

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

R.M., Appellant

and

**U.S. POSTAL SERVICE, PARCEL POST
OFFICE, Flushing, NY, Employer**

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**Docket No. 16-0011
Issued: February 11, 2016**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 2, 2015 appellant, through counsel, filed a timely appeal from a May 28, 2015 merit decision of the Office of Workers' Compensation Programs. 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 to zero under 5 U.S.C. § 8113(b) for failing to cooperate with the early stages of vocational rehabilitation efforts.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated August 6, 2012, the Board reversed the termination of appellant's compensation benefits.² The Board found that the

¹ 5 U.S.C. § 8101 *et seq.*

² Docket No. 12-0496 (issued August 6, 2012).

opinion of Dr. Edward A. Toriello, a Board-certified orthopedic surgeon, was not sufficiently well rationalized to resolve the conflict in the medical opinion evidence as to whether appellant had residuals of the accepted employment injury. The facts and circumstances as referred to in the prior Board decisions are incorporated herein. The relevant facts are set forth below.

On November 5, 2007 appellant, then a 37-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that day he sustained injuries to his chest and neck when he was involved in a work-related motor vehicle accident. OWCP accepted the claim for neck sprain, which was subsequently expanded to include cervical radiculitis. It later accepted recurrence claims on March 3 and October 13, 2008. By letter dated October 19, 2009, it placed appellant on the periodic rolls for temporary total disability effective September 27, 2009.

Following the Board's remand, on November 20, 2012 OWCP referred appellant to Dr. Stanley Soren, a Board-certified orthopedic surgeon, to resolve the outstanding conflict of medical opinion between Dr. Michael J. Katz, the treating Board-certified orthopedic surgeon, and Dr. Robert J. Orlandi, the second opinion Board-certified orthopedic surgeon, as to whether appellant had continuing disability due to the accepted conditions.

In a December 12, 2012 report, Dr. Soren, based upon a review of the medical and factual evidence, statement of accepted facts, and physical examination, diagnosed cervical strain, cervical radiculopathy, mild-to-moderate C4-5 and C6-7 left foraminal stenosis, moderate C6-7 canal stenosis, and complex C4-5 and C6-7 left paracentral disc osteophyte, contracting the cord surface, which he attributed to the employment injury. He opined that appellant was totally disabled from his date-of-injury job as a letter carrier, but was capable of working full time in a sedentary or light-duty job with restrictions. The restrictions included no climbing, occasional lifting of no more than 15 pounds, and no excessive arm stretching or reaching. Dr. Soren stated that appellant was unable to carry a mailbag on his shoulder or load/unload mail and parcel containers weighing more than 15 pounds.

On June 28, 2013 OWCP received a December 12, 2012 work capacity evaluation form (OWCP-5c) completed by Dr. Soren, which included up to eight hours of standing/sitting, one to two hours of reaching, no reaching above the shoulder or operating a motor vehicle at work or pushing or pulling or climbing, and one to two hours of lifting occasionally 10 to 15 pounds.

By letter dated July 15, 2013, OWCP referred appellant for vocational rehabilitation services. It informed the vocational rehabilitation counselor that Dr. Soren's opinion represented the weight of medical evidence with respect to appellant's ability to work.

In a July 20, 2013 letter to appellant, the rehabilitation counselor advised that he had been unable to reach appellant by telephone and instructed him on how to contact him by telephone.

On a July 25, 2013 Rehabilitation Action Report (Form OWCP-44), the rehabilitation counselor advised that he had been unable to obtain any working telephone numbers for appellant and that he had not responded to the July 20, 2013 letter. As of July 25, 2013, there had been no call from appellant.

By letter dated August 9, 2013, an OWCP claims examiner advised appellant that under section 8113(b) of FECA, 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 substantially increased, it may reduce prospectively the compensation based on what probably would have been the individual's wage-earning capacity had he not failed to apply for and undergo vocational rehabilitation. The claims examiner further stated:

“Also, [s]ection 10.519 of Title 20 of the Code of Federal Regulations provide that if an individual without good cause fails or refuses to participate in the essential preparatory efforts as described above, OWCP will assume, in the absence of evidence to the contrary, that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity, and compensation will be reduced accordingly. In effect, this will result in a reduction of compensation to zero.”

The claims examiner allotted appellant 30 days from the date of the letter to contact the rehabilitation counselor to make a good effort to participate in the rehabilitation effort or to provide good reasons for noncompliance. The rehabilitation counselor again requested appellant to contact him by letter dated August 19, 2013.

On a Form OWCP-44 the rehabilitation counselor confirmed the efforts he had taken to reach appellant, but that appellant had not responded

By decision dated September 13, 2013, OWCP reduced appellant's compensation to zero under 5 U.S.C. §§ 8113(b) as he had failed to participate in vocational rehabilitation efforts.

On September 23, 2013 counsel requested a telephonic hearing before an OWCP hearing representative, which was held on February 13, 2014.

By March 4, 2014 letter, appellant requested to now participate in vocational rehabilitation.

By decision dated May 2, 2014, OWCP's hearing representative affirmed the September 13, 2013 decision.

In a letter dated March 27, 2015, counsel again requested reconsideration of the May 2, 2014 decision. He argued that the decision should be vacated as appellant had participated in vocational rehabilitation.

By decision dated May 28, 2015, OWCP denied modification of the prior decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.³ Section 8113(b) of FECA provides that if an individual, without good cause, fails to apply for and undergo vocational rehabilitation

³ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

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 wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of OWCP.⁴

Section 10.519 of OWCP's regulations provide:

If an employee without good cause fails or refused to apply for, undergo, participate in, or continue to participate in a vocational rehabilitation effort when so directed, OWCP will act as follows --

(b) Where a suitable job has not been identified, because the failure or refusal occurred in the early but necessary stages of a vocational rehabilitation effort (that is, meeting with OWCP's nurses, interviews, testing, counseling, functional capacity evaluations and work evaluations), OWCP cannot determine what would have been the employee's wage-earning capacity.⁵

OWCP procedures provide that specific instances of noncooperation include a failure to appear for the initial interview, counseling sessions, a functional capacity evaluation (FCE), other interviews conducted by the rehabilitation counselor, vocational testing sessions and work evaluations, as well as lack of response, or inappropriate response to directions in a testing session after several attempts at instruction.⁶

ANALYSIS

The Board finds that OWCP properly reduced appellant's monetary compensation to zero effective September 13, 2013 because he failed, without good cause, to participate in the early stages of vocational rehabilitation efforts. Upon receiving medical evidence that he was not totally disabled for all work, but was capable of working eight hours a day with restrictions, OWCP properly referred appellant to vocational rehabilitation services. Appellant refused to cooperate with this rehabilitation effort as documented for the record by his rehabilitation counselor. In letters dated July 20 and August 9, 2013, appellant was advised of the need to participate in vocational rehabilitation and the consequences of not participating. No response was received.

OWCP further advised appellant in its August 9, 2013 letter of the consequences of failing to participate in the early stages of vocational rehabilitation efforts. Appellant was afforded 30 days to participate in such efforts or provide good cause for not doing so, or his

⁴ 5 U.S.C. § 8113(b).

⁵ 20 C.F.R. § 10.519(b).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.17(b) (February 2011); see *Sam S. Wright*, 56 ECAB 358 (2005).

compensation would be reduced to zero. He did not respond and provided no reasons for his failure to cooperate with his rehabilitation counselor.

Appellant's failure without good cause to participate in preliminary communications with his rehabilitation counselor regarding his work capacity constitutes a failure to participate in the early but necessary stages of a vocational rehabilitation effort.⁷ OWCP regulations provide that, in such a case, it cannot be determined what would have been the employee's wage-earning capacity had there been no failure to participate and it is assumed, in the absence of evidence to the contrary, that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity.⁸ Appellant did not submit evidence to refute such an assumption and OWCP had a proper basis upon which to reduce his disability compensation to zero.

The only evidence submitted was a March 4, 2014 letter from appellant requesting vocational rehabilitation. This evidence does not show or provide good reason for appellant's failure to participate in vocational rehabilitation, prior to OWCP's September 13, 2013 decision in this regard. Appellant was given appropriate notification of the sanctions for continuing to refuse to cooperate with the rehabilitation program in the early stages, but failed to comply with these rehabilitation efforts. The Board finds, therefore, that OWCP properly reduced appellant's compensation benefits to zero for failure to cooperate with the early stages of vocational rehabilitation.⁹

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation to zero under 5 U.S.C. § 8113(b) for failing to cooperate with the early stages of vocational rehabilitation efforts.

⁷ 20 C.F.R. § 10.519(b). *See also Conard Hightower*, 54 ECAB 796 (2003).

⁸ *Id.* at § 10.519(c).

⁹ Once appellant indicates in writing his intent to comply and participate in vocational rehabilitation, compensation will be reinstated as long as actual compliance is confirmed. Compliance is shown by actions such as undergoing interviews or testing. *See B.W.*, Docket No. 14-0372 (issued November 12, 2014).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 28, 2015 is affirmed.

Issued: February 11, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board