

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

M.L., Appellant and ARCHITECT OF THE CAPITOL, SENATE OFFICE BUILDINGS, Washington, DC, Employer)))))))))))	Docket No. 11-400 Issued: October 13, 2011
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Appearances: *Case Submitted on the Record*
Appellant, pro se
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
 RICHARD J. DASCHBACH, Chief Judge
 MICHAEL E. GROOM, Alternate Judge
 JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 7, 2010 appellant filed a timely appeal from the November 9, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) reducing her compensation to zero for failing to cooperate with the early stages of vocational rehabilitation efforts. Pursuant to the Federal Employees' Compensation Act (FECA)¹ 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 to zero for failing to cooperate with the early stages of vocational rehabilitation efforts.

¹ 20 C.F.R. § 8101 *et seq.*

FACTUAL HISTORY

On February 16, 2006 appellant, then a 43-year-old custodial worker, sustained injury when she bent over to pick up a trash can. OWCP accepted that she sustained a lumbar strain and lumbar disc syndrome and paid compensation for periods of disability.

In periodic reports of 2006, Dr. Hampton Jackson, Jr., an attending Board-certified orthopedic surgeon, determined that appellant was totally disabled from work due her February 16, 2006 employment injury. In a December 3, 2006 report, Dr. Kevin Hanley, a Board-certified orthopedic surgeon serving as an OWCP referral physician, indicated that appellant had no work restrictions other than no lifting more than 50 pounds.

OWCP determined that there was a conflict in the medical opinion between Dr. Jackson and Dr. Hanley regarding appellant's ability to work and referred her to Dr. Neil A. Green, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the matter. On February 22, 2007 Dr. Green examined appellant and determined that she had restrictions of no sitting, walking or standing for more than one hour at a time. He also noted that appellant should not do significant work involving twisting, bending and stooping. Dr. Green determined that appellant could be expected to do light-duty work with a lifting restriction of 10 to 15 pounds.

On October 29, 2007 OWCP referred appellant for vocational rehabilitation services. Appellant's vocational rehabilitation counselor, Debbie Moreau, determined that Dr. Green's opinion represented the weight of medical evidence with respect to her ability to work and indicated that it would be used to help develop the rehabilitation plan.

In a November 5, 2007 letter, Ms. Moreau advised appellant that she was unable to reach her by telephone. She instructed appellant about how to contact her by telephone. Appellant called Ms. Moreau and a meeting time was set. The initial meeting was held on November 14, 2007.

By letter dated January 24, 2008, Ms. Moreau advised appellant that she attempted to reach her by telephone but that the telephone was disconnected and her new number was unpublished. She asked appellant to contact her by telephone so that a rehabilitation plan could be developed. In a rehabilitation status report dated March 11, 2008, Ms. Moreau advised OWCP that appellant was obstructing the rehabilitation process. On a Form OWCP-44, she outlined the attempts she made to meet with appellant and how appellant failed to keep the appointments. On at least three occasions in February and March 2008, appellant failed to keep appointments or call Ms. Moreau to advise that she would not be appearing for the appointments.

By letter dated March 28, 2008, an OWCP claims examiner advised appellant that section 8113(b) of FECA provided that, 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 she not failed to apply for and undergo vocational rehabilitation. The claims examiner further stated:

“Also, [s]ection 10.519 of Title 20 of the Code of Federal Regulations provide 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.”

Appellant contacted Ms. Moreau and some vocational testing was completed on April 25, 2008. In the April 25, 2008 report detailing the findings of the testing, Ms. Moreau determined that appellant would benefit by obtaining her GED as this would improve her chances of obtaining employment. She noted that the Washington, DC, area did not usually offer GED training courses in the summer. Therefore, appellant would not be able to enter GED training until the fall. Ms. Moreau attempted to set up an appointment to give appellant the information on GED courses but she failed to cooperate.

In a Form OWCP-44 dated July 1, 2008, Ms. Moreau advised OWCP that appellant was not cooperating. She discussed the difficulties in reaching appellant by telephone and that appellant failed to keep an appointment in June 2008 or call to inform her that she would not be keeping the appointment.

By letter dated July 25, 2008, OWCP again advised appellant of her requirement to cooperate with vocational rehabilitation. By letter dated July 30, 2008, appellant contacted OWCP and advised that she would cooperate with vocational rehabilitation. By Form OWCP-44 dated June 17, 2009, Ms. Moreau notified OWCP that appellant failed to keep an appointment in June 2008 and did not call to inform her that she would not be keeping the appointment. After appellant missed the appointment, she did not respond to Ms. Moreau's message to call her.

By letter dated July 8, 2009, OWCP advised appellant that she had failed to participate in vocational rehabilitation efforts. It informed her that an individual who refuses or impedes a vocational rehabilitation effort without good cause after testing has been accomplished will have his compensation reduced. OWCP directed appellant to make a good faith effort to participate in the rehabilitation effort within 30 days or, if she believed he had good cause for not participating in the effort, to provide reasons and supporting evidence of such good cause within 30 days. It stated that if these instructions were not followed within 30 days action would be taken to reduce her compensation.

By letter dated July 13, 2009, appellant advised that she had gotten lost on her way to an appointment with Ms. Moreau because she did not know anything about the Virginia area. She also requested a new rehabilitation counselor be assigned because she and Ms. Moreau could not agree on her needs to get back into the workforce.

By letter dated January 18, 2010, Ms. Moreau advised appellant that she had called her on January 12, 2010 and had left her a message. She advised appellant that she again attempted to call her on January 18, 2010 but that her number was disconnected. Appellant was advised to call Ms. Moreau to schedule an appointment.

By e-mail dated January 25, 2010, Ms. Moreau advised OWCP that appellant continued to be uncooperative. She indicated that the January 18, 2010 letter was sent by certified mail for which appellant had signed a receipt. Ms. Moreau stated that appellant had failed to contact her after she received the letter.

OWCP advised Ms. Moreau to prepare OWCP-66 forms for two selected jobs that appellant could perform and to close her rehabilitation case. In early March 2010, Ms. Moreau provided information regarding cashier/checker and information clerk jobs, indicating that appellant was vocationally and physically capable of performing the jobs and that they were available within her commuting area.

In a July 2, 2010 decision, OWCP reduced appellant's compensation under 5 U.S.C. § 8113(b) to reflect her loss of wage-earning capacity had she continued to participate in vocational rehabilitation efforts. It determined that she had failed, without good cause, to undergo vocational rehabilitation as directed. OWCP selected the cashier/clerk job and reduced compensation based on appellant's ability to work the cashier/clerk position.

Appellant requested a review of the written record by an OWCP hearing representative. In a November 9, 2010 decision, OWCP's hearing representative affirmed OWCP's July 2, 2010 decision as modified to reflect that appellant failed to cooperate with the early stages of vocational rehabilitation efforts and that, due to this failure, her compensation should be reduced to zero. She indicated that appellant failed to cooperate with attempts to have her participate in a program to obtain her GED in order to increase her chances of obtaining a job. OWCP's procedure explicitly indicated that participating in a recommended GED program is part of the early stages of vocational rehabilitation efforts. OWCP's hearing representative remanded the case to OWCP for issuance of a new decision, reducing compensation to zero.

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.² 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, 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.³

² *Betty F. Wade*, 37 ECAB 556, 565 (1986).

³ 5 U.S.C. § 8113(b).

Section 10.519 of Title 20 of the Code of Federal Regulations details the actions that OWCP will take when 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. Sections 10.519(b) and (c) provide, in pertinent part:

“(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 the OWCP nurse, interviews, testing, counseling, functional capacity evaluations, and work evaluations), OWCP cannot determine what would have been the employee’s wage-earning capacity.

“(c) Under the circumstance 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 no loss of wage-earning capacity, and OWCP will reduce the employee’s monetary compensation accordingly (that is, to zero). The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.”⁴

In *Jacquelyn V. Pearsall*,⁵ the claimant met with her rehabilitation counselor, participated in a vocational evaluation and cooperated with her counseling to the point that her rehabilitation counselor was able to integrate the psychological and functional capacities information and identify appropriate employment opportunities. The rehabilitation counselor identified positions available within appellant’s physical limitations and aptitude which were also available within her commuting area. The Board found that, under the circumstances of that case, the claimant’s rehabilitation efforts had extended beyond the preliminary stages and therefore it was improper for OWCP to reduce her compensation to zero based on a finding that she failed to cooperate while engaged in the preliminary stages of her rehabilitation efforts.

OWCP’s procedure manual states in pertinent part:

“Specific instances of noncooperation include a failure to appear for the initial interview, counseling sessions, a functional capacity evaluation (FCE), other interviews conducted by the RC [rehabilitation counselor], vocational testing sessions, and work evaluations, as well as lack of response or inappropriate response to directions in a testing session after several attempts at instruction. They also include failure to begin or continue pre-vocational training such as English lessons for those who lack command of the language, or classes for a General Equivalency Diploma (GED) for those without a high school education.”⁶

⁴ 20 C.F.R. § 10.519(b), (c). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11a (December 1993).

⁵ 51 ECAB 209 (1999).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11a (November 1996).

ANALYSIS

Appellant sustained a work-related lumbar strain and lumbar disc syndrome on February 16, 2006 and she received compensation for periods of disability. On October 29, 2007 OWCP referred her for vocational rehabilitation services. Appellant's vocational rehabilitation counselor, Ms. Moreau, properly determined that the February 2007 opinion of Dr. Green, a Board-certified orthopedic surgeon serving as an impartial medical specialist, represented the weight of medical evidence with respect to appellant's ability to work and showed that she could perform limited-duty work within specified work restrictions.⁷

The Board finds that appellant failed to cooperate with vocational rehabilitation efforts. The record contains a number of documents in which Ms. Moreau memorialized appellant's failure to adequately cooperate with vocational rehabilitation efforts. On numerous occasions in 2008 and 2009, appellant failed to keep vocational rehabilitation appointments with Ms. Moreau and did not call Ms. Moreau to advise that she would not be appearing for the appointments. Ms. Moreau reported that appellant was extremely difficult to reach by telephone and often did not return her messages to call her back in order to make arrangements to further advance vocational rehabilitation efforts. Appellant was repeatedly advised of the consequences of not cooperating with her rehabilitation program and did not provide good cause for not cooperating with these efforts. On appeal, she asserted that a number of Ms. Moreau's statements regarding her noncooperation were incorrect, but she did not identify evidence in the record that would support this assertion.

The Board further finds that appellant failed to cooperate in the early stages of vocational rehabilitation efforts and, therefore, OWCP properly reduced her compensation to zero. In April 2008 Ms. Moreau determined that appellant would benefit from obtaining her GED as this would improve her chances of obtaining employment. She attempted to set up an appointment to give appellant the information on GED courses but appellant failed to cooperate. OWCP procedure specifically indicate that participating in a recommended GED program is part of the early stages of vocational rehabilitation efforts.⁸ Although appellant participated in some initial vocational testing, her noncooperative actions, including failure to participate in GED classes, prevented Ms. Moreau from identifying appropriate employment opportunities prior to closing her vocational rehabilitation file. Therefore, vocational rehabilitation efforts did not advance

⁷ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1975 (1989). In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

⁸ See *supra* note 6.

beyond the early stages.⁹ For these reasons, OWCP correctly reduced appellant's compensation to zero for failing to cooperate with the early stages of vocational rehabilitation efforts.

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 correctly reduced appellant's compensation to zero for failing to cooperate with the early stages of vocational rehabilitation efforts.

ORDER

IT IS HEREBY ORDERED THAT the November 9, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 13, 2011
Washington, DC

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

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

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

⁹ Compare *Jacquelyn V. Pearsall*, *supra* note 5. Although Ms. Moreau discussed appellant's ability to perform the cashier/checker and information clerk jobs, these positions were only identified after it was clear that appellant was not cooperating with vocational rehabilitation efforts. OWCP indicated in its July 9, 2010 decision that appellant had advanced beyond the early stages of rehabilitation efforts, but OWCP's hearing representative properly argued in her November 9, 2010 decision that appellant had not advanced beyond the early stages. Appellant had repeatedly been advised that her compensation could be reduced to zero if she did not cooperate in such early stages.