

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

C.H., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS HEALTH ADMINISTRATION,)
San Francisco, CA, Employer)

Docket No. 16-1731
Issued: September 5, 2017

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 29, 2016 appellant filed a timely appeal from a May 9, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP) and an August 2, 2016 nonmerit decision of 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.

ISSUES

The issues are: (1) whether OWCP properly reduced appellant's compensation to zero, effective May 9, 2016, under 5 U.S.C. § 8113(b), due to his failure to complete the early stages of vocational rehabilitation; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 21, 2012 appellant, then a 32-year-old electrician, filed a traumatic injury claim (Form CA-1) alleging that he injured himself when he hit his head against a pipe at work. OWCP initially accepted appellant's claim for cervical strain. His claim was expanded to include aggravation of cervical herniated disc C5-6 and C6-7 without myelopathy. Appellant received disability compensation on the daily rolls beginning February 15, 2012 and on the periodic rolls beginning July 1, 2012.

In a November 18, 2014 report, Dr. Juon-Kin Fong, an attending Board-certified orthopedic surgeon, indicated that appellant could perform light-duty work with restrictions including lifting no more than 10 pounds and pushing/pulling no more than 20 pounds.

In May 2015, appellant was referred to a vocational rehabilitation counselor for participation in a vocational rehabilitation program designed to return him to work. In mid-May 2015, he took a vocational aptitude test of general application.

In reports dated beginning in June 2015, appellant's vocational rehabilitation counselor noted that appellant increasingly resisted his suggestion that the accounting/bookkeeping field be considered as a potential suitable target vocation. Rather, appellant became increasingly adamant that he should pursue jobs in architectural drafting or engineering architecture despite his counselor's opinion that the training for these jobs would take too long, particularly given the very limited opportunities in these fields.

Appellant's rehabilitation counselor recommended that appellant take accounting/bookkeeping testing at the Elk Grove Adult School and Sacramento City Adult School. Appellant advised his counselor that he participated in such testing on June 19, 2015 but his counselor reported that he refused to provide the findings of the testing. The counselor sent appellant a June 26, 2015 letter requesting that he provide the testing results by July 7, 2015, however, appellant failed to provide the testing results.

By letter dated July 8, 2015, OWCP advised appellant of its determination that he had failed to participate in vocational rehabilitation efforts. It noted his failure to report the results of accounting/bookkeeping testing at the Elk Grove Adult School and Sacramento City Adult School. OWCP informed appellant that if he refused or impeded his vocational rehabilitation program without good cause he would have his compensation reduced. It directed him 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. OWCP advised that if these instructions were not followed action would be taken to reduce his compensation.

Appellant contacted OWCP on August 4, 2015 indicating that he was willing to comply with the vocational rehabilitation program. However, he expressed his desire to have a conference about his interest in pursuing architecture as a vocation rather than accounting. On August 7, 2015 appellant's rehabilitation counselor advised that appellant still had not provided the results of the accounting/bookkeeping testing. In a report dated August 12, 2015, he stated

that a vocational goal could not be reached without the results of the testing and he found that appellant had failed to cooperate with the vocational rehabilitation effort.

In a May 9, 2016 decision, OWCP reduced appellant's compensation to zero under 5 U.S.C. § 8113(b) to reflect his loss of wage-earning capacity had he continued to participate in the early stages of the vocational rehabilitation effort. It determined that appellant's failure, without good cause, to participate in the early stages of vocational rehabilitation prevented it from determining what his wage earning would have been had he continued his participation. Therefore, per section 20 C.F.R. § 10.519 it was assumed, in the absence of evidence to the contrary, that the vocational rehabilitation effort would have resulted in appellant's return to work at the same or higher wages than the position he held when injured.

In a May 11, 2016 letter received on May 16, 2016, appellant requested reconsideration of OWCP's May 9, 2016 decision reducing his compensation. He argued that he completed all that was required of him in connection with the vocational rehabilitation program and indicated that he had suggested to an OWCP rehabilitation specialist that a conference be set up, but that the specialist would not receive his telephone calls. Appellant asserted that he carried out all of the testing requested by his counselor at the Elk Grove Adult School and Sacramento City Adult School. He asserted that the counselor could "pull" the results at any time. Appellant noted that he completed the required testing on June 24, 2015, he provided a CASAS testing slip of that same date, and he claimed that the Sacramento City Adult School did, in fact, send the results to his counselor in an attachment.

Appellant submitted copies of a September 2015 e-mail exchange he had with his vocational rehabilitation counselor. In this e-mail exchange, the rehabilitation counselor instructed appellant to contact his OWCP claims examiner. Appellant also submitted a June 24, 2015 appointment slip for vocational testing and medical reports dated January 13, June 8 and 9, and July 13, 2016.

By decision dated August 2, 2016, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

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.² 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.³

² *Betty F. Wade*, 37 ECAB 556, 565 (1986).

³ 5 U.S.C. § 8113(b).

OWCP regulations, at 20 C.F.R. § 10.519, provide in pertinent part:

“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, meetings with the OWCP nurse, 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.”⁴

OWCP’s procedures state that specific instances of noncooperation include a failure to appear for the initial interview, counseling sessions, a functional capacity evaluation, 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.⁵

ANALYSIS -- ISSUE 1

The Board finds that the evidence of record establishes that appellant’s failure to report the findings of vocational testing designed to help identify a suitable target position for the vocational rehabilitation effort, as well as his other statements and actions showing disinclination to participate in the rehabilitation effort, constitute noncooperation with the vocational rehabilitation effort. The evidence of record supports that appellant did not cooperate with the early stages of the vocational rehabilitation process.

In reports dated beginning in June 2015, appellant’s vocational rehabilitation counselor noted that appellant increasingly resisted his suggestion that the accounting/bookkeeping field be considered as a potential suitable target vocation. He asserted that appellant became increasingly adamant that he should pursue jobs in architectural drafting or engineering architecture despite

⁴ 20 C.F.R. § 10.519; *see R.H.*, 58 ECAB 654 (2007).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.17(b) (February 2011).

his opinion that these fields were unsuitable. Appellant's rehabilitation counselor recommended that appellant take accounting/bookkeeping testing at the Elk Grove Adult School and Sacramento City Adult School. In late-June, appellant advised his counselor that he participated in such testing on June 19, 2015, but his counselor reported that he refused to provide the findings of the testing. This refusal to provide the testing results continued into August 2015. In a report dated August 12, 2015, the counselor stated that a vocational goal could not be reached without the results of the testing and he found that appellant had failed to cooperate with the vocational rehabilitation effort.

Appellant's failure without good cause to fully participate in preliminary testing by failing to report the results of accounting testing constituted a failure to participate in the "early but necessary stages of a vocational rehabilitation effort."⁶ 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.⁷ Appellant did not submit sufficient evidence to refute such an assumption and OWCP had a proper basis to reduce his disability compensation to zero effective May 9, 2016.

A review of the record indicates that appellant was offered repeated opportunities to complete the agreed upon vocational rehabilitation plan by submitting the test results. There is no evidence of record that appellant's failure to fully participate in the rehabilitation program, particularly in his clear failure to provide the findings of June 2015 testing he completed in the bookkeeping/accounting field, was based on "good cause."⁸ OWCP advised appellant in a July 8, 2015 letter that he had failed to participate in the early stages of the vocational rehabilitation effort; that he had 30 days to participate in the vocational rehabilitation effort or provide good cause for not doing so; and that his compensation would be reduced to zero if he did not comply within 30 days with the instructions contained in the letter. Appellant did not, however, participate in the vocational rehabilitation effort or provide good cause for not doing so within 30 days of OWCP's July 8, 2015 letter. A review of the case record establishes that appellant did not submit the requested test results. The Board finds his reasons for not doing so are without good cause.

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.

⁶ Although appellant did meet with his vocational rehabilitation counselor and completed rudimentary aptitude testing in May 2015, the accounting testing designed to identify his suitable target position, as recommended by his rehabilitation counselor, is considered part of the early stages of his vocational rehabilitation effort. See 20 C.F.R. § 10.519(b).

⁷ See *supra* note 4.

⁸ See *Michael D. Snay*, 45 ECAB 403, 410-12 (1994).

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁹ OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁰ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.¹¹ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹² The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹³ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁴ While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.¹⁵

ANALYSIS -- ISSUE 2

OWCP issued a decision on May 9, 2016. Appellant requested reconsideration of this decision through a letter received on May 16, 2016.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In his application for reconsideration, appellant has not shown that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted, nor did appellant advance a new and relevant legal argument not previously considered by OWCP. Appellant's argument was that he did not, in fact, fail to cooperate with the vocational rehabilitation effort because he participated in vocational testing and a vocational rehabilitation specialist rebuffed his request to have a conference. The underlying issue in this case was not whether appellant actually carried out the vocational testing at the Elk Grove Adult School and Sacramento City Adult School in June 2016 or communicated with his rehabilitation counselor or a rehabilitation specialist. Rather, the crux of appellant's noncooperation was his failure to report the findings of the

⁹ Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. § 10.606(b)(3).

¹¹ *Id.* at § 10.607(a).

¹² *Id.* at § 10.608(b).

¹³ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹⁴ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁵ *John F. Critz*, 44 ECAB 788, 794 (1993).

vocational testing he took in June 2016, thereby stymying efforts to choose a suitable target vocation. Therefore, the argument provided is not relevant to the main issue of this case.

Appellant submitted copies of a September 2015 e-mail exchange he had with his vocational rehabilitation counselor. This e-mail exchange is not relevant to the main issue of the present matter because it only indicates that appellant's rehabilitation counselor suggested that he contact his OWCP claims examiner. It does not provide any support for his claim that he did not fail to cooperate. He also submitted a June 24, 2015 appointment slip for vocational testing, but the fact that appellant carried out vocational testing is not in dispute. Appellant submitted medical reports dated January 13, June 8 and 9, and July 13, 2016, but these reports are not relevant because they do not show that he was vocationally unable to participate in the vocational rehabilitation effort.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation to zero, effective May 9, 2016, under 5 U.S.C. § 8113(b), due to his failure to complete the early stages of vocational rehabilitation. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the August 2 and May 9, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 5, 2017
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