

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

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**R.C., Appellant**

**and**

**DEPARTMENT OF LABOR, OCCUPATIONAL  
SAFETY & HEALTH ADMINISTRATION,  
Jacksonville, FL, Employer**

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**Docket No. 09-2095  
Issued: August 4, 2010**

*Appearances:*  
*William E. Shanahan, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 17, 2009 appellant, through his representative, filed a timely appeal from an April 17, 2009 decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether the Office properly reduced appellant's compensation to zero as of August 31, 2008 because he refused to cooperate with a functional capacity evaluation.

On appeal, counsel contends that appellant's compensation was improperly reduced because an impartial referee physician found that he could not work more than 30 minutes a day and remains totally disabled.

**FACTUAL HISTORY**

On January 25, 1994 appellant, then a 55-year-old safety compliance officer, sustained a back injury when he stepped into a hole and fell. The Office accepted the claim for permanent

aggravation of a preexisting herniated disc at L5-S1 and left side radiculopathy. Appellant underwent back surgery on July 23, 1996. On March 14, 1997 he sustained tendinitis of the left elbow and left shoulder.<sup>1</sup> Appellant was placed on the periodic rolls in receipt of wage-loss compensation for total disability.<sup>2</sup>

The Office determined that a conflict in medical opinion arose regarding the need for left shoulder resection and acromioplasty surgery, which appellant underwent on June 16, 2004. On August 18, 2005 appellant was referred to Dr. Bertram Zarins, a Board-certified orthopedic surgeon, for an impartial evaluation. In reports dated September 29, October 13 and November 29, 2005, Dr. Zarins provided findings on examination and restrictions regarding appellant's left shoulder. He found that the distal clavicle resection surgery was necessary. A January 26, 2006 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated severe multilevel spondylosis with moderate degenerative central stenosis at L2-3 and severe central stenosis at L3-4, evidence of remote left hemilaminectomy at L4-5 without evidence of recurrent disc herniation, and abnormal appearance of the roots within the cauda equina consistent with arachnoiditis. On August 8, 2006 Dr. Richard S. Jaslow, a Board-certified orthopedic surgeon, diagnosed left shoulder tendinitis, status post surgery. He provided restrictions to appellant's physical activity with regard to his shoulder and noted that other physicians had addressed appellant's back condition.

On September 7, 2006 the Office referred appellant to Dr. Jerald W. Katz, Board-certified in orthopedic surgery, for an impartial referee examination regarding appellant's work capacity and medical restrictions. In an October 31, 2006 report, Dr. Katz noted his review of the medical record and provided findings on examination. Regarding the low back, he advised that the employment injury exacerbated appellant's preexisting spinal arthritis and caused an acute disc herniation at L4-5 and L5-S1. Appellant had since developed chronic S1 radiculopathy precipitated by the herniated discs that contributed to his current disability for work. Dr. Katz found that appellant's left elbow tendinitis and left shoulder injury had resolved without residuals and that the June 16, 2004 surgery was necessary for treatment of distal clavicular arthritis that was not related to the March 14, 1997 employment injury. In a work capacity form, he advised that appellant could not return to his usual employment and could only work 30 minutes a day with permanent restrictions to his physical activity. On December 14, 2006 Dr. Katz advised that the physical restrictions were based on information obtained from appellant as to his inability to sit or drive more than 20 minutes at a time or stand more than 15 to 20 minutes. He stated that appellant could return to a modified position if he were allowed to change from sitting to standing as needed with a restriction of no lifting or over shoulder activity.

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<sup>1</sup> The left upper extremity claim was adjudicated under Office File No. xxxxxx919. In a January 27, 2004 decision, the Office denied authorization for left shoulder surgery. The claims were subsequently doubled. In a September 22, 2004 decision, an Office hearing representative found a conflict in medical opinion and remanded the case for further development. Appellant filed an appeal with the Board in Docket No. 05-77. In a May 13, 2005 order, the Board dismissed the appeal as the matter was in an interlocutory posture with no final decision over which the Board could exercise jurisdiction. *Petition for recon. denied* August 8, 2005.

<sup>2</sup> By decision dated February 19, 1999, appellant's compensation was suspended for failure to attend a scheduled impartial evaluation. In a July 8, 1999 decision, an Office hearing representative reinstated wage-loss compensation and the examination was rescheduled. He received a schedule award on January 18, 2000 for 13 percent impairment of his left leg.

Appellant could not drive for more than 30 minutes because after that time he needed to change positions. On December 28, 2006 Dr. Katz advised that there were no objective findings to support appellant's inability to sit for more than 20 minutes or operate a motor vehicle for more than 30 minutes. He noted that appellant drove to his appointment, and stated that there was no restriction on the amount of time appellant could drive if he divided his trip in 30-minute increments. On April 8, 2007 Dr. Katz again advised that appellant could only sit and work for 30 minutes in an 8-hour day due to calf atrophy and motor weakness in the right leg.<sup>3</sup>

On June 18, 2007 Dr. Jaslow provided findings regarding appellant's left shoulder, including full active and passive range of motion. Cervical spine range of motion was full. Dr. Jaslow diagnosed left shoulder and chronic low back pain and advised that appellant was permanent and stationary. He advised that appellant's left shoulder condition would not prevent him from returning to his previous employment but that the physicians treating appellant's low back should address his functional capacity for that condition. In an August 13, 2007 form report, Dr. Michael D. Mason, an osteopath specializing in orthopedic surgery, advised that appellant could not perform his usual job because he was unable to sit for more than 10 to 20 minutes at a time and required frequent position changes. He noted that appellant had not improved in 10 years. Dr. Mason provided limitations to appellant's physical activity of sitting and standing less than 20 minutes at a time, uncertain walking, minimal twisting and bending, driving for short periods, occasional squatting, no kneeling and lifting less than 20 pounds occasionally. Dr. Mason recommended a functional capacity evaluation to obtain more detailed restrictions.

On September 4, 2007 appellant was referred for a functional capacity evaluation which was performed by Leslie Collins, a physical therapist, on November 13, 2007. Ms. Collins noted appellant's report of severe limitations on sitting, standing, walking and driving and provided test results. She advised that he was pleasant and cooperative but did not demonstrate maximal effort, showing self-limiting behaviors throughout the examination with complaints of increased pain but no objective signs of increased pain. Ms. Collins concluded that appellant could work in a sedentary position and return to work for two hours daily, gradually progressing as tolerated.

On December 5, 2007 the Office proposed to suspend appellant's monetary compensation on the grounds that he failed to cooperate in rehabilitation efforts as he did not demonstrate a maximum effort during the functional capacity evaluation. Appellant was notified of the penalty provisions of section 8113(b) and afforded 30 days to respond.<sup>4</sup>

Appellant disagreed with the proposed reduction of compensation. In a December 17, 2007 report, Dr. Jay Rosenfeld, Board-certified in physiatry, reported findings on physical examination and advised that appellant was interested in prolotherapy. In a January 15, 2008 report, Christina M. Linkiewicz, a physician's assistant with Dr. Mason, noted appellant's

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<sup>3</sup> In March 2007 appellant was referred for vocational rehabilitation services. The services were closed based on appellant's medical restrictions.

<sup>4</sup> See 5 U.S.C. § 8113(b). Under this section, an employee's failure to willingly cooperate with vocational rehabilitation may form the basis for reduction of monetary compensation. See *Rebecca L. Eckert*, 54 ECAB 183 (2002).

complaint that the functional capacity testing had been painful and exacerbated his back pain. She stated that the office visit was spent discussing the test results and that she would ask Dr. Mason for an opinion regarding a repeat evaluation.

A second functional capacity evaluation was performed by Ms. Collins on February 14, 2008. Ms. Collins again advised that appellant was pleasant and cooperative, noting that he spent extensive time explaining his belief that he was giving his best effort but that he would not be able to return to work. She advised that he did not demonstrate objective signs of increased pain such as heart rate spikes, shortness of breath, or excessive perspiration and that he attempted all tasks requested of him; however, he cried out, reported sudden increases in sharp pain, and was limited as to any prolonged positions and frequently took breaks to sit or lie down and rest. Ms. Collins concluded that appellant could return to sedentary employment that allowed for frequent position changes but noted that his success at remaining in such a position could be limited due to his perception of significant pain. She noted that the impartial referee report had found that he could only work for 30 minutes a day. The Office sought clarification from Ms. Collins regarding the February 14, 2007 evaluation and requested that she submit brief responses to three inquiries. In an April 7, 2008 response, Ms. Collins listed “No” to a question concerning whether appellant put forth maximum effort during the evaluation. She wrote “Medical Necessity” in response to whether the recommended restrictions were medically necessary or based on appellant’s self-assessment of his abilities. Ms. Collins responded “No” to whether she considered “the medical report presented [appellant] in determining the claimant’s functional capacity.”<sup>5</sup>

In a June 6, 2008 decision, the Office reduced appellant’s monetary compensation as of June 8, 2008, finding that he failed to cooperate with rehabilitative efforts in the evaluations of November 13, 2007 and February 14, 2008. On June 13, 2008 it set aside the June 6, 2008 decision. The Office notified appellant that his compensation would be reduced to zero for failure to cooperate in the February 14, 2008 functional capacity evaluation. Appellant was informed of the provisions of section 8113(b) and section 10.519 of the implementing federal regulations and given 30 days to respond.

In a May 20, 2008 report, Dr. Mason noted that appellant was seen to review the most recent test results. He advised that appellant continued to have low back and leg pain and reported difficulty with activities of daily living, prolonged walking and sitting. On physical examination, Dr. Mason noted leg pain with swelling. He diagnosed lumbosacral spondylosis without myelopathy, spinal stenosis of the lumbar region and disc degeneration of the lumbar/lumbosacral spine. Based on the functional capacity evaluation, appellant could “likely” work at a sedentary position for up to two hours a day with frequent position changes but that finding a position at his age with these parameters would be very difficult. Dr. Mason concluded that appellant had reached maximum medical improvement. He considered appellant totally disabled and not capable of work. In a May 22, 2008 work capacity form, Dr. Mason advised that appellant could work up to two hours intermittently and provided restrictions to physical activity. On June 26, 2008 he noted that the recent functional capacity evaluation had questioned

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<sup>5</sup> The Office’s March 31, 2008 list of questions did not identify the specific medical report on which the question was based.

appellant's effort. Dr. Mason stated, "I was not present for the exam[ination] so I cannot speak directly to this point." He stated that appellant was always compliant with his treatment program, stating "I believe any perceived lack of effort was probably due to pain." Dr. Mason reiterated that appellant was permanently disabled.

On June 23, 2008 appellant disagreed with the proposed suspension of compensation, stating that he fully cooperated with the recent evaluation and that the report was inaccurate and subjective. Counsel advised that appellant would be willing to again participate in any further evaluation.

In an August 8, 2008 decision, the Office finalized the reduction of appellant's monetary compensation as August 31, 2008, finding that he did not fully cooperate with the February 14, 2008 evaluation.

On August 12, 2008 appellant, through his attorney requested a hearing.

Following preliminary review of the record, in a November 7, 2008 decision, an Office hearing representative reversed the August 8, 2008 decision; however, in a December 3, 2008 decision, the Chief of the Branch of Hearings and Review reinstated the reduction of appellant's monetary compensation to zero. It was found that he failed to cooperate with the physical therapist conducting the evaluation by not putting forth maximum effort and the medical evidence did not establish his physical incapacity to undergo the evaluation. The November 7, 2008 decision was vacated and the matter remanded to go forward to an oral hearing.

On January 26, 2009 appellant's attorney modified the hearing request to a review of the written record and reiterated that appellant was willing to participate in additional functional capacity evaluations. In reports dated January 13 and 21, 2009, Dr. Mason stated that he reviewed the evaluation reports of November 13, 2007 and February 14, 2008 with regard to his June 26, 2008 office note. He advised it was his opinion that appellant cooperated during each of the tests and that any perceived lack of effort on his part was likely due to pain. Dr. Mason advised that appellant was unable to provide any further physical effort that he performed during each of the tests because of the physical limitations imposed by his accepted conditions. He concluded that appellant was incapable of completing further evaluations with any more "so called effort."

In an April 17, 2009 decision, an Office hearing representative found that the Office properly reduced appellant's monetary compensation to zero because he failed to fully cooperate with vocational rehabilitation efforts.<sup>6</sup>

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<sup>6</sup> On August 18 and September 26, 2008 the Office found overpayments of compensation in the amounts of \$17,049.23 and \$7,175.08 based on dual receipt of benefits under the Act and from the Social Security Administration. In decisions dated April 17 and 23, 2009 respectively, an Office hearing representative finalized the overpayments and denied waiver. Appellant filed appeals in Docket Nos. 09-2131 and 09-2132. Those matters will proceed to decision under the respective docketed files.

## LEGAL PRECEDENT

Section 8104(a) of the Federal Employees' Compensation Act provides that the Office may direct a permanently disabled employee to undergo vocational rehabilitation.<sup>7</sup> Section 8113(b) provides that, if an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under 8104, the Secretary, on review under section 8128 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 or her wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary.<sup>8</sup>

Section 10.519 of Office's implementing regulations provide that where a suitable job has not been identified because the failure or refusal of the employee occurred in the early but necessary stages of a vocational rehabilitation effort (that is, meetings with the Office nurse, interviews, testing, counseling, functional capacity evaluations and work evaluations), the Office cannot determine what would have been the employee's wage-earning capacity. Under these circumstances, in the absence of evidence to the contrary, the Office will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity and the Office will reduce the employee's monetary compensation to zero. This reduction will remain in effect until such time as the employee acts in good faith to comply with the directions of the Office.<sup>9</sup>

The Office's procedure manual states 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.<sup>10</sup>

## ANALYSIS

The Board finds that the Office did not meet its burden of proof to reduce appellant's monetary compensation to zero. The medical evidence does not establish that he failed to cooperate in the vocational rehabilitation process.

Appellant's claim was accepted for permanent aggravation of a preexisting herniated disc at L5-S1, left side radiculopathy, left elbow tendinitis and left shoulder distal clavicle resection. Due to a conflict in medical opinion, he was referred to Dr. Katz, an impartial medical specialist, who found that appellant's injury exacerbated his preexisting spinal arthritis and caused acute

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<sup>7</sup> 5 U.S.C. § 8104(a); *see J.E.*, 59 ECAB \_\_\_\_ (Docket No. 07-1577, issued July 3, 2008).

<sup>8</sup> 5 U.S.C. § 8113(b); *see Freta Branham*, 57 ECAB 333 (2006).

<sup>9</sup> 20 C.F.R. § 10.519; *see Marilou Carmichael*, 56 ECAB 451 (2005).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11(a) (November 1996); *see Sam S. Wright*, 56 ECAB 358 (2005).

herniations at L4-5 and L5-S1. He advised that appellant had chronic S1 radiculopathy precipitated by the herniated discs. Based on an October 23, 2006 examination, Dr. Katz found that appellant could not return to his usual employment and could only work 30 minutes in an 8-hour day with permanent restrictions on his activities. He stated that appellant could not sit or drive for more than 20 minutes or stand more than 15 to 20 minutes and required the capacity to change from sitting to standing as needed. On April 8, 2007 Dr. Katz reiterated his opinion that appellant could only sit or stand for 30 minutes due to residuals of his accepted back condition.

Dr. Mason, an attending physician, similarly advised that appellant was unable to sit for more than 10 to 20 minutes at a time and required frequent position changes. He provided limitations to this effect and recommended obtaining a functional capacity evaluation.

Appellant was referred for functional evaluation testing on November 13, 2007. Ms. Collins, the physical therapist who performed the evaluations, advised that he did not put forth his best effort on testing. She noted that appellant reported severe limitations on sitting, standing, walking and driving and advised that he was pleasant and cooperative but did not demonstrate maximal effort, with self-limiting behavior demonstrated. Ms. Collins concluded that he was capable of work in a sedentary position for two hours daily. The Board notes that the test reports pertaining to the November 13, 2007 evaluation do not establish that Ms. Collins had reviewed the reports of either Dr. Katz or Dr. Mason in addressing appellant's medical limitations and capacity. The January 15, 2008 note of Dr. Mason's assistant noted that the evaluation had been painful and exacerbated appellant's low back pain.

A second evaluation was obtained on February 14, 2008. Ms. Collins reported that appellant was pleasant and cooperative but did not demonstrate objective signs of increased pain, such as heart rate spikes, shortness of breath or excessive perspiration. She stated that appellant attempted all tasks requested of him but that he cried out and made repeated complaints of sharp pain. Ms. Collins advised that testing was limited as to any prolonged positions and that appellant took frequent breaks to change positions. She reiterated that appellant could return to sedentary employment but was limited by his perception of significant pain "and his [impartial medical examination] IME report stating that he can only work for 30 minutes a day." The Office sought clarification from Ms. Collins as to whether appellant put forth maximum effort during the most recent evaluation. On April 7, 2008 Ms. Collins responded "No." She did not further elaborate on the testing conducted on February 14, 2008 or address the reports of Dr. Katz or Dr. Mason. It appears Ms. Collins did not consider any medical report in determining appellant's functional capacity as she responded "No" to this inquiry.

Dr. Mason subsequently reviewed both the functional capacity evaluation test results and reiterated that appellant had residuals of his low back condition. While testing indicated that appellant could "likely" work at a sedentary position for up to two hours a day with frequent changes in position, he advised that he found appellant to be totally disabled and not capable of working. On June 26, 2008 Dr. Mason acknowledged that he was not present during the functional capacity testing and could not speak directly to the results, but noted that he had no reason to believe that appellant had not complied with the evaluation and that any perceived lack of effort was due to pain. In 2009 treatment reports, he stated that it was his opinion that appellant had cooperated with the testing and became unable to provide further physical effort due to the limitations imposed by his accepted back conditions.

The functional capacity evaluations obtained for Dr. Mason do not reflect that the physical therapist conducting the tests adequately considered the medical evidence from Dr. Katz or Dr. Mason in addressing appellant's abilities or demonstrated maximum efforts. The medical evidence reflects that both the impartial medical specialist and appellant's attending physician recommended significant physical limitations related to his accepted back condition. Dr. Katz found that appellant could work only 30 minutes in an 8-hour day. He addressed appellant's inability to sit more than 20 minutes at a time or stand more than 15 to 20 minutes. Dr. Mason also found that appellant could not sit for more than 10 to 20 minutes and required frequent position changes. As noted, Ms. Collins acknowledged that she did not consider these medical reports or recommended limitations in appellant's functional capacity or assessing whether he was putting forth maximal effort. As a physical therapist, she is not a physician as defined under the Act and her reports may not be considered as probative medical opinion evidence in this regard.<sup>11</sup> While Ms. Collins noted that appellant did not exhibit objective signs of increased pain such as heart rate spikes, shortness of breath, or excessive perspiration, her observations are diminished by her failure to take the medical evidence concerning appellant's limitations into consideration in addressing his ability to perform the directed tests.

In the absence of probative medical opinion, the Board finds that the Office's determination that appellant did not put forth maximum effort on functional capacity testing is not established. The reports of Ms. Collins are not sufficient to establish that appellant failed to participate in or undergo the directed vocational rehabilitation.

### **CONCLUSION**

The Board finds that the Office did not establish that appellant failed to cooperate with vocational rehabilitation under section 8113(b) to support its reduction of his monetary compensation to zero.

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<sup>11</sup> See 5 U.S.C. § 8101(2). See also *James Robinson, Jr.*, 53 ECAB 417 (2002); *Vickey C. Randall*, 51 ECAB 357 (2000).



**ORDER**

**IT IS HEREBY ORDERED THAT** the April 17, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 4, 2010  
Washington, DC

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

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board