

FACTUAL HISTORY

On May 9, 2008 appellant, then a 54-year-old clerk, filed a traumatic injury claim alleging that she fell in the parking lot that day, injuring her right shoulder in the performance of duty. OWCP accepted her claim for right labral tear and right rotator cuff tear on November 7, 2008. Appellant filed a notice of recurrence of disability on December 4, 2008 alleging on that date she stopped work. OWCP accepted this claim on December 31, 2008. On January 29, 2009 it accepted appellant's claim for the additional condition of loosening of the right knee joint.

On August 12, 2009 OWCP referred appellant for vocational rehabilitation counseling. In a letter dated August 17, 2009, the vocational rehabilitation counselor stated that appellant had returned her telephone call and agreed to meet with her on August 24, 2009. OWCP informed her on September 30, 2009 that if she elected to receive a \$15,000.00 one-time retirement incentive payment from the employing establishment, that this amount would have to be offset against her compensation for total disability. It entered appellant on the periodic rolls on September 30, 2009 and informed her that benefits from OPM were not payable for the same time as compensation benefits from OWCP. OWCP stated that she was required to elect the benefits to be received and that if she elected OPM benefits she would still be entitled to medical benefits under FECA. It provided appellant with an election form.

In a report dated September 14, 2009, the vocational rehabilitation counselor stated that appellant was cooperated with the initial meeting on August 24, 2009, but stated that she expected to receive retirement benefits beginning on September 29, 2009. The vocational rehabilitation counselor contacted her on August 31, 2009 and she stated that her retirement would be effective October 31, 2009. Appellant agreed to testing scheduled on September 18, 2009.

Appellant completed an election form and selected retirement benefits effective November 1, 2009. In a letter dated October 15, 2009, OWCP transferred her health benefit enrollment to OPM effective November 1, 2009.

In a report dated October 15, 2009, the vocational rehabilitation counselor stated that appellant cooperated with testing and telephone conversations. OWCP completed a letter dated October 16, 2009 stating that appellant had decided not to continue participating in vocational rehabilitation. It informed appellant of the penalties for failing to cooperate with vocation rehabilitation and allowed her 30 days to cooperate or offer a good reason for not participating. OWCP stated that if she did not provide good cause within 30 days, her rehabilitation effort would be terminated and her compensation reduced under sections 8113(b) of FECA and 10.519 of OWCP's regulations. It added, "Please note that you do not have to respond to this notice if you do not wish to receive monetary FECA benefits in preference to CSRS or FERS benefits."

In a report dated November 5, 2009, the vocational rehabilitation counselor closed appellant's file effective October 15, 2009.

By decision dated December 1, 2009, OWCP noted that appellant had not responded to the October 16, 2009 letter and reduced her compensation benefits to zero effective December 1,

2009 based on her refusal to cooperate with the early stages of vocational rehabilitation. Counsel requested an oral hearing on December 7, 2009. On March 30, 2010 he converted the request for an oral hearing to a review of the written record. Counsel argued that appellant cooperated with vocational rehabilitation efforts through October 15, 2009 and elected to receive OPM benefits effective November 1, 2009. He referenced OWCP's procedure manual, noting that appellant was not entitled to vocational rehabilitation services while collecting benefits from OPM. Counsel argued that the December 1, 2009 decision should be vacated. Appellant submitted a statement dated March 5, 2010 asserting that she cooperated with the vocational rehabilitation efforts until services were terminated pending her retirement.

By decision dated June 1, 2010, OWCP's hearing representative affirmed the December 1, 2009 OWCP's decision stating that appellant's election of OPM benefits during vocational rehabilitation placement interrupted the services provided her and disqualified her from further services such that OWCP was required to issue the sanction decision reducing her compensation benefits to zero.

LEGAL PRECEDENT

Section 8113(b) of FECA provides:

“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.²”

Section 10.519(b) and (c) of OWCP's regulations provided that if a suitable position is not identified because of the failure or refusal to cooperate in the early but necessary stages of a vocational rehabilitation effort *i.e.*, meeting with nurse, interviews, testing, counseling, functional capacity evaluations or work evaluations, then OWCP will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity and will reduce compensation 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.³

ANALYSIS

OWCP referred appellant for vocational rehabilitation services on August 12, 2009. Appellant met with the vocational rehabilitation counselor on August 24, 2009 and informed the counselor that she expected to retire on September 29, 2009. On August 31, 2009 she informed the vocational rehabilitation counselor of her retirement effective October 31, 2009, but agreed

² 5 U.S.C. § 8104.

³ 20 C.F.R. § 10.519(b) and (c).

to undergo testing scheduled on September 18, 2009. OWCP received an election form on October 9, 2009 in which appellant selected retirement benefits effective November 1, 2009. By letter dated October 16, 2009, it informed appellant of the penalties for failing to cooperate with vocation rehabilitation and allowed her 30 days to cooperate or offer a good reason for not participating. OWCP stated that if she did not provide good cause within 30 days, her rehabilitation effort would be terminated and her compensation reduced until such time as she again cooperated with vocational rehabilitation. It directed appellant not to respond if she had elected OPM benefits. Appellant did not respond and by decision dated December 1, 2009, OWCP reduced her compensation benefits to zero effective December 1, 2009 based on her refusal to cooperate with the early stages of vocational rehabilitation.

The Board finds that OWCP improperly reduced appellants' compensation benefits to zero effective December 1, 2009 based on her refusal to cooperate with vocational rehabilitation services. Appellant provided OWCP with a clear election of OPM benefits on October 9, 2009 effective October 31, 2009. She continued to cooperate with the vocational rehabilitation counselor until OWCP closed her file effective October 15, 2009 noting that she had elected OPM benefits. While appellant is not entitled to receive dual benefits, as FECA provides that while an employee is receiving compensation she may not receive salary, pay or remuneration of any type from the United States except in return for services actually performed or for certain payments related to service in the Armed Forces, including benefits administered by the Department of Veterans Affairs unless such benefits are payable for the same injury or the same death being compensated for under FECA.⁴ The implementing regulations provide that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁵ Appellant properly elected the benefit that she wished to receive.⁶ As she has elected to receive OPM benefits effective October 31, 2009, she is not entitled to receive compensation benefits from OWCP on or after that date, including vocational rehabilitation services.

The Board finds that appellant continued to cooperate until OWCP ended her vocational rehabilitation services and that OWCP had no basis for its finding reducing her compensation to zero effective December 1, 2009.

CONCLUSION

The Board finds that, as there is no factual evidence that appellant refused to cooperate with vocational rehabilitation services, OWCP failed to meet its burden of proof to reduce her compensation benefits to zero effective December 1, 2009 until such time as she resumed cooperation.

⁴ 5 U.S.C. § 8116(a).

⁵ 20 C.F.R. § 10.421(a).

⁶ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the June 1, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 11, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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