

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

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**D.W., Appellant**

**and**

**DEPARTMENT OF THE NAVY, PACIFIC  
FLEET SHIPYARDS, Bremerton, WA, Employer**

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**Docket No. 20-0840  
Issued: August 19, 2021**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On February 28, 2020 appellant filed a timely appeal from a February 26, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 wage-loss compensation to zero, pursuant to 5 U.S.C. § 8113(b), effective March 1, 2020, for failure to cooperate with the early stages of vocational rehabilitation.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On July 2, 2014 appellant, then a 50-year-old wastewater treatment plant operator, filed a traumatic injury claim (Form CA-1), alleging that on June 24, 2014 he sustained injury to his left shoulder and elbow when he fell on a bicycle on wet pavement, while in the performance of duty.

OWCP accepted the claim for sprain of the left shoulder and upper arm, and abrasion or friction burn of the left elbow, forearm, and wrist. It initially paid appellant wage-loss compensation on the supplemental rolls as of November 16, 2014. OWCP paid him wage-loss compensation on the periodic rolls as of August 21, 2016.

In a letter dated March 12, 2018, OWCP requested that appellant's treating physician provide an updated report regarding appellant's accepted conditions and his medical status as it relates to his ability return to work.

In a May 14, 2018 report, Dr. Azadeh Farokhi, Board-certified in occupational medicine, noted that he was unclear as to the accepted conditions, but it appeared that appellant's claim was accepted for a left shoulder sprain. He assumed, however, that the rotator cuff degeneration/dissection and SLAP lesion also were accepted as part of the claim. Dr. Farokhi advised that surgery was not performed as the condition was "deemed irreparable." He opined that appellant was at maximum medical improvement (MMI), fixed and stable, and no further treatment was warranted. Dr. Farokhi recommended a functional capacity evaluation (FCE) to determine if appellant was capable of some type of employment.

A July 11, 2018 FCE indicated that appellant was capable of full-time, light-to-medium level employment with restrictions. Appellant was specifically restricted from using his left arm to work above his shoulders.

On August 15, 2018 OWCP referred appellant to vocational rehabilitation to assist with his return to gainful employment, based on Dr. Farokhi's findings and the FCE.

In a September 20, 2018 Form OWCP-5c work capacity evaluation, Dr. Farokhi noted that his restrictions were consistent with the FCE.

In a November 26, 2018 report, the rehabilitation counselor related that the employer had not identified available modified employment consistent with the restrictions in the July 11, 2018 FCE, with which, appellant's physician concurred. The counselor noted that appellant was capable of full-time, light-to-medium level employment.

In an April 4, 2019 report, Dr. Farokhi opined that appellant was at MMI and no further treatment was warranted. In a separate report also dated April 4, 2019, he noted that appellant had ongoing left shoulder pain, decreased motion of the shoulder in all directions, and good grip strength. Dr. Farokhi concluded that appellant was able to return to modified duty, full time, per the FCE.

In a June 6, 2019 report, the vocational rehabilitation counselor noted that a 12-month training program was developed for appellant targeting the vocational goals of production coordinator and assistant construction superintendent. She noted that she had contacted appellant

and he was “ready and eager to begin and would register for the courses.” The vocational rehabilitation counselor also noted that she followed up with appellant on May 24, 2019 and appellant was prepared to begin his computer classes. In a June 6, 2019 report, she indicated that appellant was very excited to begin the plan and “felt that it was not only consistent with his background skills, and knowledge, but targeting exactly the type of work he wanted. Appellant was doing very well in his computer class and was, in fact, helping other students.” The vocational rehabilitation counselor noted that search was conducted regarding a production coordinator/production clerk/order clerk and whether there were sufficient job numbers in King County. She noted that the American Society of Professional Estimators certificate program in construction management was chosen as it was the most cost effective program available. The vocational rehabilitation counselor also noted a targeted start date of June 24, 2019, and indicated that she would maintain contact with appellant regarding completion of testing and plan approval/implementation.

In a June 27, 2019 e-mail, the vocational rehabilitation counselor noted that a training program was submitted for one year of training, compromised of six months of computer training at Goodwill, and that appellant had already completed one course and another would be completed in a month. She noted only one additional class was needed and would be completed in a month. The vocational rehabilitation counselor indicated that online training was eight months with a new vender, the American Society of Professional Estimators. She noted the job goals were reasonably available within appellant’s commuting area of King County and utilized appellant’s one and a half years of experience as a supervisor. The vocational rehabilitation counselor advised that he had a wage-earning potential of \$28.81 per hour with the training and a wage-earning capacity of 99 percent of his date disability began wage of \$29.20. She recommended approval of the proposed training program.

In a letter dated June 28, 2019, OWCP advised appellant that a vocational training plan had been approved for an online course of study with the American Society of Professional Estimators for a certificate in construction practices. Appellant was advised that failure to adhere to the training guidelines would be considered obstructing or impeding return to work and could jeopardize his compensation benefits. A copy of the vocational training plan indicated that the selected positions were assistant construction superintendent, DOT No. 869-367-010, and production coordinator, DOT No. 221-167-018.

In an August 6, 2019 letter to appellant, OWCP provided a copy of the vocational training plan and requested that he sign, date, and return it to OWCP.

In an August 15, 2018 note, the vocational rehabilitation counselor indicated that contact with appellant was made *via* telephone and he indicated that he was eager to begin training on September 9, 2019.

In an August 16, 2019 letter to appellant, OWCP provided a copy of the vocational rehabilitation plan with the start date noted as September 9, 2019.

In e-mail correspondence dated August 20, 2019, the vocational rehabilitation counselor confirmed that she had spoken to appellant the prior day, and he acknowledged that he had received

the vocational rehabilitation plan and had been advised to sign it. Appellant signed the rehabilitation plan and award on September 1, 2019.

In an October 10, 2019 plan monitoring report, the vocational rehabilitation counselor indicated that appellant had experienced computer problems, and he had been unable to start the program until September 15, 2019. She also related that she had spoken with appellant on October 10, 2019 and that he indicated that he was on schedule to complete his construction estimating class.

In an October 29, 2019 memorandum of telephone call, the vocational rehabilitation counselor indicated that appellant was not able to participate in training due to “nonwork-related conditions, including hospitalization.” She indicated that appellant was very upset about his situation and that she had requested that he submit medical evidence to OWCP regarding his recent hospitalization.

In an October 29, 2019 report, the vocational rehabilitation counselor indicated that on October 20, 2019, appellant informed her that he was unable to participate in vocational rehabilitation because he had been hospitalized for two days due to “heart issues.” She noted that she spoke to appellant on October 21, 2019, that he had been discharged from the hospital and prescribed medications, that additional appointments were scheduled, and that “it is not clear the extent of his condition.” The vocational rehabilitation counselor also noted that appellant left her a voice mail message on October 28, 2019, indicating that he was exploring medical disability. She noted that she spoke with appellant on October 29, 2019, and he indicated that he was unable to participate in the vocational training program due to his medical condition. The vocational rehabilitation counselor indicated that she explained to appellant that medical information was needed to support his inability to participate in vocational rehabilitation, otherwise his failure to participate would be seen as noncompliance. She also noted that she followed up by “directing e-mail correspondence to the worker providing him with instructions on how to submit the medical information by either [ECOMP] or regular mail.”

In a November 1, 2019 e-mail, D.S., OWCP’s vocational rehabilitation specialist, noted that the vocational rehabilitation counselor submitted an OWCP Form 44 dated October 29, 2019, which indicated that appellant had stopped participating in the approved training program due to alleged nonwork-related conditions. The vocational rehabilitation specialist noted that there was no medical evidence submitted and that despite appellant “being upset about this turn of events, the fact remains there is no evidence to support [appellant’s] statements.” D.S. advised that appellant was noncompliant and recommended a proposed sanction.

In a November 7, 2019 letter, OWCP advised appellant that the vocational rehabilitation counselor indicated that appellant was unwilling or unable to participate in vocational rehabilitation and training during the week of October 14, 2019, because appellant believed that he was too severely disabled to work. However, it noted that Dr. Farokhi provided reports dated May 14, 2018, and April 4, 2019, advising that appellant was only partially disabled and able to perform gainful employment. OWCP explained that pursuant to 5 U.S.C. § 8113(b), if an individual without good cause fails to apply for and 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 they not failed to apply for and 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 appellant 30 days to contact the vocational rehabilitation counselor to make a good faith effort to participate in the rehabilitation effort or to provide good reasons for noncompliance.

In a November 12, 2019 report, the vocational rehabilitation counselor noted that routine contact had been made with appellant on October 29, 2019. She noted that she informed appellant that they had not received any medical documentation regarding his continued ability to participate in vocational rehabilitation and that she sent him e-mail correspondence requesting that he provide medical documentation regarding his inability to participate in training directly to OWCP *via* ECOMP or regular mail, and provided him with directions and addresses for both. The vocational rehabilitation counselor noted that on November 6, 2019 appellant left a voicemail message indicating that he was pursuing possible retirement and would call when he had "more answers."

In a November 26, 2019 memorandum of telephone call, appellant notified OWCP that he had stopped attending his training classes. He explained that he was waiting for retirement paperwork from his employer and disability benefits paperwork from the Social Security Administration (SSA).

In a December 9, 2019 memorandum of telephone call, appellant notified OWCP that he had confirmed his retirement disability and he was "done with OWCP." OWCP noted that it would review the file and any incoming documentation prior to issuing a final decision.

The vocational rehabilitation counselor submitted a December 19, 2019 report indicating that appellant ceased participation in his approved training program on October 14, 2019, due to alleged medical issues. She also related that appellant's file was closed.

By decision dated February 26, 2020, OWCP reduced appellant's compensation to zero, effective March 1, 2020, based upon its finding that he had failed to cooperate during the early stages of vocational rehabilitation. It noted that appellant did not submit any medical evidence to support his lack of participation due to nonwork-related medical conditions, and he had not shown good cause for not complying. OWCP noted that appellant had not responded to its November 7, 2019 letter or submit any medical evidence and that he contacted OWCP by telephone on November 26 and December 9, 2019, and indicated that he would no longer participate in the rehabilitation effort because he was electing retirement with OPM and SSA. It explained that the failure to undergo the essential preparatory effort of vocational rehabilitation did not permit it to determine what would have been appellant's wage-earning capacity had he undergone the testing, training, and rehabilitation effort. OWCP determined, under the provisions of Section 10.519 of the regulations, that in the absence of evidence to the contrary, the vocational rehabilitation effort would have resulted in appellant's return to work at the same or higher wages than the position he held when injured. It explained that because he had failed to undergo the early stages of vocational testing, it assumed that he either would have returned to his date-of-injury position or would have

earned higher wages. OWCP advised that the reduction in benefits would continue until appellant either underwent vocational rehabilitation or showed good cause for not complying.

### **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.<sup>2</sup> Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.<sup>3</sup>

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, then 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.<sup>4</sup>

OWCP 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, [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

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

<sup>3</sup> 5 U.S.C. § 8104(a).

<sup>4</sup> *Id.* at § 8113(b).

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.”<sup>5</sup>

### **ANALYSIS**

The Board finds that OWCP improperly reduced appellant's wage-loss compensation to zero pursuant to 5 U.S.C. § 8113(b), effective March 1, 2020, for failure to cooperate with the early stages of vocational rehabilitation.

The facts of this case establish that the vocational rehabilitation specialist had identified the positions of assistant construction superintendent and production coordinator 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. Appellant had also signed a vocational rehabilitation plan on September 1, 2019, and had commenced classes and was on schedule with his construction estimating class. He subsequently discontinued participation in the vocational rehabilitation plan based on alleged nonwork-related medical issues.

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.<sup>6</sup>

In this case, suitable positions had been identified and a vocational rehabilitation plan had been developed and commenced by appellant, but not completed. Therefore, pursuant to 20 C.F.R. § 10.519(a), OWCP was to reduce 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), effective March 1, 2020, for failure to cooperate with the early stages of vocational rehabilitation.

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<sup>5</sup> 20 C.F.R. § 10.519; *see R.H.*, 58 ECAB 654 (2007).

<sup>6</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 26, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 19, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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