

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

HOWARD L. MILLER, Appellant

and

**DEPARTMENT OF ENERGY, BONNEVILLE
POWER ADMINISTRATION, Spokane, WA,
Employer**

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**Docket No. 04-2183
Issued: August 19, 2005**

Appearances:
Howard L. Miller, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 3, 2004 appellant filed an appeal from a July 19, 2004 decision of an Office of Workers' Compensation Programs' hearing representative which affirmed the reduction of his compensation based on his failure to continue to participate in vocational rehabilitation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation for the period June 24, 2003 to May 5, 2004 based on his failure to continue to participate in vocational rehabilitation.

FACTUAL HISTORY

On June 10, 1988 appellant, then a 47-year-old electrician, sustained injuries in a motor vehicle accident.¹ The Office accepted his claim for a scalp laceration and compression fracture of the T12 vertebrae.² He returned to work on June 19, 1988 with subsequent periods of intermittent disability. Appellant filed an occupational disease claim pertaining to his left hip on February 10, 1992 which was accepted by the Office for a strain. The Office subsequently expanded the claim to accept herniated discs at L4-5 and L5-S1, left hip and thigh strain, lumbar disc displacement and thoracic disc displacement. Appellant stopped work and has been in receipt of compensation for total disability since May 23, 1995.³

Appellant came under the treatment of Dr. John Merrill-Steskal, Board-certified in family practice. In response to an Office request for an updated medical report, it received on August 28, 2000, a chart note and work tolerance limitation completed by the physician. Dr. Merrill-Steskal advised that appellant could work for 8 hours a day at sedentary work, with no frequent walking, standing and lifting limited to 10 pounds. Thereafter, appellant's case was referred to a private vocational rehabilitation counselor for job placement.

In a report dated March 20, 2001, the rehabilitation counselor noted that the employing establishment had reservations about rehiring appellant. He identified a professional skills program at the Columbia Gorge Community College in The Dalles, Oregon, which would provide training and job placement services. The record reveals that appellant's past work experience was as an electrician with an Associate's degree in math and electronics. After some development of his medical restrictions, it was determined that appellant had the physical capacity to train as a data entry clerk with a secondary goal as an office clerk. A labor market survey was completed and it was determined that such positions were reasonably available in his commuting area. The vocational plan was approved by the Office and appellant began school on September 23, 2002, training under a two-year program in the information systems program. He successfully completed the fall and winter quarters and commenced the spring academic quarter.⁴

In an April 28, 2003 letter to appellant, the Office noted that his rehabilitation counselor had advised that appellant was dropping out of school to have surgery. The Office noted that it had no information regarding any recommended surgery and requested that appellant submit a report from his physician.

¹ The record reflects that appellant obtained a recovery of \$25,000.00 against the third party responsible for the automobile accident.

² On February 15, 1996 a magnetic resonance imaging scan was reviewed by Dr. John E. Dunn, a Board-certified orthopedic surgeon selected as the impartial medical specialist. He indicated that the defect at T12 represented wedging related to juvenile osteochondrosis rather than a fracture.

³ On December 30, 1996 the Office of Personnel Management approved appellant's application for a disability retirement; however, he elected receipt of compensation under the Federal Employees' Compensation Act.

⁴ On April 16, 2003 the vocational counselor advised the Office of his relocation from Washington State to Arkansas as of June 1, 2003.

By letter dated May 5, 2003, appellant advised that he had met with doctors at the Department of Veterans Affairs (DVA) hospital and was told that he could go in for hip replacement surgery in a couple of months and would be out of commission for four or more months. Appellant indicated that he dropped out of vocational training “to take care of my duties on the farm such as weed control and irrigation of weeds....”

On May 15, 2003 the Office noted that no medical documentation had been provided regarding any anticipated surgery or explaining why appellant could not continue to participate in his training program. Appellant was advised of the provisions of section 8113(b) and that his compensation could be reduced prospectively based on what probably would have been his wage-earning capacity had he not failed to continue in vocational rehabilitation. The Office gave appellant 30 days within which to make arrangements to return to the training program or show good cause for not undergoing training, or his rehabilitation effort would be terminated and action initiated to reduce his compensation to reflect his probable wage-earning capacity as a data entry clerk.

On May 16, 2003 the vocational counselor provided a closing report, noting that appellant had started the spring quarter in the information systems program but advised on April 22, 2003 that he would drop out of school as he was going to have hip surgery. The counselor noted that appellant had successfully completed the fall and winter quarters, and had the aptitude and vocational interest to work with computers.

In an undated response to the Office, appellant stated that he had explained to the vocational counselor that he was to go in for surgery and would be laid up for a long time. He also had to do weed control and irrigation before he had surgery. Appellant alleged that he was advised by the vocational counselor to quit school and to do what was needed, and then pick up where he left off. He noted that it would take a few months to prepare for surgery, which was now authorized, and that he would return to school when the DVA stated he was able.

On June 23, 2003 the new rehabilitation counselor noted that appellant had discontinued his training program without sufficient documentation to justify this action. He met with appellant on June 4, 2003, who noted that he dropped out for left hip replacement surgery which had not yet been scheduled. Appellant stated that the former vocational counselor had advised him to drop out and that a government agency required that he control the weeds growing on his property.

By decision dated June 24, 2003, the Office adjusted appellant’s compensation under section 8113(b) because he had failed, without good cause, to continue to participate in vocational rehabilitation. The Office noted that appellant had not yet undergone hip replacement surgery and failed to submit any medical documentation to support dropping out of school. It found that, had he completed the vocational rehabilitation training program, he would be able to perform the duties of a data entry clerk. In making this finding, it considered factors such as his disability, training, experience, age, and the availability of such work in his area. It provided the job description of data entry clerk and the physical requirements of the position, which was mostly sedentary work. The Office applied the *Shadrick* formula to adjust his continuing compensation to reflect his probable wage-earning capacity. The adjustment to his compensation was made effective June 15, 2003.

In a July 17, 2003 vocational rehabilitation closing report, the vocational counselor discussed his contacts with appellant and noted that he dropped out of the retraining program in May 2003, indicating that he had to undergo hip replacement surgery in the fall. Appellant also claimed that he was required to perform weed control on his property. He claimed that the previous counselor had told him to drop out of the program and to pick up where he left off when he was able. However, it was noted that there was no written evidence or corroboration to support that the prior counselor had given such advice. The Office had requested several times that appellant submit medical evidence supporting the need to drop out of school to undergo hip replacement surgery, but no medical evidence was ever submitted. The vocational counselor stated that appellant's weed control problem was not a sufficient reason to drop out of school and, absent medical documentation that he was not allowed to continue participation in school due to his hip condition, this was not a sufficient excuse to discontinue training, particularly as the anticipated surgery was not to be performed until the fall of 2003. He noted that the Office would consider that performing weed control and irrigation on his property was more physically demanding than being a student.

On July 18, 2003 appellant requested an oral hearing before an Office hearing representative. He submitted an undated report from Dr. Charles J. Manak, a Board-certified internist in Montrose, Colorado. He noted that, in June 2003, appellant's mother was hospitalized and there was concern as to her survival. Appellant came to Colorado to be with her and, following hospitalization, she was admitted to an extended care facility for convalescence and eventual discharge. Appellant also submitted DVA medical records pertaining to his September 24, 2003 left hip total arthroplasty and post-surgical care. An October 30, 2003 record noted that appellant was doing well following surgery and, for the most part, walked without any assistive devices and was no longer taking pain medications.

An oral hearing was held on May 5, 2004 at which appellant appeared. He testified that he spoke with his rehabilitation counselor concerning taking the summer off in order to do work on his farm and to attend to his mother in Colorado. Appellant indicated that she was hospitalized in May and underwent physical rehabilitation during June 2003.⁵ He returned to Washington State on June 27, 2003 and subsequently underwent hip surgery in September. When asked why he had not submitted medical documentation to the Office pertaining to his surgery, he stated that he was in Colorado during May and had not received the letter requesting additional documents. At the end of the hearing, the record was held open in order that appellant could submit medical documentation to establish that his presence in Colorado during May and June 2003 was necessary in order that he act as his mother's caretaker and a report from his physician stating how long he was disabled following hip surgery and his capacity to return to school. No further evidence was submitted.

In a July 19, 2004 decision, the Office hearing representative affirmed the June 24, 2003 decision, modified to reflect appellant's stated willingness at the May 5, 2004 hearing to cooperate with vocational rehabilitation and to complete school. He considered appellant's arguments and noted that there was no documentation submitted to support that the first vocational counselor advised him to drop out of the academic program, nor did the record

⁵ The record reflects that appellant went to Colorado in May and stayed through most of June 2003.

contain evidence to support that dropping out of school was necessitated by circumstances beyond his control. The hearing representative directed that appellant's compensation benefits be reinstated as of May 5, 2004 and that his case be referred back to vocational rehabilitation in order that he could reenroll back in school.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of proof to support that the disability has ceased or lessened before it may terminate or modify compensation benefits.⁶

Section 8113(b) of the Act 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.”⁷

Section 10.519 of the Office's implementing federal regulation, provides in relevant part:

“Under 5 U.S.C. § 8104(a), [the Office] may direct a permanently disabled employee to undergo vocational rehabilitation.... 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, [the Office] will act as follows:

(a) Where a suitable job has been identified, [the Office] 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. [The Office] will determine this amount in accordance with the job identified through the vocational rehabilitation planning process.... The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of [the Office].”⁸

⁶ See *Kevin M. Fatzner*, 51 ECAB 407 (2000).

⁷ 5 U.S.C. § 8113(b).

⁸ 20 C.F.R. § 10.519(a).

ANALYSIS

In this case, there is no question that appellant dropped out of the professional skills training program at Columbia Gorge Community College in late April 2003. The record reflects that, upon his entry into the program, he successfully completed two quarters of academic work and was in the third quarter when he dropped out. By doing so, he failed to continue participating in the program that was authorized as part of his vocational rehabilitation efforts. As a result, the Office applied section 8113(b) to reduce his monetary compensation for the period June 15, 2003 to May 5, 2004 to reflect his probable wage-earning capacity in the absence of such failure.

The issue is whether appellant's failure to continue participation in the vocational rehabilitation program was without "good cause."⁹ Appellant has presented several arguments in support of his contention that he left the program with "good cause": (1) that his first vocational counselor had recommended that he stop the program in anticipation of surgery; (2) that he dropped out of school to perform required weed control on his property; and (3) that his mother became ill and he had to go to Colorado to care for her. The Board finds that appellant has not presented evidence to establish "good cause" for his failure to continue to participate in the directed vocational rehabilitation training program.

The first vocational counselor provided a May 16, 2003 closing report, noting that appellant had advised him on April 22, 2003 that appellant would drop out of school in anticipation of having hip surgery. The reports of the first vocational counselor do not reflect that he ever advised appellant to drop out of the training program. The subsequent vocational counselor noted that he found no documentation that appellant was ever given such advice. Appellant has not submitted any evidence to support his contention that the vocational counselor recommended that he quit the vocational rehabilitation program. For this reason, the Board finds that he has not established "good cause" based on advice received from his vocational counselor.

The record reflects that appellant underwent hip surgery at the DVA on September 24, 2003. His stated reason for dropping out of school was in anticipation of surgery and the need to clear weeds from his property. The Board finds, however, that, as of the time appellant dropped out of the vocational rehabilitation training program, surgery had not yet been scheduled. Appellant has not explained why his anticipated hip surgery necessitated that he stop school. He was given several opportunities to provide medical evidence from the DVA in order to establish that his hip condition compelled him to stop the training program. At the May 5, 2004 hearing, he stated that he did not receive the Office's May 15, 2003 letter requesting medical documentation as he had gone to Colorado to attend to his mother. However, he was provided an additional 30 days to submit medical evidence from the DVA as to his hip condition and disability for participation in the academic program. Nothing further was submitted. The Board finds, therefore, that appellant has not provided medical evidence sufficient to establish

⁹ See *Jonathan Gibbs*, 52 ECAB 91 (2000) (the Board noted the directed training program was an appropriate method of realizing the rehabilitation goals in the case).

that he stopped the program for “good cause” due to any necessity pertaining to the treatment of his hip condition.¹⁰

Appellant noted that he wanted to take several months off in order to perform weed control and irrigation on a farm he owned. Again, there is nothing in the reports of the vocational counselors to support that it was recommended that he could leave school for this reason. Appellant has not submitted any documentation establishing the necessity that he leave the vocational rehabilitation program in order to accomplish this work. He has not established this reason as “good cause” for his failure to continue to participate in the academic program. Moreover, his argument that his hip condition precluded him from continuing doing classroom work and study appears inconsistent with the stated goal of performing weed control and irrigation duties on his farm.

At the time of the Office’s June 24, 2003 decision, the evidence of record did not include any argument from appellant that he could not continue in vocational rehabilitation due to the illness of his mother. However, the record does establish that she was hospitalized and then released to an extended care facility during May and June 2003. He noted at the May 5, 2004 hearing that his presence in Colorado was necessitated because his sister could not attend to his mother due to diabetes and that he had to act as her caretaker. The hearing representative observed, however, that his mother was treated in a hospital and then released for convalescence to an extended care facility before being released to return home. The report of Dr. Manak does not establish that appellant’s presence in Colorado was necessitated by the need that he personally attend to her during her illness. At the hearing, appellant acknowledged that, as his mother was at the extended care facility from June 2 to 27, 2003, he “could have probably been back” in Washington State. He stated that he remained in Colorado to keep up her morale. While recognizing his concern for his mother during this time, the Board finds that appellant did not submit any medical documentation to establish that his presence in Colorado during May and June 2003 was required as her caretaker.

CONCLUSION

For these reasons, the Board finds that appellant has failed to provide “good cause” for his failure to continue to participate in vocational rehabilitation efforts. Under section 8113(b), the Office properly reduced his wage-loss compensation from June 15, 2003 to May 5, 2004 to reflect his wage-earning capacity had he properly completed the data entry clerk training program.

¹⁰ Compare *Mary Ann J. Aanenson*, 53 ECAB 761 (2002) (the employee was found to have supported her failure to continue a directed vocational training program for “good cause” based on the recommendation of her treating physician that she stop).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 19, 2004 be affirmed.

Issued: August 19, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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