

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

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ALICE CANTU, Appellant )

and )

DEPARTMENT OF THE TREASURY, )  
INTERNAL REVENUE SERVICE, Fresno, CA, )  
Employer )

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**Docket No. 05-1756  
Issued: January 19, 2006**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On August 23, 2005 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated August 27, 2004 and June 27, 2005. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue on appeal is whether the Office properly reduced appellant's compensation under 5 U.S.C. § 8113(b), because of her failure to participate in vocational rehabilitation.

**FACTUAL HISTORY**

On June 13, 1997 appellant, then a 32-year-old tax examiner, filed an occupational disease claim alleging that she developed bilateral carpal tunnel syndrome and depression while in the performance of duty. The Office accepted appellant's claim for bilateral carpal tunnel syndrome and right lateral epicondylitis and later accepted depressive disorder. Appellant stopped work on May 5, 1997 and did not return.

Appellant came under the treatment of Dr. Ahsan K. Bajwa, a Board-certified neurologist, who treated her from February 14, 1997 to March 18, 1998 for bilateral carpal tunnel syndrome. He noted that appellant worked as a data transcriber from 1985 to 1995 and as a tax examiner from 1995 to the present, and was required to perform repetitive duties including working on a computer and writing. Dr. Bajwa noted that appellant presented with symptoms of pain and paresthesias in both hands. An electromyography (EMG) performed on January 9, 1996 confirmed moderately severe right carpal tunnel syndrome. Dr. Bajwa diagnosed bilateral carpal tunnel syndrome and bilateral epicondylitis and opined that her condition was related to her repetitive duties at work and recommended that she use wrist splints.<sup>1</sup>

In a memorandum dated December 17, 1997, the employing establishment advised that it did not have work available which would accommodate appellant's work restrictions. On April 14, 1998 the Office referred appellant for vocational rehabilitation. In June 1998 appellant's rehabilitative services were postponed due to surgery.

In August 1998, appellant came under the treatment of Dr. Randi A. Galli, a Board-certified orthopedic surgeon, who noted a history of injury and diagnosed bilateral median neuropathy secondary to compression at the carpal tunnel. On June 9, 1998 he performed a left median nerve decompression with wrist flexor tenosynovectomy and steroid injection of the left index distal metacarpal. Dr. Galli indicated in reports dated July 8 and August 17, 1998 that appellant was progressing well postoperatively. On August 4, 1998 Dr. Galli performed a right median nerve decompression at the carpal tunnel with accompanying wrist flexor and a steroid injection of the right index metacarpal phalangeal joint pain. He noted that appellant began to experience electrical shocks on the right side which did not subside after repeated injections and recommended a repeat right carpal tunnel release. On January 26, 1999 Dr. Galli performed an external neurolysis of the right median nerve at the carpal tunnel with release of the carpal tunnel. He diagnosed status post right carpal tunnel release on August 4, 1998 with accompanying wrist flexor tenosynovectomy, right first dorsal compartment extensor tenosynovitis and status post left median nerve decompression with wrist flexor. Dr. Galli noted in reports dated February 8 to June 12, 1999 that appellant was progressing well postoperatively and could return to work six hours per day subject to restrictions.

In a letter dated June 10, 1999, the employing establishment requested that Dr. Galli review a position description for a limited-duty tax collector and determine appellant's suitability for return to work. On June 23, 1999 Dr. Galli noted that appellant could perform the limited-duty tax collector position. On August 14, 1999 he advised that appellant was permanent and stationary. In a memorandum dated November 15, 1999, the Office advised that the employing establishment would not make a job offer as appellant was removed from employment for improperly accessing tax records on her last day at work.

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<sup>1</sup> On September 29, 1997 the Office referred appellant to a second opinion physician for evaluation as to the relationship of appellant's diagnosed condition to her employment. In a report dated October 23, 1997, Dr. Gerald W. Cady, a Board-certified orthopedist, diagnosed bilateral carpal tunnel syndrome, de Quervain's tenosynovitis of the right thumb, and medial epicondylitis of the right elbow. He advised that appellant continued to have residuals of her work-related injury and recommended carpal tunnel release surgery. Dr. Cady further opined that appellant was a good candidate for vocational rehabilitation and could work in a position that does not require repetitive use of the hands.

A rehabilitation counselor developed a rehabilitation plan on November 17, 1999. The counselor proposed training appellant for a pharmacy technician or a sales clerk position and advised that she could begin classes at Quality College on November 30, 1999. The counselor also indicated that Dr. Galli supported appellant participating in vocational rehabilitation prior to entering the job market. In a letter dated November 17, 1999, the Office approved the vocational rehabilitation training plan for appellant.

In a report dated January 7, 2000, the rehabilitation counselor reported that appellant had a high absentee rate from class and the school placed her on attendance probation. In reports dated January 3 and 10, 2000, Dr. Galli advised that appellant experienced a recurrence of numbness in her right hand due to note taking at school. On January 10, 2000 she had an adverse reaction to a medication and missed one week of school. In a report dated March 20, 2000, Dr. Galli noted that he could offer appellant no further assistance. He advised that appellant could continue with vocation rehabilitation.

By letter dated February 2, 2000, the Office notified appellant that it proposed to reduce her compensation based on her capacity to earn wages as a pharmacy technician. The Office noted appellant's noncooperation in vocational rehabilitation and provided her 30 days to "undergo the approved training program" or show good cause for not undergoing training.

Appellant came under the treatment of Dr. Robert Salazar, a Board-certified anesthesiologist, who, in reports dated March 8 to 29, 2000, diagnosed bilateral carpal tunnel syndrome. He advised that appellant could not resume vocational rehabilitation until a functional capacity evaluation was performed. A functional capacity evaluation of April 26, 2000 concluded that appellant could perform sedentary light work, with restrictions on lifting up to 15 pounds occasionally and 10 pounds frequently. The evaluation determined that appellant did not meet the requirements for a pharmacy technician or a sales clerk. In a report dated June 13 and 14, 2000, Dr. Salazar advised that vocational rehabilitation could not continue as the functional capacity evaluation concluded that appellant could not tolerate work as a pharmacy technician or a sales clerk. He recommended a repeat evaluation with the rehabilitation counselor in view of the functional capacity evaluation and recommended another course of action for vocational rehabilitation. Dr. Salazar submitted reports from July 31, 2000 to March 15, 2001 which noted appellant's continued treatment for bilateral carpal tunnel syndrome.

In a report dated March 28, 2001, the rehabilitation counselor noted that Dr. Salazar provided appellant with extensive restrictions and indicated that there was no vocational training program suitable for appellant. Appellant expressed interest in a position as a case aide or a substance abuse counselor and the counselor advised that there were certificate programs available through the Fresno City College. The counselor prepared job descriptions for a case aide and a substance abuse counselor and submitted them to Dr. Salazar for his approval. In a report dated March 15, 2001, Dr. Salazar advised that appellant could work as a substance abuse counselor and a case aide. The rehabilitation counselor developed a rehabilitation plan on April 23, 2001. The counselor proposed training for a substance abuse counselor or a case aide and advised that appellant could begin classes at Fresno City College on May 29, 2001. The counselor also indicated that Dr. Salazar supported appellant participating in vocational

rehabilitation prior to entering the job market. In a letter dated May 16, 2001, the Office approved the vocational rehabilitation training plan for appellant as a substance abuse counselor. In a report dated December 14, 2001, the rehabilitation counselor advised that appellant stopped attending classes on December 3, 2001. Appellant reported that she had an adverse reaction to a medication prescribed by Dr. Salazar causing her to become drowsy and unable to attend classes.

By letter dated December 14, 2001, the Office notified appellant that it proposed to reduce her compensation based on her capacity to earn wages as a substance abuse counselor. The Office noted that appellant's noncooperation in vocational rehabilitation and provided appellant 30 days within which she must undergo the approved training program or show good cause.

Appellant submitted a report from Dr. Salazar dated December 17, 2001. He noted that appellant experienced a severe flare-up on November 27, 2001 and increased her medication which caused her to become drowsy. He advised that appellant discontinued school attendance on December 3, 2001 under his advice and that she could return to school in January 2002.

In vocational rehabilitation reports dated April 4 to December 23, 2002, the rehabilitation counselor advised that she completed her spring, summer and fall 2002 classes successfully. In a report dated February 6, 2003, the rehabilitation counselor advised that appellant started the spring 2003 semester but did not have an internship site. Appellant was provided with several leads but failed to follow-up, indicating that she experienced severe pain.

By letter dated February 19, 2003, the Office notified appellant that it proposed to reduce her compensation based on her capacity to earn wages as a substance abuse counselor. The Office noted that appellant's noncooperation in vocational rehabilitation and provided her 30 days to undergo the approved training program or show good cause.

Appellant submitted a note from Dr. Salazar dated June 2, 2003 advising that she experienced a flare-up of pain on March 6, 2003 and would be removed from school and vocational rehabilitation beginning that date.

In a vocational rehabilitation report dated September 10, 2003, the rehabilitation counselor noted that appellant resumed classes in the fall. On October 7, 2003 the counselor noted that appellant finished her mid-terms and had registered for the spring 2004 semester of classes. On December 11, 2003 appellant reported that she had stopped attending classes in November because her medication had been denied and she was experiencing withdrawal symptoms. She further indicated that she was experiencing a flare-up and her physician advised her to stop vocational rehabilitation. In a report dated January 28, 2004, the counselor advised that appellant resumed school; however, was required to withdraw from the fall 2003 semester.

In a report dated December 15, 2003, Dr. Salazar noted that appellant was unable to continue with vocational rehabilitation due to a flare-up of symptoms. On January 12, 2004 he reinstated vocational rehabilitation and recommended that she continue without interruption. On February 9 and March 17, 2004 appellant experienced flare-ups of pain in the bilateral base of the thumb, persistent pain over the radial heads and medial and lateral epicondyles.

Dr. Salazar diagnosed carpal tunnel syndrome, medial epicondylitis, bilateral de Quervain's syndrome and intersection syndrome and recommended continued vocational rehabilitation. On April 28, 2004 he noted that appellant missed two weeks of vocational rehabilitation because of moderate pain at the base of both thumbs and over the radial aspect of the left wrist. He noted normal range of motion with positive Finkelstein's tests bilaterally. Dr. Salazar diagnosed carpal tunnel syndrome, medial epicondylitis, bilateral de Quervain's and intersection syndrome. He opined that the Office had not authorized the required sequential staged injections and, as a result, appellant had not attended vocational rehabilitation. Dr. Salazar advised that appellant presented with clinical evidence of first dorsal compartment syndrome. He reinstated vocational rehabilitation and recommended that appellant continue vocational rehabilitation "as tolerated."

In a vocational rehabilitation report dated May 18, 2004, the counselor advised that appellant stopped school two weeks prior and did not plan to attend her final examinations. Appellant reported that the Office had not authorized steroid injections. She indicated that her medication caused her to be drowsy and unable to attend classes. The rehabilitation counselor advised appellant to take her examinations so that she did not fail the semester.

By letter dated May 19, 2004, the Office notified appellant that it proposed to reduce her compensation based on her capacity to earn wages as a substance abuse counselor. The Office noted appellant's noncooperation in vocational rehabilitation and provided 30 days to undergo the approved training or show good cause.

Appellant submitted a report from Dr. Salazar dated June 2, 2004. He advised that appellant continued to have vocational rehabilitation interrupted as of April 12, 2004 due to a flare-up of pain. Dr. Salazar noted moderate aching pain in the bilateral upper extremities and bilateral bases of the thumb which was frequent, range of motion was normal and there was a positive Finkelstein's test bilaterally. Dr. Salazar diagnosed carpal tunnel syndrome, medial epicondylitis, bilateral de Quervain's and intersection syndrome. He requested authorization from the Office for staged injections which had not been approved and added that her vocational rehabilitation would be interrupted. On July 20, 2004 he noted that the Office authorized the staged injections and he reinstated vocational rehabilitation.

In reports dated June 7 and July 21, 2004, the rehabilitation counselor noted that appellant failed to take her final examinations at school and failed to take the necessary steps to stay in good standing. Appellant reported that Dr. Salazar interrupted the vocational rehabilitation pending authorization for staged injections.

In a memorandum dated August 26, 2004, the rehabilitation specialist noted that appellant failed to complete her training for a drug abuse counselor and case aide and had not obtained employment.

By decision dated August 27, 2004, the Office reduced appellant's compensation pursuant to section 8113(b) of the Federal Employees' Compensation Act based on her capacity to earn wages as a substance abuse counselor. The Office noted that appellant impeded the rehabilitation effort without good cause. The Office reduced her wage-loss benefits because the

evidence established that the constructed position of substance abuse counselor represented her wage-earning capacity.

In a letter dated January 28, 2005, appellant requested that she be permitted to resume vocational rehabilitation. On February 4, 2005 the Office referred appellant for vocational rehabilitation.

In a letter dated April 4, 2005, appellant requested reconsideration. She advised that during the week of May 3, 2005 she informed the rehabilitation counselor that she was experiencing a flare-up and was unable to drive or attend classes. Appellant indicated that Dr. Salazar interrupted vocational rehabilitation until the Office authorized staged injections to relieve her pain. She contended that she had provided good cause for failing to undergo vocational rehabilitation and provided a report from Dr. Salazar dated June 2, 2004 which fully explained the reasons for the interruption. Appellant submitted reports from Dr. Salazar dated August 19 to November 17, 2004 which noted that she received two dorsal compartment injections with dramatic results. In a report of January 12, 2005, Dr. Salazar further explained the interruption of vocational rehabilitation noting that appellant presented for a follow-up visit on June 2, 2004 with a flare-up of her condition with limited thumb range of motion and severe Finkelstein's test bilaterally. He advised that it was necessary to interrupt vocational rehabilitation until treatment could occur. Other reports from Dr. Salazar dated April 5 to July 18, 2005 noted that rehabilitation was reinstated as of January 17, 2005 and advised that she continued to receive staged injections for continuing symptomology.

A rehabilitation counselor developed a rehabilitation plan on May 18, 2005. In the rehabilitation plan, the counselor proposed training for a drug and alcohol counselor. Appellant resumed vocational rehabilitation and enrolled in Fresno City College.

By decision dated June 27, 2005, the Office affirmed the decision dated August 27, 2004.

### **LEGAL PRECEDENT**

Section 8113(b) of the Act states:

“If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of this title, the Secretary, on review under section 8128 of this title 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 wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary.”<sup>2</sup>

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<sup>2</sup> 5 U.S.C. § 8113(b).

Section 10.519 of Title 20 of the Code of Federal Regulations, the implementing regulations of 5 U.S.C. § 8113(b), further provides in pertinent part:

“Under 5 U.S.C. § 8104(a), [the Office] may direct a permanently disabled employee to undergo vocational rehabilitation. To ensure that vocational rehabilitation services are available to all who might be entitled to benefit from them, an injured employee who has a loss of wage-earning capacity shall be presumed to be “permanently disabled” for purposes of this section only, unless and until the employee proves that the disability is not permanent. If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue participation in a vocational rehabilitation effort when so directed. [The Office] will reduce the employees’ 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>3</sup>

### ANALYSIS

Appellant was referred for rehabilitative services in April 1998 but no progress was made until April 2001. In the rehabilitation plan, a counselor proposed training for a substance abuse counselor or a case aide and advised that appellant could begin classes at Fresno City College on May 29, 2001. The counselor also noted that Dr. Salazar supported appellant participating in vocational rehabilitation prior to entering the job market. In a letter dated May 16, 2001, the Office approved the vocational rehabilitation training plan for appellant for a substance abuse counselor. She subsequently finished her summer and fall classes.

The record reflects that, on April 28, 2004, Dr. Salazar noted that appellant missed two weeks of vocational rehabilitation because of moderate pain at the base of both thumbs and over the radial aspect of the left wrist. He diagnosed carpal tunnel syndrome, medial epicondylitis, bilateral de Quervain and intersection syndromes. Dr. Salazar advised that appellant had not received the required sequential staged injections and as a result she did not attend class over in the prior several weeks. Dr. Salazar reinstated vocational rehabilitation and recommended that appellant continue vocational rehabilitation “as tolerated.” Thereafter, the Office proposed to reduce appellant’s compensation noting her noncooperation with vocational rehabilitation; however, appellant’s noncooperation was due to the recommendations of her physician that she continue vocational rehabilitation “as tolerated.” The record supports that appellant was unable to tolerate vocational rehabilitation due to her flare-up of pain. In a report dated June 2, 2004, Dr. Salazar advised that appellant continued to have vocational rehabilitation interrupted as of April 12, 2004 and that her pain symptoms needed to be addressed prior to reinstating vocational rehabilitation. He advised that appellant’s vocational rehabilitation would continue to be interrupted until she received authorization for staged injections to address the pain at the bilateral base of the thumbs. In a report dated July 20, 2004, he noted that the Office had authorized the staged injections and reinstated vocational rehabilitation. In a report of

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<sup>3</sup> 20 C.F.R. § 519. See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment Vocational Rehabilitation Services*, Chapter 2.813.11 (November 1996).

January 12, 2005, Dr. Salazar noted that appellant presented on June 2, 2004 with a flare-up of her bilateral carpal tunnel syndrome and advised that she was unable to forcefully grasp or pinch with her hands and found it necessary to interrupt vocational rehabilitation until treatment could occur. The Board finds that appellant's failure to cooperate with vocational rehabilitation was based on Dr. Salazar's recommendation and medical treatment. The record indicates that appellant was enrolled in a training program; however, her participation in the training was based on the recommendation of Dr. Salazar who determined that appellant was intermittently disabled due to her accepted bilateral carpal tunnel syndrome. Appellant demonstrated good faith by notifying the rehabilitation counselor prior to her failure to take final examinations that she could not proceed with rehabilitation due to her current flare-up of pain. This evidence supports that appellant's failure to continue the training program was with "good cause."<sup>4</sup>

The Board further notes that under section 10.519 of Title 20 of the Code of Federal Regulations the Office is permitted to reduce compensation only until such time as the employee acts in good faith to comply with the direction of the Office. In this instance, the Office improperly reduced appellant's compensation for noncooperation in August 2004, after Dr. Salazar returned appellant to vocational rehabilitation in July 2004, when appellant was no longer uncooperative and was acting in good faith to comply. Therefore, the Office failed to comply with section 10.519 of Title 20 of the Code of Federal Regulations.

Accordingly, the Board finds that the Office did not properly reduce appellant's compensation under 5 U.S.C. § 8113(b) to reflect a loss of wage-earning capacity for failure to cooperate with vocational rehabilitation.

### **CONCLUSION**

The Board finds that the Office improperly reduced appellant's compensation to reflect a loss of wage-earning capacity for her failure to cooperate in vocational rehabilitation efforts.

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<sup>4</sup> See *Patrick A. Santucci*, 40 ECAB 151 (1988).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 27, 2005 and August 27, 2004 decisions of the Office of Workers' Compensation Programs decision are reversed.

Issued: January 19, 2006  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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