

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

S.E., Appellant

and

**U.S. POSTAL SERVICE, CINCINNATI BULK
MAIL CENTER, Cincinnati, OH, Employer**

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**Docket No. 12-1558
Issued: February 26, 2013**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 16, 2012 appellant, through his attorney, filed a timely appeal from a June 25, 2012 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.

ISSUE

The issue is whether OWCP properly reduced appellant's compensation, effective January 15, 2012, on the grounds that he failed to cooperate with vocational rehabilitation efforts without good cause.

On appeal, appellant's attorney asserts that the June 15, 2012 decision is contrary to fact and law.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

This case has previously been before the Board. In a February 15, 2008 decision, the Board found that appellant did not meet his burden of proof to establish that he was totally disabled for the period June 14 through August 2, 2006 causally related to an accepted low back condition.² The facts of the previous Board decision are incorporated herein by reference.

Appellant was removed for cause effective May 4, 2007. On June 27, 2007 OWCP accepted that he sustained a herniated disc at L4-5 and proposed surgery was approved. On September 25, 2007 appellant had additional back surgery at L4 to S1. He was placed on the periodic compensation rolls. On March 16, 2008 appellant was referred for vocational rehabilitation services.³ On May 22, 2008 he underwent arthroscopic right shoulder surgery and vocational rehabilitation services were closed.⁴ Appellant was referred to a medical management nurse and for physical therapy but was noncompliant. In October 2008, he was referred to Vanessa Harris, a rehabilitation counselor, for vocational rehabilitation services, who identified the positions of medical laboratory technician and pharmacy technician as vocational goals and recommended training at Cincinnati State Technical College. The recommended training plan was approved and he began school; but missed many classes.

On May 26, 2009 appellant's rehabilitation case was closed because he was scheduled for surgery. On June 25, 2009 Dr. Joseph P. Iannotti, a Board-certified orthopedic surgeon, performed arthroscopic repair of a right rotator cuff tear. A spinal cord stimulator for pain relief was authorized in November 2009. In a January 5, 2010 work capacity evaluation, Dr. Mitchell E. Simons, Board-certified in anesthesiology and pain management, advised that appellant could work eight hours of modified duty daily. He provided restrictions to appellant's

² Docket No. 07-1901 (issued February 15, 2008). On December 10, 2004 appellant a mail handler working modified duty, sustained aggravation of a lumbosacral strain. The claim, adjudicated by OWCP under file number xxxxxx252, was accepted for displacement of an intervertebral disc without myelopathy. The instant claim was doubled with file numbers xxxxxx580, xxxxxx445 and xxxxxx947, with the latter being the master file. All claims were for low back conditions including a herniated disc at L5-S1 for which appellant underwent surgery in 1999. He also has claims for a knee contusion and left and right shoulder sprains, adjudicated under file numbers xxxxxx279, xxxxxx218 and xxxxxx283 respectively. Under file number xxxxxx445, on December 4, 2001 appellant was granted a schedule award for a 16 percent permanent impairment of the left lower extremity and a 27 percent permanent impairment of the right lower extremity. Under file number xxxxxx445, by decision dated October 13, 2006, OWCP denied his claim for wage-loss compensation for the period October 14 through November 16, 2006 and his claim for an additional schedule award.

³ On April 8, 2008 appellant was seen as a new patient by Dr. Lindy M. Wyatt, a Board-certified neurologist, who performed a physical examination. Dr. Lindy diagnosed lumbosacral spondylosis, lumbosacral radiculopathy, lumbosacral postlaminectomy syndrome, chronic pain syndrome and pain behaviors and advised "appears to be seeking disability but I see no reason why he cannot work." Appellant returned to see Dr. Wyatt on April 21, 2008 when he and his wife got into a dispute with her and her staff. She then discharged him from her practice.

⁴ On June 2, 2008 the assigned case manager reported that appellant became angry and combative toward her at a May 27, 2008 visit to a rehabilitation center. Appellant stated that she would no longer meet with him unless an off-duty law enforcement officer was present.

physical activity.⁵ Appellant's vocational rehabilitation case was reopened on February 17, 2010 and the vocational rehabilitation counselor, Ms. Harris, identified the positions of medical laboratory technician or pharmacy technician as vocational goals. Appellant resumed training at Cincinnati State Technical College.

Dr. Simons implanted a spinal cord stimulator on June 21, 2010. On June 25, 2010 he reported that, when seen in follow up at his office, appellant began to scream at staff members. Dr. Simons stated that it was the most inappropriate, belligerent attitude he had seen in 27 years. He noted that appellant would not be seen again unless he apologized to his staff and referred him to his family physician, Dr. Jennifer Messer, who would remove the staples from the surgical procedure and follow up with appellant's care. Appellant thereafter came under the care of Dr. Hal S. Blatman, Board-certified in occupational medicine.

Ms. Harris documented a difficult relationship with appellant and reported that he was banned from the college bookstore following a September 10, 2010 incident when campus police had to be called. In October 2010, appellant complained about her and requested that his counselor be changed. On October 22, 2010 he caused a scene at a restaurant where he was meeting Ms. Harris. On November 12, 2010 Ms. Harris purchased books appellant would need for the next semester and noted that he had taken only one course the previous term. She notified him that she would be contacting his academic adviser regarding his progress.

In a November 18, 2010 treatment note, Dr. Blatman advised that appellant's back pain was worse and the spinal implant was not helping. He submitted additional reports describing appellant's pain and condition. On May 13, 2011 Dr. Lawrence A. Zeff, a Board-certified physiatrist, removed the spinal cord stimulator.

In a May 31, 2011 report, Ms. Harris described a history of incidents involving appellant at the college and with medical personnel that caused concern. She noted that he had dropped and added classes and made unauthorized purchases at the campus bookstore. Ms. Harris requested that appellant be assigned to a different counselor. By report dated June 27, 2011, she noted that she opted to continue with him as his case would be too difficult for another counselor. Ms. Harris reported that appellant had registered for the summer semester.

On July 15, 2011 appellant was involved in an altercation at the college where he was arrested. He could not return to school. Appellant was convicted of resisting arrest and disorderly conduct. On August 18, 2011 Ms. Harris informed him that his rehabilitation plan would change to a job seeking skills program. She identified the position of industrial order clerk and information clerk as vocational goals and provided labor market surveys that indicated that the positions were sedentary and available in the local labor market. Appellant signed an agreement to participate in job seeking skills training and job development on August 23, 2011.

In correspondence dated September 16 and 22, 2011, Ms. Harris informed appellant of scheduled meetings. In a September 29, 2011 report, she noted that he was not cooperating with

⁵ Bending and stooping were limited to four hours a day; reaching and reaching above the shoulder to two hours a day; climbing was limited to one hour daily with no squatting or kneeling and a 20- to 25-pound limit to pushing, pulling and lifting. Appellant could sit, walk, stand, operate a motor vehicle and repetitively move his wrists and elbows for eight hours daily.

vocational rehabilitation efforts because he had not turned in necessary homework regarding his resume. In October 4, 2011 correspondence, Ms. Harris noted that appellant's request that the location of the meetings with her be changed. Appellant's request was granted but he still missed meetings scheduled for September 27 and October 4, 2011 at the new location, a library. Ms. Harris informed him that he should have completed 30 job contacts to date but none had been received and reminded him of his responsibilities. She advised that future meetings were scheduled on October 11, 21 and 28, 2011. In an October 11, 2011 report, Ms. Harris noted that appellant arrived for their meeting at the library and confronted her, stating that he had been at the library to meet with her the previous week. Appellant gave her an envelope, told her that he was refusing vocational rehabilitation and was not staying for the meeting. He then left. In an October 10, 2011 letter, appellant advised Ms. Harris that he was not walking away from vocational rehabilitation but found it very difficult to relate to her because she continually maligned and misrepresented him. He requested a new counselor. Appellant stated that he did not timely receive information regarding a change in the location of meetings and attached a note, signed by someone identified as library staff, attesting that he had been at the library on the morning of October 4, 2011.

Ms. Harris reported that appellant called her on October 13, 2011 to state that his physician advised that he not participate in a job search because it was too stressful. She told him to submit the physician's report in writing. Dr. Blatman signed a note dated October 11, 2011, stating that appellant was physically unable to do a job search at that time with an estimated date to start the search of December 12, 2011. In October 13, 2011 correspondence, Ms. Harris informed appellant that she would remain his counselor and would continue the vocational rehabilitation efforts until told to terminate his case. She advised him that the goal of the October 11, 2011 meeting was to complete his resume and provide solid job leads based on his vocational rehabilitation plan. On October 31, 2011 appellant called an OWCP rehabilitation specialist and inquired about his maintenance allowance and stated that he could no longer participate in vocational rehabilitation.

In letters dated November 9 and 30, 2011, OWCP advised appellant that he had obstructed the vocational rehabilitation plan by failing to attend a meeting scheduled for September 27, 2011. On October 11, 2011 appellant had confronted the rehabilitation counselor and did not participate in the meeting. It further noted that the medical evidence demonstrated that he was able to participate in vocational rehabilitation services and that he had failed to turn in required assignments. Appellant was instructed to contact OWCP claims examiner and rehabilitation specialist and resume a good faith effort in the job search and placement program. He was notified of the penalty provisions of section 8113(b) of FECA and was given 30 days to resume the effort or show good cause for discontinuing it or the rehabilitation effort would be terminated and action would be taken to reduce his compensation to reflect his wage-earning capacity.

In telephone calls on December 8 and 9, 2011, appellant disagreed with OWCP notification, stating that he was on crutches, did not drive and could not go to meetings due to his medical condition. On January 4, 2012 the rehabilitation counselor advised that appellant continued to be noncompliant.

By decision dated January 10, 2012, OWCP reduced appellant's compensation, effective January 15, 2012, to reflect what his wage-earning capacity would have been had he cooperated

with vocational rehabilitation efforts. It found that the constructed position of industrial order clerk was within his physical capabilities and reduced his compensation based on anticipated weekly earnings of \$614.00 in that position. Appellant's rehabilitation case was closed.

Appellant's attorney requested a hearing. In a January 15, 2012 letter, appellant asserted that he was medically unable to participate in vocational rehabilitation. He stated that Ms. Harris intimidated and maligned him, incorrectly stating that he missed meetings and that there had been confrontations.

Appellant submitted a December 12, 2011 lumbar spine magnetic resonance imaging (MRI) scan that demonstrated disc herniations at L2-3 and L3-4 with canal narrowing and degenerative changes, fusion changes at L4-S1 and L5-S1 central canal compromise related to prominent epidural fat and asymmetric laminectomies. On December 29, 2011 Dr. Blatman stated that appellant had postlaminectomy syndrome and sciatica in both legs and was unable to walk long distances without using a cane. He noted that appellant had a spinal stimulator removed and was in an automobile accident on October 19, 2011. Dr. Blatman opined that appellant was unable to complete vocational rehabilitation at that time, noting that he needed additional treatment as the stress level and physical ability needed had not been reached. In reports dated January 22 to April 5, 2012, he described appellant's condition and treatment. Dr. Blatman noted physical findings of spasm and tenderness in the muscles of the lower back, buttocks and legs, diagnosed lumbar disc displacement, a lumbosacral sprain and advised that appellant had continued pain from his injury.

In a March 16, 2012 report, Dr. John B. Jacquemin, a Board-certified orthopedic surgeon, noted appellant's complaints of radiating low back pain. He provided physical examination findings, noting painful, reduced back range of motion, 5/5 motor function and intact sensation on examination of the lower extremities with a negative straight leg raise and no pain with range of motion of motion of the major joints. Dr. Jacquemin diagnosed L2-3 and L3-4 stenosis and recommended surgery.

At the hearing, held on April 18, 2012, counsel asserted that appellant was not physically able to participate in vocational rehabilitation due to mobility issues and that the vocational rehabilitation program was unreasonable. Appellant stated that he would participate if the rehabilitation counselor would provide transportation. He testified that he missed appointments because he had no driver's license,⁶ could not walk to a bus and that the rehabilitation counselor would not meet him in his home. Appellant noted that he also had restrictions due to right shoulder surgery. He finished two years of college and would participate in vocational training that consisted of a home-based computer course.

In a May 15, 2012 report, Dr. Jacquemin provided physical examination findings and diagnosed sprain and strain of lumbosacral area, displacement of lumbar disc without myelopathy and displacement of cervical disc without myelopathy. He again recommended surgery. Dr. Blatman submitted a treatment note dated May 29, 2012 in which he reiterated his findings and conclusions.

⁶ Appellant testified that he lost his license due to a motor vehicle accident.

By decision dated June 25, 2012, the hearing representative found that OWCP met its burden of proof to reduce appellant's compensation because he failed to cooperate with vocational rehabilitation. The hearing representative noted that the medical evidence was insufficient to show that appellant could not continue to meet with his rehabilitation counselor and pursue job leads and affirmed the January 20, 2012 decision.

LEGAL PRECEDENT

Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.⁷ 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.⁸

Section 10.519 of OWCP regulations state that OWCP may direct a permanent disabled employee to undergo vocational rehabilitation. 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. This reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.⁹

ANALYSIS

The Board finds that OWCP properly reduced appellant's monetary compensation because he failed, without good cause, to cooperate with vocational rehabilitation efforts.

Dr. Simons found that appellant was not totally disabled for all work and was capable of working eight hours a day with physical restrictions. OWCP properly referred him to Ms. Harris for vocational rehabilitation services. Appellant cooperated with the early and necessary stages of the vocational rehabilitation effort, signed a rehabilitation plan and attended courses at Cincinnati State Technical College until he was arrested there on July 15, 2011 following an altercation. He was convicted of resisting arrest and disorderly conduct. Appellant could not return to the college and the rehabilitation effort changed to a job seeking skills program. He signed a new agreement to participate in job seeking skills training and job development on August 23, 2011. Appellant met with Ms. Harris on several occasions; but failed to attend a meeting scheduled on September 27, 2011. He also failed to complete assignments regarding his resume and job contacts and did not participate in any vocational rehabilitation efforts after October 11, 2011.

⁷ 5 U.S.C. § 8104(a); *see J.E.*, 59 ECAB 606 (2008).

⁸ *Id.* at § 8113(b); *see Freta Branham*, 57 ECAB 333 (2006).

⁹ 20 C.F.R. § 10.519 (2011).

At an October 11, 2011 meeting, appellant confronted Ms. Harris, stating that he would no longer participate in vocational rehabilitation. He provided a note from Dr. Blatman who stated that appellant was physically unable to do a job search. Appellant did not establish good cause for his failure to participate in vocational rehabilitation after October 11, 2011. He asserted that he was medically incapable of continuing to participate and testified at the April 18, 2012 hearing that he had mobility issues. Appellant submitted a December 29, 2011 report, in which Dr. Blatman stated that appellant had postlaminectomy syndrome and sciatica in both legs and was unable to walk long distances without a cane. Dr. Blatman opined that appellant was unable to complete vocational rehabilitation because he did not have the needed stress level or physical ability. Additional evidence included a December 12, 2011 lumbar spine MRI scan and March 16 and May 15, 2012 reports from Dr. Jacquemin who provided findings and recommended surgery.

The Board finds that the medical evidence from appellant does not establish good cause for his failure to continue participating in the vocational rehabilitation process. Dr. Jacquemin did not address whether appellant was capable of participating. Dr. Blatman's opinion is also insufficient to support appellant's nonparticipation in vocational rehabilitation. He did not provide objective findings showing a worsening of appellant's condition such that he could no longer participate in the vocational rehabilitation process. At the time appellant abandoned the vocational rehabilitation process, he was asked to attend meetings and had homework assignments to prepare a resume and conducting job searches. He had successfully attended classes at a technical college until he was removed from the campus in July 2011. Dr. Blatman merely indicated that appellant could not walk long distances without a cane and did not have the proper stress level. He showed no knowledge of what the vocational rehabilitation process entailed. Dr. Blatman's reports are of diminished probative value and do not establish that appellant was medically incapable of continued participation in the vocational rehabilitation process.

In letters dated November 9 and 30, 2011, OWCP advised appellant that failure to participate in vocational rehabilitation efforts when he had not established good cause would result in penalties. Appellant was given 30 days to participate in such efforts or provide good cause for not doing so. He did not further participate in the vocational rehabilitation efforts by meeting with Ms. Harris, the vocational rehabilitation counselor and did not provide good cause for not doing so within 30 days of the November 30, 2011. Ms. Harris had identified several sedentary positions, including that of industrial order clerk which had a weekly wage of \$614.00. In this case, OWCP properly made a medical determination of partial disability and of specific work restrictions and referred appellant's case to Ms. Harris who properly selected the industrial order clerk position as within appellant's capabilities with regard to his limitations, education, age and prior experience.

By decision dated January 10, 2012, OWCP reduced appellant's compensation under section 8113(b) of FECA, based on the difference between his pay rate for compensation purposes and his wage-earning capacity as an industrial order clerk. It applied the principles set forth in *Albert C. Shadrick*,¹⁰ codified at section 10.403 of OWCP regulations.¹¹ The Board has

¹⁰ 5 ECAB 376 (1973).

¹¹ 20 C.F.R. § 10.403.

reviewed these calculations and finds that they appropriately represent appellant's wage-earning capacity.

Appellant has not submitted sufficient rationalized medical evidence to establish his claimed inability to continue with the vocational rehabilitation process. 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.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation under section 8113(b) of FECA because he failed, without good cause, to cooperate with vocational rehabilitation.

ORDER

IT IS HEREBY ORDERED THAT the June 25, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 26, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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