HEADQUARTERS, WRIGHT-PATTERSON)
AIR FORCE BASE, OH, Employer)

**Docket No. 15-734
Issued: June 5, 2015**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
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 February 6, 2015 appellant, through counsel, filed a timely appeal from a January 12, 2015 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 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.

¹ 5 U.S.C. §§ 8101-8193.

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 when he slipped while descending a ladder and struck his left shoulder on an airplane hatch. Appellant stopped work on April 8, 1988 and returned to work on May 9, 1988. He had periodic work stoppages until being totally disabled from work beginning 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. OWCP authorized these procedures. From May 1994 through January 1998, appellant worked in various temporary positions in the private sector. He stopped work in January 1998 and did not return to work for the employing establishment. On August 15, 2000 appellant had 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 he 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.

In 2009, appellant began to assert that his medical condition prevented him from continuing with vocational rehabilitation efforts. In a July 15, 2009 note, Dr. Donald W. Ames, an attending Board-certified orthopedic surgeon, discussed a July 7, 2009 nonwork-related motor vehicle accident involving appellant. He noted that appellant reported missing school due to pain. Dr. Ames diagnosed sprain/strain of the rotator cuff, pain in shoulder joint, and diabetes mellitus.

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. The computer security specialist position was described in the Department of Labor's *Dictionary of Occupational Titles*. OWCP discussed the classes appellant missed and his failure to take a computer certification test. It found that these actions were not excused by his medical condition or any other reason. In a February 4, 2011 decision, OWCP affirmed its August 24, 2009 decision.

In a January 27, 2012 decision,² the Board affirmed the February 4, 2011 decision noting 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 reflected 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. Appellant claimed that a

² Docket No. 11-871 (issued January 27, 2012).

medical condition prevented him from participating in vocational rehabilitation efforts, but he did not submit sufficient medical evidence to establish this assertion. The Board referred to appellant's successful training efforts up until his refusal to continue cooperation and concluded that, but for his obstruction, he would have been able to earn wages as a computer security specialist. The Board determined that OWCP properly adjusted appellant's compensation based on the wages of this position.

Appellant continued to argue that OWCP improperly reduced his compensation in August 2009 under 5 U.S.C. § 8113(b). He also suggested that his current medical condition prevented him from returning to participation in vocational rehabilitation efforts. In a January 25, 2012 report, Dr. Gregory Fisher, a Board-certified orthopedic surgeon serving as an OWCP referral physician, diagnosed surgery (times four) for failed rotator cuff repair of the left shoulder with evidence of osteoarthritis of the glenohumeral joint and a high riding humeral head. He indicated that the left shoulder surgery recommended by Dr. Robert Nowinski, an attending osteopath and Board-certified orthopedic surgeon, was medically necessary to treat appellant's left shoulder condition.

In an April 25, 2012 letter, Dr. Ames stated that he had treated appellant for years for "severe problems with his left shoulder." He discussed appellant's left shoulder and arm diagnoses and the left shoulder surgeries he underwent between 1991 and 2006. Dr. Ames stated that appellant had been seen on January 24, 2012 by Dr. Fisher who recommended that he have left shoulder surgery performed by Dr. Nowinski. He stated that appellant reported that he had to discontinue a reeducation training program because he was unable to attend due to severe pain about the shoulder.

In a June 7, 2012 report, Dr. Nowinski diagnosed left shoulder arthropathy with recurrent rotator cuff tear, left biceps tendon tear, left capsular contraction, and retained hardware. He recommended additional left shoulder surgery. On August 20, 2012 Dr. Nowinski performed a left shoulder reversed total shoulder arthroplasty with latissimus dorsi tendon transfer, rotator cuff reconstruction, biceps tenodesis, and capsular contracture release. In a July 2, 2013 report, he indicated that appellant's surgical implant had good alignment and position without complications and no other surgical care was needed.

In an August 19, 2013 decision, OWCP determined that it 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.

In a June 16, 2014 decision,³ the Board affirmed the August 19, 2013 decision noting 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 found that the medical evidence dated in 2012 and 2013 did not establish that appellant was medically unable to participate in vocational rehabilitation efforts when his compensation was adjusted in August 2009. The Board also found that the medical evidence did not clearly establish that his medical condition in 2012 and 2013 prevented him from returning to vocational rehabilitation efforts at that time.

³ Docket No. 14-365 (issued June 16, 2014).

In a letter dated June 26, 2014, counsel argued that OWCP improperly 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. He asserted that appellant's medical condition prevented him from participating in vocational rehabilitation efforts. Counsel argued that the Department of Labor's *Dictionary of Occupational Titles* did not provide an accurate description of the duties of a computer security specialist, the position which OWCP deemed appellant could perform if he continued to participate in vocational rehabilitation efforts.

Appellant submitted a June 25, 2014 report in which Dr. Ames noted that he presented complaining of numbness into the little finger on his left hand, pain at the base of his neck, and pain about his left shoulder. Dr. Ames did not provide any treatment for appellant and referred him to a neurosurgeon for evaluation. A report of June 25, 2014 x-ray testing of appellant's left shoulder showed that the reverse total shoulder replacement from August 20, 2012 was in good position with no loosening of the components noted. Appellant also submitted physical therapy notes dated between May and June 2014 and copies of requests for authorization for physical therapy.

In a January 12, 2015 decision, OWCP again determined that it 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.

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.⁴ 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.⁵

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. It 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

⁴ *Betty F. Wade*, 37 ECAB 556, 565 (1986).

⁵ 5 U.S.C. § 8113(b).

such time as the employee acts in good faith to comply with the direction of OWCP.”⁶

ANALYSIS

OWCP accepted that on April 5, 1988, appellant 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. Appellant last worked in January 1998 and has not returned to work for the employing establishment. Beginning in 1991, he underwent several left shoulder surgeries which were authorized by OWCP.

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. In a February 4, 2011 decision, it affirmed its August 24, 2009 decision. By decision dated January 27, 2012, the Board affirmed the February 4, 2011 decision noting that OWCP properly reduced appellant’s compensation under 5 U.S.C. § 8113(b). In an August 19, 2013 decision, OWCP again determined that it 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. By decision dated June 16, 2014, the Board again affirmed the August 19, 2013 decision noting that OWCP properly reduced appellant’s compensation under 5 U.S.C. § 8113(b).

Following the prior appeals, appellant, through counsel, contended that OWCP improperly reduced his compensation under 5 U.S.C. § 8113(b) in August 2009. He asserted that his current medical condition prevented him from participating in vocational rehabilitation efforts. The Board finds that the evidence submitted by appellant does not prove that OWCP improperly reduced his 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 more recent medical evidence submitted by appellant describes his medical condition in 2014 and therefore is not relevant to his claim that his medical condition in mid-2009 prevented him from continuing his participation in vocational rehabilitation efforts at that time. As discussed by the Board in its January 27, 2012 and June 16, 2014 decisions, appellant had not previously submitted rationalized medical evidence showing that his medical condition justified his stoppage of vocational rehabilitation efforts in mid-2009.

Moreover, although the new medical evidence submitted by appellant shows that he continued to have left shoulder problems in 2014, this evidence does not contain a clear, rationalized opinion that he was medically prohibited from returning to a vocational rehabilitation program in 2009. In a June 25, 2014 report, Dr. Ames, an attending Board-certified orthopedic surgeon, noted that appellant presented complaining of numbness into the little finger on his left hand, pain at the base of his neck, and pain about his left shoulder. He indicated that he did not provide any treatment for appellant and referred him to a neurosurgeon for evaluation. The Board notes that, in this report, Dr. Ames did not provide an opinion that appellant was medically incapable of participating in vocational rehabilitation efforts. A report

⁶ 20 C.F.R. § 10.519(a).

of June 25, 2014 x-ray testing of appellant's left shoulder showed that the reverse total shoulder replacement from August 20, 2012 was in good position with no loosening of the components noted.⁷

Counsel argued that Department of Labor's *Dictionary of Occupational Titles* did not provide an accurate description of the duties of a computer security specialist, the position which OWCP deemed appellant could perform if he had continued to participate in vocational rehabilitation efforts. The Board notes that OWCP procedure provides that in cases where the claimant has undergone vocational rehabilitation, the vocational rehabilitation counselor will submit a final report to the vocational rehabilitation specialist summarizing why vocational rehabilitation was unsuccessful and listing two or more jobs which are medically and vocationally suitable for the claimant. The report will include the Department of Labor's *Dictionary of Occupational Titles* description (or OWCP specified equivalent) of the duties and physical requirements of each job.⁸ Counsel has not provided compelling argument that the description of the computer security specialist position in the Department of Labor's *Dictionary of Occupational Titles* was inaccurate.

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.

⁷ Appellant also submitted physical therapy notes dated between May and June 2014. These reports are of limited probative value regarding the severity of his medical condition as the reports of nonphysicians such as physical therapist do not constitute medical evidence under FECA. See *Jane A. White*, 34 ECAB 515 (1983).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4 (June 2013); see also *T.G.*, Docket No. 14-921 (issued September 17, 2014) (the Board noted that appellant did not submit evidence supporting that the position at issue was not reasonably available and that OWCP procedures clearly state that the vocational counselor shall include in his or her report the Department of Labor's *Dictionary of Occupational Titles* description of duties and physical requirements).

ORDER

IT IS HEREBY ORDERED THAT the January 12, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 5, 2015
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