

ISSUE

The issue is whether OWCP met its burden of proof to reduce appellant's compensation, effective May 11, 2022, pursuant to 5 U.S.C. § 8113(b), for failure to cooperate with vocational rehabilitation, as directed, without good cause.

FACTUAL HISTORY

On September 12, 2008 appellant, then a 44-year-old chauffeur/carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 6, 2008 he sustained a stress-related injury when he was involved in a fatal motor vehicle accident (MVA), resulting in the death of a child, while in the performance of duty. He stopped work on the date of the claimed injury. OWCP accepted appellant's claim for post-traumatic stress disorder (PTSD). It paid him wage-loss compensation on the supplemental rolls, effective October 22, 2008 and on the periodic rolls, effective December 21, 2008.

On June 1, 2021 OWCP referred appellant, along with the case record, a statement of accepted facts (SOAF), and a series of questions, to Dr. Alain De la Chapelle, a Board-certified psychiatrist, for a second opinion evaluation to determine the extent of his employment injury and work capacity.

In a July 22, 2021 report, Dr. De La Chapelle discussed appellant's factual and medical history and reported the findings of his examination and evaluation. He noted that appellant reported visual flashbacks, nervousness when driving a car, continued thoughts of the September 6, 2008 MVA, and a depressed mood. Appellant reported the severity of his current symptoms as moderate. Dr. De La Chapelle indicated that appellant did not exhibit evidence of delusions, hallucinations, or thought disorder, and that his recent and remote memories were good. He diagnosed PTSD and depressive disorder, and indicated that appellant was partially disabled due to his accepted September 6, 2008 employment injury. Dr. De La Chapelle advised that appellant could perform his usual daily activities and could return to work on a part-time basis for four hours per day, five days per week. He noted, "[appellant] is currently markedly symptomatic behind the wheel; therefore, it is recommended that the claimant perform duties that do not involve driving."

In August 2021, OWCP referred appellant to a vocational rehabilitation counselor, noting that appellant's work restrictions should be based on the July 22, 2021 report of Dr. De La Chapelle. The counselor spoke with appellant on several occasions in September 2021, and discussed the vocational rehabilitation plan. Appellant reported that he had completed 12 hours of college credit while he was in the U.S. Army, and that he had limited computer skills.

Appellant's vocational rehabilitation counselor identified the position of information clerk, Department of Labor, *Dictionary of Occupational Titles* (DOT) No. 237.367-022, as a viable employment option for appellant, noting that the goal was for appellant to work four hours per day

in the position per the opinion of Dr. De La Chapelle. The information clerk position was considered to be in the sedentary demand level.⁴

Appellant's vocational rehabilitation counselor spoke with appellant on January 5, 2022, but left voice messages on January 18 and 24, and February 8 and 11, 2022 which were not returned. She sent appellant a January 31, 2022 letter requesting that he contact her, but no response was received.

On January 31, 2022 appellant's vocational rehabilitation counselor completed a labor market survey for the information clerk position, noting that the position was reasonably available within appellant's commuting area, and had wages of \$300.00 for 20 hours of work per week.

In a letter dated February 14, 2022, OWCP informed appellant of its determination that he was failing in his responsibility to participate in vocational rehabilitation efforts. It informed him that an individual who refuses or impedes a vocational rehabilitation effort without good cause after testing has been accomplished will have his compensation reduced. OWCP directed appellant to make a good faith effort to participate in the rehabilitation efforts within 30 days or, if he believed he had good cause for not participating in the efforts, 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.

In a February 25, 2022 report, Dr. Vilor Shpitalnik, a psychiatrist, indicated that he had reviewed the July 22, 2021 report of Dr. De La Chapelle. He noted that appellant was suffering from PTSD, and reported that he was still experiencing persistent nightmares, flashbacks, and fragmented sleep. Appellant reported experiencing repeated disturbing memories, thoughts, and images of the September 6, 2008 employment injury, and felt extremely upset when something reminded him of the event. Dr. Shpitalnik noted that, at these moments, appellant experienced a pounding heart, and had trouble breathing. Appellant also reported feeling emotionally numb. Dr. Shpitalnik indicated, "[i]n my professional opinion, in this point of time, the patient is unable to work in any work setting and his disability is temporary and 70 [percent]."

On March 25, 2022 appellant's vocational rehabilitation counselor completed a form indicating that appellant was continuing to obstruct vocational rehabilitation efforts. She cited additional instances in February and March 2022 when she left voice messages for appellant to call her, but appellant did not respond. In April and May 2022, the counselor continued to leave voice messages for appellant to call her, but appellant still did not respond.

By decision dated May 11, 2022, OWCP finalized the February 14, 2022 proposed reduction of appellant's wage-loss compensation, pursuant to 5 U.S.C. §§ 8104 and 8113(b), because he failed without good cause to undergo vocational rehabilitation as directed. It referenced the position description for an information clerk, DOT #237.367-022. OWCP indicated that the information clerk position was medically suitable because appellant's accepted condition was psychological in nature and he did not have any injury-related physical or psychological

⁴ A sedentary demand level required exerting up to 10 pounds occasionally and/or a negligible amount of force frequently to lift, carry, push, pull, or otherwise move objects. Sedentary work also involved sitting most of the time, but may involve walking or standing for brief periods of time.

limitations, which would prevent him from performing the job. It noted that had appellant successfully completed the approved vocational rehabilitation program, he would have been capable of securing reemployment as an information clerk, which had an entry-level wage of \$300.00 for 20 hours of work per week. OWCP applied the *Shadrick* formula,⁵ finding that he had 22 percent wage-earning capacity. It reduced appellant's wage-loss compensation, effective May 11, 2022.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to establish that the disability has ceased or lessened before it may terminate or modify compensation benefits.⁶ Section 8104(a) of FECA⁷ provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.⁸

Section 8113(b) of FECA provides:

“If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of this title, the Secretary, on review under section 8128 of this title and 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 the Secretary.”⁹

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 a vocational rehabilitation effort 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. [It] will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with the OWCP nurse and the [employing establishment]. The reduction will remain in

⁵ *Albert C. Shadrick*, 5 ECAB 376 (1953); codified at 20 C.F.R. § 10.403.

⁶ *C.H.*, Docket No. 18-1153 (issued January 2, 2019); *Betty F. Wade*, 37 ECAB 556, 565 (1986).

⁷ *Supra* note 2.

⁸ 5 U.S.C. § 8104(a).

⁹ *Id.* at § 8113(b).

effect until such time as the employee acts in good faith to comply with the direction of OWCP.”¹⁰

OWCP’s procedures state that specific instances of non-cooperation 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.¹¹

ANALYSIS

The Board finds that OWCP met its burden of proof to reduce appellant’s compensation, effective May 11, 2022, for failure to cooperate with vocational rehabilitation, as directed, without good cause.

When determining whether OWCP properly reduced appellant’s wage-loss compensation benefits based on his failure to participate in vocational rehabilitation, the Board must first analyze whether OWCP properly determined appellant’s work restrictions and ability to work.¹² OWCP initially referred appellant to vocational rehabilitation based on the July 22, 2021 report of Dr. De La Chapelle, an OWCP second opinion examiner, who conducted an examination and opined that appellant could perform his usual daily activities and could return to work on a part-time basis for four hours per day, five days per week. He noted, “[appellant] is currently markedly symptomatic behind the wheel; therefore, it is recommended that the claimant perform duties that do not involve driving.” Dr. De La Chapelle did not provide any other restrictions due to the September 6, 2008 employment injury.

As Dr. De La Chapelle’s report was sufficiently rationalized and based on examination findings, the Board finds that OWCP properly determined that Dr. De La Chapelle’s opinion represents the weight of the medical evidence and, accordingly, that appellant had the capacity to perform the duties of an information clerk.¹³ The position was classified as sedentary, and did not require driving, *i.e.*, the only injury-related limitation Dr. De La Chappelle placed on appellant other than working on a part-time basis. The Board notes that the findings of Dr. De La Chapelle fall within these sedentary work requirements, because he provided no injury-related physical restrictions.

Based on Dr. De La Chapelle’s findings, OWCP referred appellant for vocational rehabilitation. The vocational rehabilitation counselor identified the position of information clerk as an appropriate employment option for appellant and provided a rehabilitation plan, which

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

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.17(b) (February 2011).

¹² *See F.N.*, Docket No. 20-0435 (issued February 26, 2021); *L.C.*, Docket No. 12-972 (issued November 9, 2012).

¹³ *See S.C.*, Docket No. 19-1680 (issued May 27, 2020); *see also M.P.*, Docket No. 19-1364 (issued February 4, 2020).

OWCP approved. The counselor informed OWCP that, between January and May 2022, appellant failed to respond to numerous voice mails, as well as a registered letter, in which she requested that he contact her to discuss the rehabilitation efforts which included a plan for him to gain additional computer skills training. OWCP's procedures state that specific instances of noncooperation include lack of response or inappropriate response to directions in a testing session, as well as failure to attend an approved training program; failure to attend classes; failure to apply appropriate effort to succeed in such classes; and failure to undergo training after a training program had been approved.¹⁴ The Board finds that the evidence of record establishes that appellant's actions constitute noncooperation with vocational rehabilitation efforts.

The evidence supports that appellant did not cooperate with vocational rehabilitation efforts after he had participated in the early stages of the vocational rehabilitation process. 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 in his clear failure to exercise a reasonable standard of cooperation in communicating with his counselor, was based on "good cause."¹⁵ OWCP advised appellant in a February 14, 2022 letter that he had failed to participate in vocational rehabilitation efforts; that he had 30 days to participate in such efforts or provide good cause for not doing so; and that his compensation would be reduced if he did not comply within 30 days with the instructions contained in the letter. Appellant did not, however, participate in vocational rehabilitation efforts or provide good cause for not doing so within 30 days of OWCP's February 14, 2022 letter.

The case record contains medical evidence from an attending physician indicating that appellant had partial disability. In a February 25, 2022 report, Dr. Shpitalnik indicated that he had reviewed the July 22, 2021 report of Dr. De La Chapelle. He noted that appellant was suffering from PTSD and reported that he was still experiencing repeated disturbing memories, thoughts, and images of the September 6, 2008 incident, and felt extremely upset when something reminded him of the event. Dr. Shpitalnik indicated, "[i]n my professional opinion, in this point of time, the patient is unable to work in any work setting and his disability is temporary and 70%." The Board notes that Dr. Shpitalnik did not provide sufficient medical reasoning to support the level of disability found in his report. He did not refer to sufficient examination findings or objective evidence to support his opinion on disability. Rather, Dr. Shpitalnik primarily relied on appellant's own reported symptoms and perceived ability to function. The Board has found that findings on examination are generally needed to support a physician's opinion that an employee is disabled from work.¹⁶

¹⁴ See *supra* note 11.

¹⁵ See *Michael D. Snay*, 45 ECAB 403, 410-12 (1994).

¹⁶ *R.C.*, Docket No. 17-0748 (issued July 20, 2018); *Dean E. Pierce*, 40 ECAB 1249 (1989).

Accordingly, the Board finds that OWCP properly determined that appellant had, without good cause, failed to continue vocational rehabilitation.¹⁷ Pursuant to 5 U.S.C. § 8113(b) and the implementing regulations, OWCP may reduce appellant's compensation based on the amount which would likely have been his wage-earning capacity had he undergone vocational rehabilitation. The rehabilitation counselor identified the position of information clerk, DOT No. 237.367-022, with wages of \$300.00 per 20 hours of work per week. This represents the amount, which would likely have been appellant's wage-earning capacity had he completed vocational rehabilitation. OWCP followed its procedures and advised him that, if he did not continue vocational rehabilitation, his compensation would be reduced. It properly applied the *Shadrick* formula, as codified in section 10.403 of its regulations,¹⁸ in determining appellant's loss of wage-earning capacity and reducing his compensation. The Board, thus, finds that appellant had, without good cause, failed to continue participation in vocational rehabilitation, and his compensation was properly reduced to reflect a wage-earning capacity as an information clerk.

CONCLUSION

The Board finds the OWCP met its burden of proof to reduce appellant's compensation, effective May 11, 2022, for failure to cooperate with vocational rehabilitation, as directed, without good cause.

¹⁷ See *D.T.*, Docket No. 16-1590 (issued January 17, 2018); *M.K.*, Docket No. 16-1676 (issued February 16, 2017).

¹⁸ 20 C.F.R. § 10.403.

ORDER

IT IS HEREBY ORDERED THAT the May 11, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 2, 2023
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board