

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

T.R., Appellant)

and)

DEPARTMENT OF THE NAVY, NORFOLK)
NAVAL SHIPYARD, Portsmouth, VA, Employer)
-----)

Docket No. 24-0934
Issued: December 20, 2024

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

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 23, 2024 appellant filed a timely appeal from a September 6, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ Appellant submitted a timely oral argument request before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, he asserted that oral argument should be granted because his vocational rehabilitation counselor was inexperienced, he did not volunteer for assignment for vocational rehabilitation services, and his training program was unrealistic. The Board, in exercising its discretion, denies his request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied, and this decision is based on the case record as submitted to the Board.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the September 6, 2024 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly reduced appellant's wage-loss compensation to zero, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, effective May 24, 2024, for failure to cooperate with the early stages of vocational rehabilitation, or continue to participate in a vocational rehabilitation effort, without good cause.

FACTUAL HISTORY

On November 8, 2017 appellant, then a 38-year-old shipfitter, filed a traumatic injury claim (Form CA-1) alleging that on October 30, 2017 he sustained right arm, thigh, hip, and lumbar injuries when a safety latch on a hatch door was not secured and the door closed improperly as he was descending the hatch while in the performance of duty. His payrate at that time was reported as \$25.06 per hour. OWCP initially accepted the claim for right thigh, knee, and upper arm contusions and lumbar sprain. It expanded acceptance of appellant's claim to include temporary aggravation of preexisting lumbar degenerative disc disease. OWCP paid appellant on the supplemental rolls commencing December 24, 2017, on the periodic rolls from February 4, 2018 until June 23, 2018. Subsequently, it paid appellant intermittent compensation on the supplemental rolls from June 24, 2018 through May 20, 2023, and on the periodic rolls from May 21, 2023.

Appellant's treating physician, Dr. Arthur W. Wardell, a Board-certified orthopedic surgeon, in a June 15, 2022 duty status report (Form CA-17), opined that appellant was capable of working with restrictions, which he indicated were permanent.

The employing establishment separated appellant from employment effective June 16, 2022 due to his inability to perform the essential functions of his job resulting from his permanent work restrictions.

On June 13, 2023 OWCP referred appellant, the case record, a statement of accepted facts (SOAF), and a series of questions to Dr. James R. Schwartz, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the status of his employment-related injuries.

In a July 29, 2023 report, Dr. Schwartz noted his review of the SOAF and the medical record and provided his physical examination findings. He indicated that appellant had ongoing residuals of his lumbar spine and bilateral knee injuries. Dr. Schwartz related that appellant had been working light-duty work until he was separated from the employing establishment last year. He opined that appellant could work eight hours per day in a sedentary or light duty capacity. In a July 29, 2023 work capacity evaluation (Form OWCP-5c), Dr. Schwartz noted that appellant could work eight hours per day in a sedentary or light-duty capacity with no squatting, kneeling, bending, stooping, twisting, or climbing. He further found that he could walk or stand for up to three hours and could push, pull, or lift up to 10 pounds, three hours per day.

On August 10, 2023 OWCP referred appellant to vocational rehabilitation services to assist with his return to gainful employment, based on Dr. Schwartz' findings.

In an August 22, 2023 rehabilitation action report (Form OWCP-44), the vocational rehabilitation counselor noted her recommendation that appellant undergo vocational evaluation

to determine his residual skills and abilities. She noted that appellant expressed interest in using his skills in blueprint reading and drafting.

On October 7, 2023 appellant underwent vocational testing on September 20, 2023. The vocational rehabilitation counselor recommended computer skills training to assist in preparing appellant for entry level sedentary positions such as routing clerk, repair-order clerk, service clerk, or scheduler.

In an October 26, 2023 letter, the vocational rehabilitation counselor, informed appellant that he had been enrolled in computer classes at the public library and that he would be provided with a laptop to use during these classes. The computer classes were from 2:00 p.m. to 4:00 p.m. on the first, third, fourth, and fifth Wednesdays of the month.

In a November 5, 2023 Form OWCP-44, the vocational rehabilitation counselor advised that the initial plan was for appellant to attend computer classes at the library. Appellant attended class on November 1, 2023, but was unable to participate in the Excel training because he lacked basic computer training. The vocational rehabilitation counselor explored other options including a community college where appellant could register for a computer-assisted drafting and design (CADD) certification program. After extensive discussion with appellant, it was decided that he needed basic computer training before any other specific training. The basic computer training was scheduled at the library for November 8, 2023 through February 8, 2023. The instructor indicated that the initial basic course could be taken several times to become proficient and then online computer training would be set up. The online training would be conducted at the library because appellant did not own a computer.

In rehabilitation plan and award (Form OWCP-16) dated November 10, 22 and December 29, 2023, the vocational rehabilitation counselor reported that the free training was to take place in person at the library, followed by online training at the library, and then career exploration.

In a November 14, 2023 Form OWCP-44, the vocational rehabilitation counselor advised that appellant disagreed with the training plan because he wanted blueprint training. She noted that he had no computer skills which would be the first step in training.

In a November 22, 2023 individual rehabilitation plan and job search plan agreement, the job goals of information clerk or dispatcher were identified. Appellant's transferrable skills were noted based on his high school education. The average wage for a dispatcher was noted to be \$520.40 per week, and the average wage for an information clerk was \$400.00 per week.

In a letter dated December 14, 2023, the rehabilitation consultant provided appellant with information on computer courses which he was scheduled to attend in January 2024.

In a February 14, 2024 Form OWCP-16, the vocational rehabilitation counselor recommended purchase of a laptop computer for appellant and computer training at a local library followed by online training through a university. The vocational rehabilitation counselor identified the expected occupations of information clerk and dispatcher following completion of the rehabilitation program. Total rehabilitation costs included a laptop computer and tuition fees for two classes.

In a letter dated February 23, 2024, OWCP advised appellant that it had reviewed the plan developed by his vocational rehabilitation counselor and determined that the job duties of information clerk were within his limitations. It indicated that based on the vocational rehabilitation counselor's vocational evaluation and survey of the local labor market, appellant would have a wage-earning capacity of \$400.00 per week. At the end of the rehabilitation program, whether appellant was actually employed or not, OWCP would likely reduce his compensation based on this amount. It informed appellant that he was expected to fully cooperate with the vocational rehabilitation counselor and that 90 days of placement services would be provided after any necessary training.

The vocational rehabilitation counselor, in a March 6, 2024 Form OWCP-44, advised that documentation regarding the rehabilitation plan had been sent for appellant's signature. Until appellant returned the signed documents she could not give a start date for online training with the university.

On March 14, 2024 appellant signed an individual rehabilitation placement and job search plan agreement noting job goals of information clerk and dispatcher.

In an April 18, 2024 Form OWCP-44, the vocational rehabilitation counselor stated that appellant did not want to take computer classes as documented in his plan. Appellant stated that he did not have any money to purchase a computer. The vocational rehabilitation counselor informed him to check out purchasing a computer, and that he subsequently would be reimbursed by completing and submitting a Form OWCP-915. Appellant agreed to speak with a rehabilitation specialist to assist in purchasing a computer. However, he had indicated that he was not interested in basic computer classes because he wanted training in architectural drawing and wanted to take computer-aided CADD classes.

In an April 19, 2024 vocational rehabilitation progress report, the vocational rehabilitation counselor requested further case direction and instruction because appellant did not want to take basic computer training. She noted appellant refused to purchase a computer alleging he did not have the money to purchase one. The vocational rehabilitation counselor told appellant that he would be reimbursed for the purchase. She related that appellant cancelled a meeting scheduled on April 11, 2024 at the library. The reason he gave for cancelling the meeting was that he was only interested in CADD.

In an April 22, 2024 vocational rehabilitation status change (Form OWCP-3), the rehabilitation counselor advised that appellant was refusing to participate in vocational rehabilitation and requested that an obstruction letter be sent.

The vocational rehabilitation specialist, in an April 22, 2024 memorandum, related that appellant was unwilling to participate in training even though he had signed the rehabilitation plan. Appellant stated that the only training he was interested in CADD. He did not want to take any basic computer courses even though he did not know how to use a computer.

In an April 23, 2024 letter, OWCP advised appellant that the vocational rehabilitation counselor reported that appellant refused to participate in an approved training program in online computer courses. It noted that the primary purpose of the vocational rehabilitation effort was to assist appellant in returning to employment as an information clerk. 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 directed, it may prospectively reduce the compensation based on what likely would have been the individual's wage-earning capacity had they not failed to apply for and undergo vocational rehabilitation. 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, or the vocational rehabilitation effort would be terminated, and action would be initiated to reduce his compensation to reflect his probable wage-earning capacity.

In a memorandum of telephone call (Form CA-110) dated May 1, 2024, appellant noted receipt of a letter stating he refused to participate in OWCP-approved training. He stated that was not the case and requested OWCP contact him.

In a May 22, 2024 Form OWCP-44, the vocational rehabilitation counselor advised that appellant had not contacted her since the April 22, 2024 plan interruption.

The vocational rehabilitation specialist, in a May 23, 2024 Form OWCP-3, requested closure because appellant failed to participate in the approved plan and ceased contact with the rehabilitation counselor.

By decision dated May 24, 2024, OWCP reduced appellant's compensation to zero, effective that date, based upon his failure to cooperate with vocational rehabilitation. It found that his May 1, 2024 telephone call did not show good cause for not participating in training in online computer courses. OWCP explained that the failure to undergo the essential preparatory effort of vocational rehabilitation did not permit it to determine what would have been his wage-earning capacity had he undergone the training program in online computer courses, and rehabilitation effort. It determined that, under the provisions of 5 U.S.C. § 8113(b) of FECA and section 10.519 of its regulations (20 C.F.R. § 10.519), and 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. OWCP advised appellant that the reduction in benefits would continue until he either underwent vocational rehabilitation or showed good cause for not complying.

In a letter dated May 28, 2024, OWCP informed appellant that his case for vocational rehabilitation services had been closed.

On May 28, 2024 OWCP received an undated statement from appellant denying that he did not cooperate with the vocational rehabilitation counselor. He asserted that the plan had been changed from attending a local college, to signing up for online courses with a university. Appellant indicated that the vocational rehabilitation counselor told him that she would be in trouble with her boss if he did not sign up for the online courses by April 17, 2024. He explained that he could not afford purchasing a laptop. Additionally appellant asserted that talks with the vocational rehabilitation counselor were about enhancing his knowledge in the field of shipbuilding. He requested a new vocational rehabilitation specialist with experience in the field.

OWCP also received an undated letter from the library branch manager, relating that appellant attended two sessions of basic computer class on February 14 and March 13, 2024.

On June 26, 2024 appellant requested reconsideration.

By decision dated September 6, 2024, OWCP denied modification finding that he failed to provide sufficient justification for not participating in vocational rehabilitation .

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.⁴ Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.⁵

Section 8113(b) of FECA provides, 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.⁶

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

⁴ See *D.M.*, Docket No. 23-0912 (issued March 5, 2024); *S.B.*, Docket No. 19-0781 (issued February 2, 2022); *E.W.*, Docket No. 19-0963 (issued January 2, 2020); *Betty F. Wade*, 37 ECAB 556, 565 (1986).

⁵ 5 U.S.C. § 8104(a); see also *A.L.*, Docket No. 22-0316 (issued January 10, 2023); *J.E.*, 59 ECAB 606 (2008).

⁶ *Id.* at § 8113(b); *M.D.*, Docket No. 23-0377 (issued June 5, 2023); *J.S.*, Docket No. 22-0386 (issued October 19, 2022); *S.H.*, Docket No. 16-1827 (issued March 12, 2018); *R.M.*, Docket No. 16-0011 (issued February 11, 2016).

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.”⁷

ANALYSIS

The Board finds that OWCP improperly reduced appellant's wage-loss compensation to zero, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, effective May 24, 2024.

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 undergone vocational rehabilitation.⁸ But if the failure or refusal to participate occurred prior to the identification of a suitable job, during the so-called early, but necessary stages of a vocational rehabilitation effort, OWCP is not in a position to determine what would have been the individual's wage-earning capacity.⁹ Under this latter scenario, OWCP will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity, and therefore, the individual's prospective monetary compensation is reduced to zero.

Upon receiving medical evidence that appellant could work with restrictions, OWCP properly referred him for vocational rehabilitation services on August 10, 2023. On November 22, 2023 the vocational rehabilitation counselor identified the position of information clerk as suitable for appellant based on his job history, medical restrictions, and the labor market survey. On February 23, 2024 OWCP notified him that it had approved 90 days of job placement services for the selected position of information clerk. OWCP informed appellant that it would likely reduce his compensation based on his ability to earn wages of \$400.00 per week as an information clerk at the end of the 90-day period and that it was thus important for him to cooperate with vocational rehabilitation. On March 14, 2024 appellant signed the individual rehabilitation plan.

In an April 23, 2024 letter, OWCP advised appellant that the vocational rehabilitation counselor reported that appellant refused to participate in an approved basic computer training program online. It 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 directed, it may prospectively reduce the compensation based on what likely would have been the individual's wage-earning capacity had they not failed to apply for and undergo vocational rehabilitation. OWCP 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, or the vocational rehabilitation effort would be terminated, and action would be initiated to reduce his compensation to reflect his probable wage-earning capacity.

⁷ 20 C.F.R. § 10.519; *see D.W.*, Docket No. 20-0840 (issued August 19, 2021); *R.H.*, 58 ECAB 654 (2007).

⁸ *Id.*

⁹ 20 C.F.R. § 10.519(b); *see also S.V.*, Docket No. 20-0906 (issued February 11, 2021); *C.S.*, Docket No. 06-1612 (issued February 27, 2007).

The facts of this case establish that the vocational rehabilitation counselor had identified the position of information clerk as appellant's vocational goal and had also identified his potential earnings in this position. OWCP had confirmed and relayed this information to appellant. Therefore, pursuant to 20 C.F.R. § 10.519(a), OWCP should have reduced his future monetary compensation based on the amount which would likely have been his wage-earning capacity had he undergone vocational rehabilitation in the position of information clerk. However, it improperly reduced appellant's wage-loss compensation to zero.¹⁰

CONCLUSION

The Board finds that OWCP improperly reduced appellant's wage-loss compensation to zero pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, effective May 24, 2024, for failure to cooperate with the early stages of vocational rehabilitation, or continue to participate in a vocational rehabilitation effort, without good cause.

ORDER

IT IS HEREBY ORDERED THAT the September 6, 2024 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 20, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁰ See *S.V., id.*; *D.W., supra* note 7.