

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

S.V., Appellant)	
)	
and)	Docket No. 20-0906
)	Issued: February 11, 2021
DEPARTMENT OF THE ARMY, RESEARCH,)	
DEVELOPMENT & ENGINEERING)	
COMMAND, Fort Monmoth, NJ, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 20, 2020 appellant filed a timely appeal from a January 16, 2020 merit decision of the Office of Workers' Compensation Programs (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.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the January 16, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly reduced appellant's wage-loss compensation to zero, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, effective January 17, 2020, due to appellant's failure to cooperate with vocational rehabilitation without good cause.

FACTUAL HISTORY

On May 28, 1975 appellant then a 24-year-old mason helper, filed a traumatic injury claim (Form CA-1), alleging that on that date he was rodding a concrete sidewalk when he injured his back while in the performance of duty. He stopped work on that date and returned to light-duty work on June 2, 1975. OWCP accepted the claim for lumbosacral strain.

Appellant stopped work again, and on March 29, 1979 OWCP reduced his wage-loss compensation based upon his ability to perform the duties based on the constructed position of a clerical sorter. OWCP paid his wage-loss compensation on the periodic rolls commencing June 16, 2002.

OWCP previously referred appellant for vocational rehabilitation services in October 1981 and April 1987, however, neither of these vocational rehabilitation efforts resulted in his return to work.

On September 18, 2018 appellant was referred for a second opinion examination with Dr. Andrew Farber, an osteopathic physician specializing in orthopedic surgery. In an October 8, 2018 report, Dr. Farber related that appellant's lumbar radiculopathy was chronic in nature, which affected his recovery. He advised that appellant would be able to return to work in a light-duty position, eight hours per day, with a lifting restriction of 20 pounds occasionally, and 10 pounds frequently. However, a return to full-duty work was unlikely.

On November 9 and 13, 2018 the employing establishment indicated that it was unable to accommodate appellant's work restrictions.

On October 30, 2018 OWCP referred appellant for vocational rehabilitation services.

In a letter dated November 20, 2018, OWCP's vocational rehabilitation counselor wrote to appellant and advised that he had been assigned to work with him to provide vocational rehabilitation services. She related that she had attempted to reach him by telephone and had left voice mail messages, but he had not returned her call. Appellant was advised that participation in vocational rehabilitation was mandatory and that failure to comply could endanger his benefits.

In reports beginning December 12, 2018, appellant's vocational rehabilitation counselor reported her interactions with appellant. On December 12, 2018 the rehabilitation counselor related that she had conducted an initial interview assessment with him on December 3, 2018. Appellant advised that he had previously undergone vocational rehabilitation services in the 1980's and was sent for vocational training at that time. He attended classes at a community college for basic computer skills training and his wage-loss compensation benefits were adjusted following the job search process. The vocational rehabilitation counselor noted that based on appellant's past work experience and education, as well as extensive labor market research in the

geographic area where he currently resides, a vocational option to pursue for return to work, customer service representative, had been identified.

In a January 11, 2019 report, Dr. Nasser Ani, a Board-certified orthopedic surgeon, diagnosed lumbar intervertebral disc displacement and recommended that appellant undergo a magnetic resonance imaging (MRI) scan to determine further medical treatment. He concluded that appellant was totally and permanently disabled.

In a report dated February 12, 2019, the vocational rehabilitation counselor related that she had conducted research for computer skills training which included basic computer skills and Microsoft Office applications. She noted that appellant had no computer skills although he received training in the 1980's and had not used a computer after that time. The rehabilitation counselor also noted that she had reviewed the plan development on February 11, 2019 with him. In a report dated March 12, 2019, she related that she had completed the plan justification report on February 22, 2019 to document the recommendations for training and vocational rehabilitation services necessary to assist appellant in returning to work and had faxed the report to the rehabilitation specialist on March 5 2019. The vocational rehabilitation counselor also noted that he remained cooperative during this process.

By letter dated April 18, 2019, OWCP advised appellant that the position of customer service representative and information clerk was identified for his return to work. It advised that he was expected to cooperate fully with the necessary training. OWCP also advised appellant that, based on the rehabilitation counselor's evaluation and survey of the local labor market, he would then have a wage-earning capacity between \$402.00 and \$438.00 per week. It advised that, if he did not cooperate with the present plan, his wage-loss compensation could be reduced.

By letter dated April 30, 2019, the vocational rehabilitation counselor wrote to appellant and asked that he call her office by May 7, 2019 to discuss his training plan. She advised him that failure to comply could endanger his benefits.

In a rehabilitation action report (Form OWCP-44) dated May 13, 2019, the vocational rehabilitation counselor related that she had attempted to reach appellant to discuss the change in status of his rehabilitation plan to training and to advise him of the schedule for his computer training. She noted that she had left voice mail messages for him on April 24 and 29 and May 8 and 10, 2019, however, no response was received from him. The vocational rehabilitation counselor also related that she had sent appellant a letter on April 30, 2019 requesting that he call to discuss his rehabilitation status by May 7, 2019, however, no response was received.

In a May 20, 2019 report, Dr. Ani noted that appellant had lower back pain and sharp pain in his lower back and the lower aspect of his buttocks, which was a 10 on a scale of 1 to 10. He noted that appellant was not able to increase his activity level since his last visit and that could not sit or stand for a long period of time. Dr. Ani noted that an x-ray of appellant's lumbar spine revealed degenerative disc disease. He advised that appellant was taking prescription medications not prescribed by his office and he advised that appellant rest and take ibuprofen. Dr. Ani again noted that appellant was totally and permanently disabled from work. He completed a work capacity evaluation (Form OWCP-5c) on May 20, 2019 indicating that appellant could not perform any work activities.

In a May 20, 2019 memorandum of telephone call (Form CA-110), the vocational counselor indicated that appellant informed her that his treating physician had determined that he was totally disabled and he did not understand why he needed to participate in vocational rehabilitation.

In a May 21, 2019 Form OWCP-44, the vocational rehabilitation counselor related that she had received correspondence from appellant's treating physician, Dr. Ani. She noted that she had attempted to reach appellant on May 16, 20, and 21, 2019 and had left voicemail messages, but had not received a response from him.

By letter dated May 22, 2019, OWCP informed appellant that it had been advised that he had refused to cooperate in the continued development of a rehabilitation effort with his vocational rehabilitation counselor. It advised appellant that, pursuant to section 8113(b) of FECA if an employee without good cause failed to undergo vocational rehabilitation when so directed, OWCP may reduce compensation prospectively based on what would have been the employee's wage-earning capacity had he or she not failed to undergo vocational rehabilitation. OWCP advised that his case would be held open for 30 days to afford him an opportunity to make a good faith effort to participate in the rehabilitation effort. It further advised appellant that if during the allotted 30-day period he did not comply with the instruction to undergo the rehabilitation effort, or did not show good cause for not participating, the rehabilitation effort would be terminated and action would be initiated to reduce his probable wage-earning capacity as a customer service representative or information clerk.

In a July 2, 2019 Form OWCP-44, the vocational rehabilitation counselor related that she had spoken with appellant on July 2, 2019 by telephone. Appellant had related that he would welcome the chance for training, but could not do so at this time. In a Form OWCP-44 dated July 23, 2019, the vocational rehabilitation counselor related that she had called him on July 17 and 23, 2019, however, no response had been received.

In an August 8, 2019 letter, OWCP advised appellant that the vocational rehabilitation counselor indicated that he had stopped participating in vocational rehabilitation and training. It explained that, pursuant to 5 U.S.C. § 8113(b), if an individual without good cause fails to undergo vocational rehabilitation when so directed, and OWCP finds that, in the absence of the failure the individual's wage-earning capacity would probably have substantially increased, it may reduce prospectively the compensation based on what probably would have been the individual's wage-earning capacity had he or she not failed to undergo vocational rehabilitation. OWCP further advised appellant: "Also, [s]ection 10.519 of Title 20 of the Code of Federal Regulations provides that, if an individual without good cause fails or refuses to participate in the essential preparatory efforts as described above, OWCP will assume, 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, and compensation will be reduced accordingly. In effect, this will result in a reduction of compensation to zero." It afforded him 30 days to contact the vocational rehabilitation counselor and participate in the rehabilitation effort or to provide good reasons for noncompliance.

In a Form OWCP-44 dated September 12, 2019, the rehabilitation counselor related that she had spoken with appellant on September 12, 2019 and that he had related that his physician had informed him that he had nerve damage which required further evaluation, and which

prevented him from participating in vocational rehabilitation at this time. In a Form OWCP-44 dated November 15, 2019, she related that she had spoken with him on October 23, 2019 and that he had related that he was to see a neurologist on October 25, 2019. The rehabilitation counselor had then attempted to reach appellant on November 5, and 12, 2019, but he had not returned her telephone calls. In a Form OWCP-44 dated December 23, 2019, she related that she had spoken with him on November 18, 2019 and he had related that he had been seen by a neurologist on November 6, 2019 was awaiting the results of that evaluation. The vocational rehabilitation counselor also related that she had called appellant on December 12 and 16, 2019 with no response. She related that he had not started the computer skills training as outlined in the rehabilitation plan.

In reports dated September 6, November 18, and December 16, 2019, Dr. Ani noted that appellant was unable to sit or stand for a long period of time. He indicated that appellant's pain had not improved and appellant's work status had not changed. Dr. Ani diagnosed intervertebral disc displacement, lumbar region, other intervertebral disc displacement, lumbosacral region; other intervertebral disc degeneration, lumbar region; and other intervertebral disc degeneration, lumbosacral region.

By decision dated January 16, 2020, OWCP reduced appellant's wage-loss compensation to zero pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, effective January 17, 2020, due to his failure to cooperate with vocational rehabilitation without good cause. It found that his failure to undergo the essential preparatory effort of vocational testing did not permit OWCP to determine what would have been his wage-earning capacity had he undergone the testing and rehabilitation effort.

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.³ Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.⁴

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.⁵

³ See *E.W.*, Docket No. 19-0963 (issued January 2, 2020); *Betty F. Wade*, 37 ECAB 556, 565 (1986).

⁴ 5 U.S.C. § 8104(a).

⁵ *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 --

(a) 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 the *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*.

(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*.”

ANALYSIS

The Board finds that *OWCP* improperly reduced appellant's wage-loss compensation to zero, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, effective January 17, 2020, due to appellant's failure to cooperate with vocational rehabilitation without good cause.

If the individual fails or refuses to continue to participate in a vocational rehabilitation effort after a suitable position has been identified, future monetary compensation will be reduced based on the potential earnings of the identified position, as this would likely have been the individual's wage-earning capacity had he or she undergone vocational rehabilitation.⁶ But if the failure or refusal to participate occurred prior to the identification of a suitable job -- during the so-called early, but necessary stages of a vocational rehabilitation effort, *OWCP* is not in a position to determine what would have been the individual's wage-earning capacity.⁷ Under this latter

⁶ *Id.*

⁷ 20 C.F.R. § 10.519(b); *see also* C.S., Docket No. 06-1612 (issued February 27, 2007).

scenario, OWCP will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity, and therefore, the individual's prospective monetary compensation is reduced to zero.

Upon receiving medical evidence that appellant was not totally disabled from all work and was capable of performing light-duty work with restrictions, OWCP properly referred him to vocational rehabilitation services on October 30, 2018. The vocational rehabilitation counselor related on December 12, 2018 that, after appellant's initial interview assessment on December 3, 2018, based on his prior work experience and education, the vocational option of customer service representative had been identified and would be pursued. By letter dated April 18, 2019, OWCP advised him that the position of customer service representative had been identified for his return to work, which would provide a wage-earning capacity between \$402.00 and \$438.00 per week. On May 22, 2019 OWCP informed appellant that, if he did not comply with the vocational rehabilitation effort or provide good cause for not cooperating, the rehabilitation effort would be terminated and action would be taken to reduce his compensation based upon his probable wage-earning capacity as a customer service representative or information clerk.

On August 8, 2019 OWCP again explained in a letter to appellant that, pursuant to 5 U.S.C. § 8113(b), if an individual without good cause fails to undergo vocational rehabilitation when so directed, and OWCP finds that, in the absence of the failure the individual's wage-earning capacity would probably have substantially increased, it may reduce prospectively the compensation based on what probably would have been the individual's wage-earning capacity had he not failed to undergo vocational rehabilitation.

The facts of this case establish that the vocational rehabilitation specialist had identified the position of customer service representative or information clerk as appellant's vocational goal and she had identified appellant's potential earnings in this position. OWCP had confirmed and related this information to him. Therefore, pursuant to 20 C.F.R. § 10.519(a), OWCP was to reduce the appellant's future monetary compensation based on the amount which would likely have been his wage-earning capacity had he undergone vocational rehabilitation. However, it improperly reduced his wage-loss compensation to zero.

CONCLUSION

The Board finds that OWCP improperly reduced appellant's wage-loss compensation to zero, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, effective January 17, 2020, due to appellant's failure to cooperate with vocational rehabilitation without good cause.

ORDER

IT IS HEREBY ORDERED THAT the January 16, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 11, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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