



## **ISSUE**

The issue is whether OWCP met its burden of proof to justify the reduction of appellant's compensation to zero for failing to cooperate with the early stages of vocational rehabilitation.

On appeal, appellant generally contends that OWCP improperly weighed the medical evidence, that the medical evidence was sufficient to reestablish benefits, that the burden to terminate benefits was not met, that OWCP's decision was untimely, that certain statements in the decision were incorrect, and that the Social Security Administration (SSA) found appellant disabled.

## **FACTUAL HISTORY**

This case has previously been before the Board. The facts set forth in the Board's prior decision are incorporated herein by reference.<sup>3</sup> On October 19, 1987 appellant, then a 36-year-old maintenance worker, filed a traumatic injury claim (Form CA-1) alleging that on October 15, 1987 he was using his ram set nail gun to fasten a 2x4 piece of wood onto a concrete wall when he felt a tingling sensation in his left arm and fingers. OWCP accepted his claim for cervical strain with radiculopathy, and disc protrusions and osteophytes at C4-5 and C5-6.<sup>4</sup>

In an April 25, 2013 report, Dr. Jose C. De Leon, appellant's treating Board-certified internist, noted that appellant was suffering from left-sided neck pain with radiation to the left hand and fingers as tingling pain and numbness. He opined that the basis of these symptoms was due to neck sprain and cervical disc disease with radiculitis. Dr. De Leon noted that appellant has suffered from the same neck pain with radiation to the left arm since the injury of October 15, 1987, and that it should logically be considered permanent. He further noted that degenerative cervical disc disease has a natural course of being stable or getting worse, but that appellant will never again be unimpaired. Dr. De Leon further opined that appellant was not capable of working any job due to his chronic, daily severe pain. He found that "vocational rehabilitation will relieve his pain temporarily and thus will be useless." Dr. De Leon further opined that appellant's symptoms were permanent and that he should be considered permanently disabled. He also noted that Medicare has granted him permanent disability due to these symptoms. Dr. De Leon anticipated no further improvement.

On June 6, 2013 OWCP referred appellant to Dr. Kenneth T. Kaan, a Board-certified orthopedic surgeon, for a second opinion. It asked Dr. Kaan to discuss the current status of appellant's neck strain, herniated cervical disc, brachial neuritis, and aggravation of cervical disc disease, whether any of appellant's accepted conditions still persist, whether appellant is able to work, how many hours a day appellant is able to work, whether appellant is able to participate in

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<sup>3</sup> Docket No. 99-1194 (issued March 22, 2001) (the Board vacated OWCP decisions and remanded the case for further development of the medical evidence with regard to whether appellant suffered a recurrence of disability on November 19, 1987).

<sup>4</sup> Appellant also filed a claim alleging that on July 3, 1986, while changing a fluorescent light fixture, he reached overhead and felt pain in his neck and left shoulder (OWCP File No. xxxxxx099). He was initially treated at the occupational health clinic where he was diagnosed with a neck strain. Appellant returned to light duty, and this claim was never formally adjudicated.

vocational rehabilitation training, and describe appellant's limitations. In a July 18, 2013 opinion, Dr. Kaan noted that appellant's diagnoses were C5 and C6 radiculopathy, secondary to C4-5 left disc herniation, and C5-6 left foraminal stenosis. He explained that a neck sprain/strain usually resolves in about six weeks to three months after the onset of symptoms. Dr. Kaan opined that appellant had multiple small episodes that exacerbated his cervical disc disease leading to axial-type neck symptoms and sometimes right upper extremity pain. He found that appellant's herniated disc at C4-5 could have been caused by an acute injury at work. Dr. Kaan noted that appellant's neurological examination was inconsistent due to the fact that appellant had "give away weakness" and was unable to cooperate with the neurological examination. He opined that the diffuse weakness in the C6-T1 levels was more likely psychological in nature and not related to the original work exposure. Dr. Kaan further noted that, although appellant was still complaining of cervical pain, the cervical strain/sprain should have healed by now, but cervical disc disease was still present and it is his chronic pain syndrome which is primarily responsible for his current symptomatology. He noted that appellant still has cervical disc disease and cervical radiculopathy. In a subsequent October 2, 2013 work capacity evaluation, Dr. Kaan opined that appellant was able to work eight hours a day with a lifting restriction of 10 pounds, and pushing pulling limited to 20 pounds.

On November 5, 2013 OWCP referred appellant's case for vocational rehabilitation services. In a November 15, 2013 letter, it advised him that as Dr. Kaan opined that appellant was capable of resuming gainful employment within imposed restrictions, his case was being referred for appropriate vocational rehabilitation. OWCP informed appellant that he would be contacted by a vocational rehabilitation counselor, and that he was expected to cooperate fully with the rehabilitation and reemployment effort.

In a November 25, 2013 letter to appellant, the vocational rehabilitation counselor indicated that she had not been able to contact appellant by telephone, so she was informing him by letter that he has an appointment with her on December 6, 2013 at 10:00 a.m. She informed him that if he was unable to attend, he should contact her and provide possible dates and times that he would be available.

In a November 26, 2013 letter, appellant stated that he was unable to pursue a return to work status as vocational rehabilitation might aggravate his work-related injury and that pursuant to the opinion of his treating physician, Dr. De Leon, vocational rehabilitation would be useless.

In a December 6, 2013 response to appellant's November 26, 2013 letter, OWCP noted that the weight of the medical evidence has been given to the evaluation conducted by Dr. Kaan, and that therefore, it has accepted that appellant was capable of working eight hours a day in a sedentary capacity. It had not accepted Dr. De Leon's April 25, 2013 opinion that appellant was totally disabled from work.

In a December 9, 2013 letter to appellant, OWCP indicated that it had been informed by the rehabilitation specialist of appellant's unwillingness to participate in a possible rehabilitation effort because he believed that he was too severely disabled to work. It noted that appellant did not keep his rehabilitation appointment. OWCP indicated that the medical evidence of record showed that he was not totally disabled. It afforded appellant 30 days to make a good faith effort to participate in rehabilitation and noted that if, at the expiration of the 30-day period, he has not

complied or provided a good reason for not participating in the effort, the rehabilitation effort would be terminated and action would be taken to reduce his compensation under the provisions of section 8113(b) of FECA and section 10.519 of the regulations.

In a statement dated November 23, 2013, but received by OWCP on December 10, 2013, appellant discussed his treatment from Dr. De Leon and his conclusion that appellant was unable to work any job due to his chronic daily severe pain. He noted various concerns with Dr. Kaan including that he was an hour late to his office which backed up all his appointments and that the medical records he reviewed were incomplete. Appellant argued that his injury was accepted by OWCP 12 years ago and that there was no medical evidence that “may help me return back to work.” He noted that he was unable to accept the offer to pursue a return to work status.

In a December 20, 2013 vocational rehabilitation report, the vocational rehabilitation counselor noted her attempts to reach appellant and indicated that appellant did not show up for his December 13, 2013 appointment nor did he call. She noted that he had not been agreeable to meeting for an initial vocational evaluation. The counselor also forwarded a copy of a December 12, 2013 letter wherein appellant informed her, “I will not be attending your last minute schedule appointments, due to other obligations. I will give you a call in regards of a rescheduled appointment.”

Appellant sent OWCP a letter dated December 24, 2013, wherein he forwarded March 22 and April 2, 2001 multiple impairment questionnaires completed by Dr. De Leon, and a copy of a July 19, 2001 fully favorable decision by SSA. He contended that this evidence justified his disability and outweighs Dr. Kaan’s opinion.

In a January 13, 2014 decision, OWCP notified appellant that his compensation was being reduced to zero due to his refusal to participate in vocational rehabilitation, and that the reduction will continue until he, in good faith, undergoes the directed vocational testing or showed good cause for not complying with rehabilitation.

On January 29, 2014 appellant requested a review of the written record. He argued that he sent documents that justified his disability and that he was ordered by his primary physician to not return to work. Appellant noted that he declined to participate in the rehabilitation program for good cause. He contended that removing his benefits after all this time was unfair treatment, and would constitute double jeopardy as his claim had already been accepted. Appellant again argued that SSA’s decision was fully favorable to him. In support thereof, he resubmitted multiple documents by Dr. De Leon, including 2001 questionnaire responses and medical reports dated October 25, 2003; March 20, 2007; May 21, 2010; and April 25, 2013. Appellant also submitted prior correspondence and decisions from OWCP and another copy of the fully favorable decision by SSA.

In a decision dated August 5, 2014, the hearing representative affirmed the January 13, 2014 decision of OWCP.

## LEGAL PRECEDENT

FECA provides that the Secretary of Labor may direct a permanently disabled individual whose disability is compensable to undergo vocational rehabilitation.<sup>5</sup> 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 5 U.S.C. § 8104, OWCP may, after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, reduce prospectively the monetary compensation of the individual. The reduction of compensation is performed 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 to undergo vocational rehabilitation. It is OWCP's burden of proof with respect to any reduction of compensation, including the reduction of compensation pursuant to 5 U.S.C. § 8113(b).<sup>6</sup>

Section 10.519 of OWCP's regulations provides:

“If 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, 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, interviews, testing, counseling, functional capacity evaluations, and work evaluations) OWCP cannot determine what would have been the employee's wage-earning capacity.

(c) Under the circumstances identified in paragraph (b) of this section, in the absence of evidence to the contrary, OWCP will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity, and OWCP will reduce the employee's monetary compensation accordingly (that is, to zero). This reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.<sup>7</sup>

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<sup>5</sup> 5 U.S.C. § 8104(a).

<sup>6</sup> *See D.A.*, Docket No. 14-375 (issued May 28, 2014).

<sup>7</sup> 20 C.F.R. § 10.519.

## ANALYSIS

Once OWCP has made a determination that an employee is totally disabled as a result of an employment injury and pays compensation, it has the burden of justifying a subsequent reduction of benefits.<sup>8</sup> It reduced appellant's compensation based on his failure to participate in vocational rehabilitation.

In reaching its conclusion with regard to appellant's ability to work, OWCP must initially determine the employee's medical condition and work restrictions.<sup>9</sup> When it referred appellant to vocational rehabilitation, it determined that the weight of the evidence was represented by the opinion of the Dr. Kaan, the second opinion physician. Dr. Kaan determined that appellant was capable of returning to work eight hours a day with a lifting restriction of 10 pounds and pushing and pulling limited to 20 pounds. His opinion differed from appellant's treating physician, Dr. De Leon, who opined that appellant was not capable of working any job due to chronic daily severe pain. Dr. De Leon further opined that vocational rehabilitation would be useless.

It is well established that when there are opposing medical reports of virtually equal probative value between an attending physician and a second opinion physician, 5 U.S.C. § 8123(a) requires OWCP refer the case to a referee physician to resolve the conflict.<sup>10</sup> The Board finds that the medical reports of Dr. De Leon and Dr. Kaan are in equipoise on the issue of whether appellant is capable of returning to work and are thus in conflict. The hearing representative found Dr. De Leon's medical opinion was of diminished probative value as he was not an appropriate specialist and he did not provide sufficient medical rationale to support his opinion of total disability. The Board disagrees as Dr. De Leon is an attending physician with Board certification in internal medicine who has provided long-standing medical care for the accepted conditions in this claim and has set forth his medical opinion on the relevant issue with equal rationale and clarity as the opinion of the second opinion physician, Dr. Kaan. As the opposing medical reports are of virtually equal weight and rationale, the Board finds that there is an unresolved conflict between Dr. De Leon and Dr. Kaan with regard to appellant's ability to return to work and participate in vocational rehabilitation efforts.

As there remains an unresolved conflict of medical opinion as to whether appellant is physically capable of participating in vocational rehabilitation, OWCP has not met its burden of proof to justify termination of appellant's compensation benefits for failure to participate in vocational rehabilitation efforts.<sup>11</sup>

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<sup>8</sup> *M.A.*, 59 ECAB 624, 631 (2008).

<sup>9</sup> *L.C.*, Docket No. 12-972 (issued November 9, 2012).

<sup>10</sup> *William C. Bush*, 40 ECAB 1064 (1989).

<sup>11</sup> *Supra* note 9.

**CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to justify the reduction of appellant's compensation to zero for failure to cooperate with the early stages of vocational rehabilitation.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 5, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 23, 2016  
Washington, DC

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

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

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