

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

E.W., Appellant

and

**DEPARTMENT OF JUSTICE, U.S.
PENITENTIARY, Florence, CO, Employer**

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) **Docket No. 19-0963**
) **Issued: January 2, 2020**
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 1, 2019 appellant filed a timely appeal from a November 2, 2018 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 to review the merits of this case.

ISSUE

The issue is whether OWCP has met its burden of proof to reduce appellant's compensation, effective November 2, 2018, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 for failure to cooperate with vocational rehabilitation without good cause.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances of the case as presented in the prior Board orders and decision are incorporated herein by reference. The relevant facts are as follows.

On April 6, 2002 appellant, then a 44-year-old case manager, filed a traumatic injury claim (Form CA-1) alleging that, on that day, he sustained a deep cut on his right leg when a wall locker fell on his right leg while in the performance of duty. He stopped work on the date of injury and returned on April 17, 2002. OWCP accepted the claim for right ankle sprain and right leg laceration. Appellant filed a second Form CA-1 on May 9, 2002 alleging that he injured his left shoulder, back, and right leg as a result of the accepted April 6, 2002 employment-related injuries. OWCP further accepted the claim for left shoulder, lumbar, and thoracic strains.³ It authorized repair of the chronic rotator cuff tear acromioplasty of the left shoulder, which was performed on July 2, 2003 and left shoulder irrigation and debridement, which were performed on August 14 and 16, 2003.

OWCP subsequently expanded the acceptance of appellant's claims to include right rotator cuff sprain/strain, bilateral knee medial meniscus tear and localized secondary osteoarthritis, venous embolism and thrombosis of deep vessels of the lower extremity, not otherwise specified, pulmonary embolism and infarction, and lumbar spinal stenosis. It paid him wage-loss compensation for intermittent periods of disability dating back to August 14, 2003.

In an attending physician's report (Form CA-20) dated January 5, 2018, Dr. Anjumun Sharma, an attending family practitioner, diagnosed left knee osteoarthritis, right knee total knee arthroplasty, and left and right shoulder rotator cuff repair due to the accepted April 6, 2002 employment injuries. He released appellant to return to light-duty work with permanent restrictions as of the date of his examination.

On February 21, 2018 OWCP referred appellant to a certified vocational rehabilitation counselor based on Dr. Sharma's work restrictions. In letters dated February 27 and March 12, 2018, the vocational rehabilitation counselor requested that he complete a work and education form. The vocational rehabilitation counselor further requested that appellant contact her upon his receipt of this correspondence to schedule an appointment at her office. In an e-mail dated March 21, 2018 and preliminary reports dated March 26 to September 24, 2018, she noted contacting appellant to develop a rehabilitation plan; however, he did not respond. On March 26, 2018 the vocational rehabilitation counselor noted in a rehabilitation action report (Form OWCP-44) that he had obstructed the rehabilitation process by failing to appear at scheduled meetings. She indicated that appellant had not responded to her two written requests for contact so that an initial interview could be scheduled. The vocational rehabilitation counselor related that neither letter had been returned as nondeliverable. She further related that when she followed-up by

² *Order Remanding Case*, Docket No. 05-0519 (issued June 10, 2005); *Order Remanding Case*, Docket No. 05-1261 (issued February 1, 2006); Docket No. 07-1662 (issued January 15, 2009).

³ OWCP assigned the April 6, 2002 traumatic injury claim OWCP File No. xxxxxx652. It assigned the May 9, 2002 traumatic injury claim OWCP File No. xxxxxx814. OWCP has administratively combined these claims, with OWCP File No. xxxxxx652 serving as the master file.

telephone, appellant's telephone system informed her that the memory was full and, thus, she could not leave a message.

OWCP, in a letter dated October 2, 2018, notified appellant of the penalties under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 for failing to cooperate with vocational rehabilitation without good cause. It noted that he had not responded to his vocational rehabilitation counselor's letters and telephone calls. OWCP advised appellant that the initial stages of vocational rehabilitation included interviews, testing, counseling, guidance, and work evaluations. It further advised him that, if he failed or refused to participate in vocational rehabilitation without good cause, his compensation benefits would be reduced to zero and that this reduction would continue until he complied with OWCP's directions concerning rehabilitation. OWCP afforded appellant 30 days to contact OWCP and his rehabilitation counselor to make a good faith effort to participate in the rehabilitation effort designed to return him to gainful employment. It informed him that, if he believed he had a good reason for not participating in the rehabilitation effort, he should respond within 30 days, with reasons for noncompliance, and submit evidence in support of his position. OWCP noted that, if appellant did not comply with the instructions contained in the letter within 30 days, the rehabilitation effort would be terminated and action would be taken to reduce his compensation under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.

OWCP thereafter received a medical report dated October 19, 2018 from Dr. David S. Matthews, a Board-certified orthopedic surgeon. Dr. Matthews noted that appellant was retired and related his history of a 2002 left knee injury sustained while working as correctional officer, right knee conditions, and medical treatment. He reported examination findings, and provided assessments of left knee pain and unilateral primary osteoarthritis, and the presence of right artificial knee joint, right. Dr. Matthews also recommended a knee replacement.

By decision dated November 2, 2018, OWCP reduced appellant's compensation to zero, effective that date, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, for his failure to cooperate with vocational rehabilitation without good cause.

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.⁴ Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.⁵ 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.⁶

⁴ *Betty F. Wade*, 37 ECAB 556, 565 (1986).

⁵ 5 U.S.C. § 8104(a).

⁶ *Id.* at § 8113(b).

OWCP's 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 OWCP nurse, interviews, testing, counseling, functional capacity evaluations [(FCE)], 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.”⁷

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.⁸

ANALYSIS

The Board finds that OWCP has met its burden of proof to reduce appellant's compensation, effective November 2, 2018, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 for his failure to cooperate with vocational rehabilitation without good cause.

Upon receiving medical evidence that appellant was not totally disabled for all work, but was capable of performing light-duty work with permanent restrictions, OWCP properly referred him to vocational rehabilitation services on February 21, 2018. The rehabilitation counselor reported that appellant had twice failed to respond to her February 27 and March 12, 2018 letters requesting that he contact her to schedule an initial interview. She also reported that her attempt to follow-up with him by telephone was unsuccessful because his telephone memory was full and she was unable to leave a message. Further, in an October 2, 2018 letter, OWCP advised appellant of the need to participate in vocational rehabilitation and the consequences of not participating under section 8113(b) of FECA and section 10.519 of its regulations. OWCP afforded him 30 days to participate in vocational rehabilitation services or provide good cause for his noncompliance. However, appellant did not contact OWCP or his rehabilitation counselor prior

⁷ 20 C.F.R. § 10.519.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.17(b) (February 2011).

to the November 2, 2018 reduction of his compensation to clearly express his intent to participate in the vocational rehabilitation effort, nor did he provide good cause for such noncooperation.

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.⁹ OWCP's 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.¹⁰ 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 an October 19, 2018 report from Dr. Matthews. Dr. Matthews noted appellant's history of a 2002 work-related left knee injury, right knee conditions and medical treatment, discussed examination findings, opined that he had significant arthritis of the left knee, and recommended knee replacement. He did not, however, offer an opinion finding that appellant was able to return to work or was unable to participate in vocational rehabilitation.

Appellant was given appropriate notification of the sanctions for continuing to refuse to cooperate with the rehabilitation program in the early stages, but failed, without good cause, to comply with these rehabilitation efforts. The Board finds, therefore, that OWCP properly reduced his compensation benefits to zero for his failure to cooperate with vocational rehabilitation without good cause. Accordingly, the reduction will remain in effect until such time as appellant acts in good faith to comply with the direction of OWCP.¹¹

On appeal appellant contends that he was unable to attend vocational rehabilitation in Parker, Colorado because it was located 100 miles one way from his home in Pueblo, Colorado, and he did not have a working motor vehicle. However, he did not inform OWCP or his vocational rehabilitation counselor of these reasons why he could not attend the early stages of vocational rehabilitation prior to the reduction of his compensation on November 2, 2018.

Appellant further contends on appeal that his willingness to undergo vocational testing on November 10, 2018 showed his good faith participation in vocational rehabilitation efforts. However, regardless of whether appellant was willing to participate in vocational testing, he failed to participate in vocational rehabilitation efforts prior to the reduction of his compensation on November 2, 2018, as discussed above.¹²

Additionally, appellant contends that he was totally disabled from work due to his left shoulder and knee which required replacement, lumbar degenerative disc disease and herniated

⁹ 20 C.F.R. § 10.519(b). *See also R.M.*, Docket No. 16-0011 (issued February 11, 2016); *Conard Hightower*, 54 ECAB 796 (2003).

¹⁰ *Id.* at § 10.519(c).

¹¹ *See supra* note 6.

¹² *S.M.*, Docket No. 15-1236 (issued February 18, 2016).

disc, bilateral carpal tunnel syndrome, and right knee condition. For the reasons stated above, however, the Board finds that OWCP properly reduced appellant's compensation to zero.

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.

CONCLUSION

The Board finds that OWCP has met its burden of proof to reduce appellant's compensation, effective November 2, 2018, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 for his failure to cooperate with vocational rehabilitation without good cause.

ORDER

IT IS HEREBY ORDERED THAT the November 2, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 2, 2020
Washington, DC

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

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

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