

LEGAL PRECEDENT

On June 13, 1989 appellant, then a 42-year-old ship fitter, filed a traumatic injury claim (Form CA-1) alleging that he sustained a back injury on that date due to pushing heavy equipment at work. He stopped work on June 13, 1989 and OWCP accepted that he sustained a cervical strain.³

In a report dated October 18, 201, Dr. Robert Draper, a Board-certified orthopedic surgeon serving as an OWCP referral physician, determined that appellant was partially disabled due to his June 13, 1989 employment injury. He found that appellant could work on a full-time basis with various work restrictions, including lifting no more than 50 pounds occasionally and no more than 25 pounds frequently. Appellant could stand and walk for six hours out of an eight-hour workday and sit for six hours out of an eight-hour workday. Dr. Draper recommended that appellant avoid bending, stooping, and crawling.

In late-October 2013, appellant was referred for participation in an OWCP-administered vocational rehabilitation program. Appellant's vocational rehabilitation counselor reported that a vocational rehabilitation plan had been developed based upon appellant's experience, education, and medical restrictions. Vocational rehabilitation efforts were placed in services interrupted status on February 6, 2014 for 60 days.⁴ At the conclusion of the 60 days, vocational rehabilitation was scheduled to resume. On May 14, 2014 appellant's vocational rehabilitation counselor reported that appellant failed to participate in or obstructed the approved vocational rehabilitation program. On May 1, 2014 appellant had been contacted by the rehabilitation counselor to notify him that rehabilitation efforts were set to resume. At that time, he advised his rehabilitation counselor *via* telephone that he would not participate in the vocational rehabilitation program. The rehabilitation counselor reported that vocational counseling was attempted, but appellant abruptly ended the telephone call. She concluded that appellant had obstructed the vocational rehabilitation efforts.

By letter dated June 25, 2014, OWCP advised appellant of its determination that he had failed to participate in vocational rehabilitation efforts. It informed appellant that an individual who refuses or impedes a vocational rehabilitation effort without good cause after testing has been accomplished will have his or her compensation reduced based on what would have been his or her wage-earning capacity had the training been successfully completed. OWCP directed appellant 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 indicated that if these instructions were not followed within 30 days action would be taken to reduce his compensation.

³ Appellant received disability compensation on the periodic rolls beginning June 16, 2002.

⁴ Although appellant participated in the early stages of the vocational rehabilitation process, his case was placed in services interrupted status by his rehabilitation counselor due to appellant's own decision to suspend participation in the program.

Appellant submitted a July 3, 2014 medical report indicating that on that date he underwent a left S1 disc transforaminal epidural steroid injection and a left L5-S1 transforaminal epidural steroid injection.

Appellant's vocational rehabilitation counselor determined that, had he continued to participate in rehabilitation efforts, appellant would have been able to work as a contract specialist.⁵ The position, classified as light in nature, involved negotiating with suppliers to draw up procurement contracts and required occasional lifting of up to 20 pounds and engaging in occasional reaching, handling, and fingering.

In an October 2, 2014 decision, 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. It determined that appellant had failed, without good cause, to undergo vocational rehabilitation as directed. With respect to his wage-earning capacity, OWCP further found that, if appellant had participated in good faith in vocational rehabilitation, he would have been able to perform the position of contract specialist.

Appellant requested reconsideration. He submitted several medical reports, including May 13, June 4, and July 8, 2014 reports in which attending physicians indicated that he complained of chronic low back pain and left-sided S1 radiculopathy symptoms. The findings of a May 19, 2014 magnetic resonance imaging (MRI) scan showed mild degenerative disc disease of the low back.

By decision dated April 24, 2015, OWCP affirmed its October 2, 2014 decision adjusting appellant's compensation effective October 19, 2014 for failure 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.⁶ 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

⁵ The position is described in the Department of Labor's *Dictionary of Occupational Titles* (DOT) and bears the DOT number 162.117-018. A state labor market survey from August 2014 revealed that the entry pay level for the position was \$493.23 per week and that the position was reasonably available in appellant's commuting area.

⁶ *Betty F. Wade*, 37 ECAB 556, 565 (1986).

⁷ 5 U.S.C. § 8113(b).

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 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.”⁸

ANALYSIS

OWCP accepted that on June 13, 1989 appellant sustained a back injury due to pushing heavy equipment at work. In late-October 2013, appellant was referred for participation in an OWCP-sponsored vocational rehabilitation program. In an October 2, 2014 decision, 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. It determined that appellant had failed, without good cause, to undergo vocational rehabilitation as directed. With respect to his wage-earning capacity, it further found that, if appellant had participated in good faith in vocational rehabilitation, he would have been able to perform the position of contract specialist. In an April 24, 2015 decision, OWCP affirmed its October 2, 2014 decision adjusting appellant’s compensation effective October 19, 2014.

The Board finds that OWCP properly reduced appellant’s compensation effective October 19, 2014 under 5 U.S.C. § 8113(b) to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts.

On May 1, 2014 appellant had been contacted by his vocational rehabilitation counselor to notify him that rehabilitation efforts were set to resume after period of interruption. At that time, appellant advised his rehabilitation counselor *via* telephone that he would not participate in the OWCP-administered vocational rehabilitation program. The rehabilitation counselor reported that vocational counseling was attempted, but that appellant abruptly ended the telephone call. In a report dated May 14, 2014, she concluded that appellant failed to participate in or obstructed the approved vocational rehabilitation program. The Board finds that these facts establish appellant’s failure to participate in vocational rehabilitation efforts.

Prior to the adjustment of his compensation, OWCP sent appellant a June 25, 2014 letter in which it advised him of the consequences of continuing his failure to participate in vocational rehabilitation efforts. Appellant was provided 30 days to begin participating in vocational rehabilitation efforts or to submit evidence establishing good cause for not doing so. He did not, however, participate in vocational rehabilitation efforts or provide good cause for not doing so within 30 days of OWCP’s June 25, 2014 letter. Appellant submitted medical documentation in response to the June 25, 2014 letter, but this evidence does not show that he was physically

⁸ 20 C.F.R. § 10.519(a).

unable to participate in vocational rehabilitation efforts or otherwise establish that he had good cause not to do so. He submitted several medical reports from mid-2014 showing that he was being treated for mild degenerative disc disease of the low back. However, none of these reports showed that he was unable to work or that he was unable to participate in vocational rehabilitation efforts.⁹

On appeal appellant argued that his willingness to participate in a functional capacity evaluation showed his participation in vocational rehabilitation efforts.¹⁰ However, regardless of whether appellant was willing to participate in a functional capacity evaluation, he engaged in actions constituting a failure to participate in vocational rehabilitation efforts, including the above-described interactions with his vocational rehabilitation counselor.

A review of the record indicates that appellant was offered an opportunity to complete the agreed upon vocational rehabilitation plan. There is no evidence that appellant's failure to fully participate in the rehabilitation program, particularly his clear failure to exercise a reasonable standard of cooperation, was based on good cause.¹¹ 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. The record also reflects that OWCP properly determined that, if appellant had continued to participate in vocational rehabilitation efforts, he would have been able to earn wages as a contract specialist.¹²

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation effective October 19, 2014 under 5 U.S.C. § 8113(b) to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts.

⁹ In an October 18, 2013 report, Dr. Draper, a Board-certified orthopedic surgeon serving as an OWCP referral physician, determined that appellant was partially disabled due to his June 13, 1989 employment injury. Dr. Draper found that appellant could work on a full-time basis with various work restrictions, including lifting no more than 50 pounds occasionally and no more than 25 pounds frequently. The Board notes that this report provides the best assessment of appellant's work restrictions around the time he stopped participating in vocational rehabilitation efforts in mid-2014.

¹⁰ Appellant indicated that a functional capacity evaluation was not in fact carried out.

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

¹² The Board notes that the physical requirements of the contract specialist position were within appellant's work restrictions and that appellant's rehabilitation counselor provided an opinion that he would have been vocationally capable of performing the position if he had continued participating in vocational rehabilitation efforts.

ORDER

IT IS HEREBY ORDERED THAT the April 24, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 18, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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