

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

J.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Brooklyn, NY, Employer**

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**Docket No. 15-1393
Issued: September 26, 2016**

Appearances:
*Paul Kalker, Esq., for the appellant*¹
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 8, 2015 appellant, through counsel, filed a timely appeal from an April 20, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly adjusted 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.

FACTUAL HISTORY

OWCP accepted that on March 8, 2010 appellant, then a 53-year-old chauffeur carrier, sustained aggravation of osteoarthritis of his left knee due to walking up steps at work. Appellant stopped work and received disability compensation beginning April 24, 2010.³

In notes dated September 12 and 25, 2012, Dr. Leon M. Bernstein, an attending Board-certified orthopedic surgeon, found appellant totally disabled. He diagnosed osteoarthritis of the left knee.

To determine appellant's ability to return to work, OWCP referred appellant for a second opinion evaluation to Dr. Leon Sultan, a Board-certified orthopedic surgeon. In an October 22, 2012 report, Dr. Sultan described appellant's factual and medical history and reported findings on examination. He indicated that appellant's left knee showed some restriction with crepitus and that McMurray test was positive on the left. Dr. Sultan diagnosed aggravation of left knee osteoarthritis and determined that appellant could engage in strict sedentary work activity performing desk work and answering telephones.⁴

In January 2013 appellant was referred for vocational rehabilitation in an effort to return him to work. He participated in initial vocational rehabilitation testing at the direction of his vocational rehabilitation counselor, Laura Nielson.

Appellant's vocational rehabilitation counselor provided reports in which she discussed appellant's later nonparticipation in vocational rehabilitation efforts. The reports revealed that he failed to respond to voice mail messages left by his rehabilitation counselor on his telephone on January 29, 30, February 4, 11, and 22, 2013 and did not respond to letters dated February 15, and March 12, 2013 requesting a resumption of his participation. He also failed to appear for a meeting with his vocational rehabilitation counselor on February 25, 2013 despite having proper notice of the scheduled meeting.

By letter dated March 1, 2013, OWCP advised appellant of its determination that he had failed to participate in vocational rehabilitation efforts. It informed him that an individual who refuses or impedes a vocational rehabilitation effort without good cause can have his compensation reduced based on what would have been his wage-earning capacity had the vocational rehabilitation process 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

³ Appellant received disability on the periodic rolls beginning August 26, 2012.

⁴ Dr. Sultan completed a work restrictions form on October 22, 2012 indicating that appellant could perform strict sedentary work for eight hours per day but could not engage in lifting, pushing, or pulling.

he had good cause for not participating in the effort, to provide reasons and supporting evidence of such good cause within 30 days. It stated that if these instructions were not followed within 30 days action would be taken to reduce his compensation.

Appellant's vocational rehabilitation counselor continued to document instances through early May 2013 where appellant had failed to participate in vocational rehabilitation efforts, including not appearing for a meeting scheduled for May 9, 2013. In a May 10, 2013 report, she concluded that appellant had obstructed the efforts.⁵ Appellant did not resume participation in vocational rehabilitation efforts.

Appellant's vocational rehabilitation counselor determined that, per appellant's qualifications and the job classification in the Department of Labor, *Dictionary of Occupational Titles* (DOT), appellant could work in the position of receptionist (DOT No. 237.367-038). State labor market surveys revealed that the job was reasonably available in appellant's commuting area. The position required occasional lifting of up to 10 pounds.

In a May 10, 2013 decision, OWCP reduced appellant's compensation to zero based on his refusal, without good cause, to participate in vocational rehabilitation efforts. It noted that appellant's failure to undergo the essential preparatory effort of vocational testing prevented OWCP from determining appellant's wage-earning capacity.

On April 29, 2014 appellant requested reconsideration of the May 10, 2013 decision and submitted additional medical evidence.

In a September 10, 2013 form report, Dr. Bernstein indicated that appellant was totally disabled from work. A work capacity evaluation form of the same date listed restrictions of no walking, standing, squatting, kneeling, or climbing.

In a March 15, 2014 report, Dr. Bernstein provided support for appellant's failure to cooperate with vocational rehabilitation. He claimed that "attending vocational rehabilitation would be difficult to impossible because of the chronic constant pain in his left knee." Dr. Bernstein found that "the condition was very distracting to him and he would not be able to learn new activities or perform activities with any reasonable form of excellence." He reiterated that appellant "certainly cannot do standing or walking."

In July 2014, the vocational rehabilitation counselor, confirmed that state labor market surveys revealed that the DOT-classified position of receptionist was still reasonably available in appellant's commuting area.

By decision dated July 23, 2014, OWCP affirmed the portion of its May 10, 2013 decision finding that appellant had failed, without good cause, to participate in vocational rehabilitation efforts. However, it vacated the portion of its May 10, 2013 decision reducing his compensation to zero for failing to undergo the essential preparatory effort of vocational testing because appellant had, in fact, undergone such vocational testing.

⁵ Appellant's vocational rehabilitation counselor noted that appellant met briefly with her on March 18, 2013 but that he otherwise obstructed rehabilitation efforts.

By decision dated September 18, 2014, OWCP found that appellant had failed, without good cause, to participate in vocational rehabilitation efforts as directed. Thus appellant's compensation was reduced under 5 U.S.C. § 8113(b), effective March 1, 2014, to reflect his loss of wage-earning capacity in the position of receptionist, the position he would have been able to perform had he continued to participate in vocational rehabilitation efforts.

OWCP reviewed the medical evidence in the record and found that Dr. Bernstein's March 15, 2014 report had failed to provide a well-reasoned medical explanation with supporting findings as to the reason for the restrictions of "no standing and no walking." It noted that appellant was not wheelchair-bound and, when he did meet with the rehabilitation counselor on March 18, 2013, he was walking with a cane.

The weight of the medical opinion was found by OWCP to be with Dr. Sultan's October 22, 2012 report. OWCP found the physical restrictions required of the receptionist position complied with the physical restrictions provided by Dr. Sultan.

OWCP issued a decision on December 17, 2014 which superseded its September 18, 2014 decision, noting that additional pay rate information had been received from the employing establishment. The December 17, 2014 decision contained the same essential findings as the September 18, 2014 decision, but OWCP incorporated the new pay rate information into its wage-earning capacity calculation. OWCP found that appellant had failed, without good cause, to participate in vocational rehabilitation efforts as directed and that his compensation was reduced under 5 U.S.C. § 8113(b), effective March 1, 2014, to reflect his loss of wage-earning capacity in the position of receptionist, the position he would have been able to perform had he continued to participate in vocational rehabilitation efforts.

In a February 6, 2015 letter, appellant, through counsel, requested reconsideration of OWCP's December 17, 2014 decision. Counsel argued that appellant had good cause not to participate in vocational rehabilitation efforts because his medical condition, particularly as characterized by Dr. Bernstein, physically prevented him from participating in such efforts. He also argued that OWCP had not adequately supported its determination that appellant should be rated in the constructed position of receptionist.

In an April 20, 2015 decision, OWCP denied modification of the July 23 and December 17, 2014 decisions reducing appellant's compensation under 5 U.S.C. § 8113(b) for failing to participate in vocational rehabilitation efforts. It again noted that his compensation had been reduced under 5 U.S.C. § 8113(b) to reflect his loss of wage-earning capacity in the position of receptionist, the position he would have been able to perform 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.⁶ Section 8113(b) of FECA provides that if an individual, without good cause, fails to apply for and undergo vocational

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

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 vocational rehabilitation efforts 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 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 appellant sustained work-related aggravation of osteoarthritis of his left knee. Appellant stopped work and received disability compensation beginning April 24, 2010. OWCP found that he had failed, without good cause, to participate in vocational rehabilitation efforts as directed. Appellant’s compensation was therefore reduced under 5 U.S.C. § 8113(b), effective March 1, 2014, to reflect his loss of wage-earning capacity in the position of receptionist, the position it determined was suitable had he continued to participate in vocational rehabilitation efforts.

The Board finds that OWCP properly found that appellant failed to participate in good faith in vocational rehabilitation efforts pursuant to 5 U.S.C. § 8113(b). Appellant’s vocational rehabilitation counselor provided reports in which she discussed appellant’s repeated nonparticipation in these efforts. Appellant failed to respond to voice mail messages left on his telephone by the rehabilitation counselor on January 29, 30, February 4, 11, and 22, 2013 and did not respond to letters dated February 15, and March 12, 2013 requesting a resumption of his participation. He also failed to appear for a meeting with his vocational rehabilitation counselor on February 25, 2013 despite having proper notice of the scheduled meeting. Appellant’s vocational rehabilitation counselor continued to document instances through early-May 2013 where appellant had failed to participate in vocational rehabilitation efforts, including not appearing for a meeting scheduled for May 9, 2013. In a May 10, 2013 report, she concluded that appellant had obstructed the efforts.

⁷ 5 U.S.C. § 8113(b).

⁸ 20 C.F.R. § 10.519(a).

Before OWCP and on appeal, counsel argues that appellant had good cause not to participate in vocational rehabilitation efforts because his medical conditions physically prevented him from participating in such efforts. He notes that the reports of Dr. Bernstein showed that appellant was not physically capable of participating in vocational rehabilitation efforts. While Dr. Bernstein generally supported appellant's claim to be unable to undergo vocational rehabilitation, he failed to tie his opinions to any specific medical condition that would preclude him from engaging in the vocational rehabilitation process. He failed to adequately explain how his opinion on disability was supported by objective findings.

A review of the record indicates that appellant was offered repeated opportunities 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 failure to exercise a reasonable standard of cooperation in applying for positions which would return him to the workforce, was based on "good cause."⁹ For these reasons, OWCP properly found that appellant failed to participate in good faith vocational rehabilitation efforts per 5 U.S.C. § 8113(b).

As noted, OWCP reduced appellant's compensation under 5 U.S.C. § 8113(b), effective March 1, 2014, to reflect his loss of wage-earning capacity in the position of receptionist, the position it determined he would have been able to perform had he continued to participate in vocational rehabilitation efforts.¹⁰ The Board has held that even when an employee fails to cooperate with vocational rehabilitation, as is the case here, the medical evidence must establish that appellant can perform the selected position.¹¹ It has further found that a wage-earning capacity must be based on a reasonably current medical evaluation.¹²

The Board finds that OWCP improperly reduced appellant's compensation, under 5 U.S.C. § 8113(b), to reflect his loss of wage-earning capacity in the position of receptionist (DOT No. 237.367-038).

OWCP procedures state that, unless the medical evidence is clear and unequivocal, the claims examiner should seek the advice of a physician regarding the suitability of the position.¹³ The determination of appellant's wage-earning capacity was based on the report of Dr. Sultan. The report from Dr. Sultan was originally obtained to determine appellant's work capacity prior to the identification of a suitable position, he did not have a copy of the physical restrictions required for the selected position of receptionist, and he provided restrictions based on appellant's physical capacity 26 months prior to the final decision. The Board finds that the medical evidence is not clear and unequivocal that appellant was physically capable of

⁹ See *Michael D. Snay*, 45 ECAB 403, 410-12 (1994).

¹⁰ See *supra* note 7. Application of this portion of OWCP regulations was appropriate as appellant had participated in the early but necessary stages of the vocational rehabilitation efforts because he participated in vocational testing. 20 C.F.R. § 10.519(b), (c).

¹¹ *S.B.*, Docket No. 15-1060, n.19 (issued March 15, 2016)

¹² *John H. Jackson*, 55 ECAB 465 (2004).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity*, Chapter 2.816.4(d) (June 2013).

performing the receptionist position at the time of the December 17, 2014 OWCP decision. As such, the Board finds that OWCP has not met its burden of proof to determine that the position of receptionist reflected appellant's wage-earning capacity.¹⁴

CONCLUSION

The Board finds that OWCP properly found that appellant failed to participate in good faith in vocational rehabilitation efforts per 5 U.S.C. § 8113(b). However, the Board further finds that the case is not in posture for decision regarding adjustment of his compensation based on the constructed position of receptionist.

ORDER

IT IS HEREBY ORDERED THAT the April 20, 2015 decision of the Office of Workers' Compensation Programs is affirmed in part and remanded in part as to the adjustment of appellant's compensation based on the position of receptionist.

Issued: September 26, 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

¹⁴ *F.W.*, Docket No. 14-1772 (issued January 28, 2015).