



## **FACTUAL HISTORY**

On February 24, 1974 appellant, then a 24-year-old ship fitter, sustained an employment-related injury when he stepped into a trench. The claim was accepted for left shoulder sprain, left bicep tendon rupture, right knee strain and permanent aggravation of chondromalacia.<sup>1</sup> Appellant stopped work at the employing establishment in 1981 and from 1981 to January 28, 2008 worked in private employment. He had numerous surgical procedures, including a right knee total arthroplasty on January 28, 2008, performed by Dr. Gregory M. Engel, a Board-certified orthopedic surgeon. At that time, the Office accepted that appellant sustained a recurrence of disability and placed him on the periodic compensation rolls. In a June 3, 2008 work capacity evaluation, Dr. Engel advised that appellant could return to work with permanent restrictions of no lifting, squatting, kneeling and climbing and that appellant could sit 8 hours daily, operate a motor vehicle at work 2 hours daily and operate a motor vehicle to and from work for 8 hours daily, with 5 to 10 minutes breaks 5 to 10 times daily.

On June 12, 2008 the Office referred appellant to Dr. Richard E. Hall, a Board-certified orthopedist. In a July 10, 2008 report, Dr. Hall noted his review of the medical record and statement of accepted facts, appellant's medical and surgical history and his complaints of bilateral knee pain and significant weakness in the left quadriceps, mild weakness in his right calf and atrophy in both due to a past history of polio. He provided physical examination findings including right knee effusion and limited range of motion. Left quadriceps strength was 3/5 and hamstrings 4/5. Dr. Hall diagnosed employment-related status post right total knee replacement and left knee pain and history of polio, not employment related. In answer to specific Office questions, he advised that appellant's shoulder condition was quiescent with no need for medical management and that appellant had not reached maximum medical improvement in regard to his right knee and could return to full-time sedentary work with permanent restrictions of 8 hours sitting, walking, standing and reaching, no squatting, kneeling or climbing and a weight restriction of 25 pounds on lifting with 1 to 2, 15 to 30 minute breaks every 8 hours. Dr. Hall placed no restrictions on appellant's driving. In a supplementary report dated August 5, 2008, he stated that, as appellant was 58 years old and weighed 350 pounds, after total knee reconstruction, he should never squat, kneel or climb. Walking and standing were limited to 15 minutes per hour, reaching 60 times per hour and reaching above the shoulder 15 times per hour with unlimited sitting. Reaching overhead was limited to 15 pounds, 12 times per hour.

In an August 18, 2008 report, Dr. Engel advised that appellant had no instability or weakness, with an excellent total knee replacement. He concluded that appellant had 37 percent right lower extremity impairment. In an August 19, 2008 work capacity evaluation, Dr. Hall advised that maximum medical improvement had been reached, that appellant could sit eight hours a day, with walking limited to one hour and standing to two hours. Bending and stooping was restricted to "minimal," and lifting was restricted to 20 pounds. Squatting, kneeling, climbing and operating a motor vehicle were also restricted but the number of hours able to perform the activity was not listed.

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<sup>1</sup> It is noted that appellant had polio as a child.

In October 2008, appellant was referred to Kierstin Clawson, a vocational consultant, for vocational rehabilitation, who noted that he was moving to a more remote location. After he had vocational testing, Ms. Clawson reviewed the results, his work and educational history. Ms. Clawson completed a transferable skills analysis and prepared a rehabilitation plan for a course of study in computer-aided drafting (CAD) at a community college with a planned goal of employment as a drafter or civil drafter. She provided a labor market survey and identified the position of civil drafter as within the sedentary strength category, with occasional stooping and lifting of 10 pounds occasionally and no climbing, balancing, kneeling, crawling or crouching. Ms. Clawson advised that the position was reasonably available in the local labor market at a weekly wage of \$1,227.60. The plan was signed by appellant on February 12, 2009 and approved by the Office.

Appellant registered for and then withdrew from the recommended classes in April 2009, stating that his physician, Dr. Engel, advised that he could not drive. He provided "health certificate" forms dated March 11 and April 8, 2009, in which Dr. Engel advised that appellant was totally disabled and was "unable to drive to and from work daily due to right total knee replacement."

By letter dated May 11, 2009, the Office proposed to suspend appellant's monetary compensation on the grounds that he failed to cooperate in rehabilitation efforts. It noted that, had he completed the rehabilitation effort, he would have the capacity to earn wages as a civil drafter with projected weekly earnings of \$1,227.60, which reflected a wage-earning capacity of 119 percent. Appellant was notified of the penalty provisions of section 8113(b) of the Federal Employees' Compensation Act<sup>2</sup> and afforded 30 days to respond.<sup>3</sup> He disagreed with the proposed suspension and on June 18, 2009, the Office reviewed the medical evidence of record, advised that the training plan was medically suitable and reduced appellant's compensation to zero on the grounds that he failed to cooperate with vocational rehabilitation efforts.

On July 6, 2009 appellant, through his attorney, requested a hearing and submitted a June 15, 2009 report, in which Dr. Engel advised that appellant had not completely healed from his total knee replacement and had chronic swelling. Dr. Engel also advised that appellant had left quadriceps and right calf weakness that contributed to frequent falling and progressive fatigability. He limited appellant to eight hours sitting, walking short distances and brief standing with breaks. Operating a motor vehicle to or from work was limited to approximately one hour each way per day and driving as a permanent occupation was restricted. In an August 20, 2009 report, Dr. Engel reiterated that, because appellant had a past history of polio, appellant had chronic weakness and that, with the chronic polio underlying degenerative disease of the knee, he had never regained enough strength to make him fully employable. He advised that the restrictions provided in June 2009 were current, stating that appellant's total driving at any one time was permanently restricted to one hour or less.

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> On April 2, 2009 the Office provided a similar letter and on May 5, 2009 suspended appellant's compensation. On May 7, 2009 it vacated the May 5, 2009 decision and on that date, he requested a hearing. By letter dated May 19, 2009, the Office notified appellant that, as the May 5, 2009 decision had been rescinded, there was no basis for an appeal.

At the hearing, held by video conference on October 29, 2009, appellant testified that both legs were weak due to the employment injury and his post-polio condition. He further stated that he did not have proper computer equipment at home for the recommended courses and the computer laboratory at the college was open limited hours. Appellant's attorney argued that, due to appellant's restrictions on lifting and stooping, the identified position was not suitable. He described appellant's commute and asserted that Dr. Engel's restriction on driving precluded the drive to classes. In reports dated November 19, 2009, Dr. Engel advised that appellant's strength waxed and waned but his overall status was stable. He restricted appellant to 10 minutes walking and standing and 30 to 60 minutes driving to work his day. Pushing, pulling, lifting, squatting, kneeling and climbing were totally precluded.

By decision dated January 14, 2010, an Office hearing representative found that the medical evidence established that appellant could perform the duties of civil drafter and that Dr. Engel did not provide a rationalized explanation as to why appellant's driving was restricted. She affirmed the June 18, 2009 decision.

### **LEGAL PRECEDENT**

Section 8104(a) of the Act provides that the Office may direct a permanently disabled employee to undergo vocational rehabilitation.<sup>4</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>5</sup>

Section 10.519 of Office regulations state that the Office may direct a permanently disabled employee to undergo vocational rehabilitation. Where a suitable job has been identified, it 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.<sup>6</sup>

### **ANALYSIS**

The Board finds that the Office properly reduced appellant's monetary compensation to zero because he failed, without good cause, to cooperate with vocational rehabilitation efforts. Upon receiving medical evidence from both Dr. Engel and Dr. Hall that appellant was not totally disabled for all work and capable of working eight hours a day with restrictions, the Office properly referred him to Ms. Clawson for vocational rehabilitation services. Appellant cooperated with the early and necessary stages of the vocational rehabilitation effort, signed the

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<sup>4</sup> 5 U.S.C. § 8104(a); *see J.E.*, 59 ECAB 606 (2008).

<sup>5</sup> *Id.* at § 8113(b); *see Freta Branham*, 57 ECAB 333 (2006).

<sup>6</sup> 20 C.F.R. § 10.519; *see Freta Branham*, *id.*

rehabilitation plan and registered for the recommended CAD classes. He then withdrew, stating that, as his physician restricted his driving, he could not drive to the classes.

The Office found that appellant could perform the duties of a civil drafter. In making this determination, it properly reviewed the medical evidence including reports from his attending orthopedic surgeon, Dr. Engel and that of Dr. Hall, an orthopedic surgeon who provided a second opinion evaluation for the Office. In a report dated June 3, 2008, Dr. Engel advised that appellant could return to work with permanent restrictions of no lifting, squatting, kneeling or climbing, that he could sit 8 hours daily, operate a motor vehicle at work 2 hours daily and operate a motor vehicle to and from work for 8 hours daily, with 5 to 10 minute breaks, 5 to 10 times daily. In reports dated August 18 and 19, 2008, he noted that appellant had reached maximum medical improvement with no instability or weakness and an excellent total knee replacement and that he could return to modified duty with sitting of eight hours daily, walking limited to one hour and standing to two hours. Bending and stooping were restricted to minimal and lifting to 20 pounds. Squatting, kneeling, climbing and operating a motor vehicle were also restricted, but Dr. Engel did not provide the exact restrictions.

In reports dated June 12 and August 5, 2008, Dr. Hall advised that appellant could return to eight hours of sedentary work daily including unlimited sitting. Walking and standing were limited to 15 minutes each hour; reaching limited to 60 times per hour; reaching above the shoulder to 15 pounds for 15 times per hour; reaching overhead limited to 12 times per hour; lifting limited to 25 pounds; and a permanent restrictions of no squatting, kneeling or climbing. Appellant was to be given 15 to 30 minute breaks, 1 to 2 times daily. Reaching was also limited and no restrictions were placed on driving.

The Board has carefully reviewed the medical evidence and finds that the opinions of both Dr. Hall and Dr. Engel supports that the position of civil drafter was within appellant's physical capabilities at the time Ms. Clawson identified the position. The position was identified as sedentary. While counsel argued at oral argument that Dr. Hall did not provide a specific weight restriction, the physician's work capacity evaluation dated July 10, 2008 clearly states that appellant can lift 25 pounds, within the occasional lifting requirements of a civil drafter. Counsel further argued that the civil drafter position was not suitable because occasional stooping was required. Dr. Hall did not restrict stooping and Dr. Engel advised that stooping should be "minimal." In describing the physical demands of the civil drafter position, the job analysis describes the occasional bending/stooping required as bending at the waist to read over a blueprint laid out on a table. The Board concludes that the weight of the medical evidence establishes that appellant could perform the duties of the civil drafter position.

Appellant also asserted that, based on Dr. Engel's driving restrictions, he could not drive to the CAD classes. In a June 3, 2008 report, Dr. Engel allowed appellant to drive to and from work. Later on August 18, 2008, he restricted the amount of driving appellant could perform but did not set a time limit. Dr. Engel limited appellant's driving in reports dated March 23 and April 8, 2009 and in reports dated June 19 and August 20, 2009 noted that, while appellant had completely healed from the total knee replacement done in January 2008, his previous polio affected his quadriceps and calf muscles leading to frequent falling and fatigue. He, however, did not adequately explain how or why appellant's condition worsened from June 2008 to

March 2009 such that appellant's driving time was so severely limited. As such, appellant's opinion is of limited probative value.<sup>7</sup>

The Office advised appellant in a letter dated May 11, 2009 that failure to participate in vocational rehabilitation efforts when he had not established that his medical condition justified such failure, would result in penalties; he had 30 days to participate in such efforts or provide good cause for not doing so; and his compensation would be reduced if he did not comply within 30 days with the instructions contained in the letters. Appellant, however, did not participate in the vocational rehabilitation efforts by attending the CAD classes or provide good cause for not doing so within 30 days of the Office's letter. By decision dated June 18, 2009, reduced his compensation under section 8113(b) of the Act, based on the difference between his pay rate for compensation purposes and what his wage-earning capacity would have been had he cooperated with vocational rehabilitation efforts by applying the principles set forth in *Albert C. Shadrick*,<sup>8</sup> codified at section 10.403 of the Office's regulations.<sup>9</sup> The Board has reviewed these calculations and finds that they appropriately represent appellant's wage-earning capacity.

Appellant has not submitted any rationalized medical evidence demonstrating his claimed inability to continue with the approved CAD classroom training. Accordingly, there is no basis upon which to conclude that he had good cause to discontinue participation in vocational rehabilitation. We therefore affirm the hearing representative's finding.

### **CONCLUSION**

The Board finds that the Office properly reduced appellant's compensation under section 8113(b) of the Act for failing, without good cause, to cooperate with vocational rehabilitation.

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<sup>7</sup> See *J.W.*, 58 ECAB 419 (2007).

<sup>8</sup> 5 ECAB 376 (1973).

<sup>9</sup> 20 C.F.R. § 10.403.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 14, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 3, 2011  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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