

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

L.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Pompano Beach, FL, Employer**

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**Docket No. 10-2203
Issued: June 6, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 30, 2010 appellant filed a timely appeal from a March 1, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 determined that appellant failed to undergo vocational rehabilitation without good cause under 5 U.S.C. § 8113(b).

FACTUAL HISTORY

On November 28, 1997 appellant, then a 37-year-old clerk, filed a traumatic injury claim alleging that she sustained a right shoulder injury while loading equipment on November 26, 1997. OWCP accepted her claim for right shoulder contusion and right incisional

¹ 5 U.S.C. § 8101 *et seq.*

hernia with repair. The record indicates that appellant had a prior claim accepted for anxiety attack and a 1990 claim accepted for anaphylactic reaction to bee stings. Appellant underwent shoulder surgery on January 2, 2002 and received compensation for temporary total disability. Another shoulder surgery was performed on March 15, 2007.

In a letter dated September 11, 2008, OWCP advised Rena Marvin, a private rehabilitation counselor, that appellant had been referred for rehabilitation services. In a letter dated October 7, 2008, Ms. Marvin indicated that she met with appellant and the employing establishment would be contacted as to obtaining a job for appellant.

By letter dated March 19, 2009, an OWCP rehabilitation specialist stated that the employing establishment had not taken action to develop a job for appellant. He stated that the counselor should prepare an individualized placement plan, job search efforts should begin no later than April 12, 2009 and appellant would receive up to 90 days of job placement services before a wage-earning capacity determination would be considered.

A memorandum of telephone call (Form CA-110) dated March 27, 2009, indicated that appellant wanted to retire and was not interested in pursuing vocational rehabilitation. An OWCP rehabilitation specialist stated that a placement plan would still be required in order to finalize all aspects of the case. On April 3, 2009 OWCP received job descriptions for customer service representative, receptionist, appointment and information clerks. In a letter to appellant dated April 7, 2009, Ms. Marvin noted that, while appellant indicated her wish to retire, the 90 days of job placement was still required.

On April 10, 2009 OWCP received appellant's written election of retirement benefits in preference to FECA benefits. The form was dated April 7, 2009 and the effective date of the election was June 1, 2009.

The record contains a memorandum of an April 28, 2009 telephone conference with appellant, two claims examiners and Ms. Marvin. The claims examiners advised appellant "that as long as she is in receipt of wage-loss benefits from this office that she is expected to participate in vocational rehabilitation efforts" and "electing OPM [Office of Personnel Management] during the rehabilitation process may be considered an obstruction." Appellant asserted that she was cooperating with vocational rehabilitation and did not understand why she had to continue after she had notified OWCP of her election of OPM benefits. She stated that she did not believe she was in a job search stage and reiterated her election of retirement benefits.

In a letter dated May 4, 2009, OWCP stated that the rehabilitation counselor had advised that appellant should have begun to look for employment and that she would receive 90 days of assistance to help her meet this goal. It advised appellant there were penalties for not cooperating with vocational rehabilitation, and stated, "Your desire to elect OPM benefits, after rehabilitation efforts have been initiated, is not considered a valid reason for not continuing to cooperate with vocational rehabilitation efforts."

By letter dated May 8, 2009, OWCP stated that appellant's election of OPM benefits was considered a refusal to fully participate in and complete the rehabilitation process. It cited its

procedure manual at Chapter 2.813.11(a)(5) and 5 U.S.C. § 8113(b). OWCP advised appellant that, if she proceeded with her election of OPM benefits and did not participate in vocational rehabilitation, her compensation would be reduced to reflect her wage-earning capacity in a job found by the counselor to be within her work restrictions.

By decision dated July 2, 2009, OWCP found that appellant, without good cause, failed to participate in vocational rehabilitation. It found that, if she had continued in vocational rehabilitation, she would have been able to perform the position of information clerk at wages of \$371.60 per week. OWCP reduced appellant's compensation based on her ability to earn these wages.²

Appellant requested a hearing before an OWCP hearing representative, which was held on December 14, 2009. By decision dated March 1, 2010, an Office hearing representative affirmed the July 2, 2009 decision. The hearing representative also referred to OWCP procedure manual 2.813.11(c)(3).

LEGAL PRECEDENT

Section 8113(b) of FECA provides:

“If an individual without good cause fails to apply for or 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.”

With respect to refusing or impeding a vocational rehabilitation placement effort, OWCP's procedures note:

“If the claimant elects OPM benefits in lieu of cooperating with rehabilitation, the CE [claims examiner], RS [rehabilitation specialist] and RC [rehabilitation counselor] should not delay or discourage this choice. Because the claimant may later elect FECA benefits retroactively, however, it is necessary to establish any wage-earning capacity in accordance with 5 U.S.C. § 8115 so that any future retroactive compensation will not be paid in error at the rate for total disability.

“It is improper to use the services of an RC when the claimant is receiving OPM benefits. Therefore, to confirm or identify two jobs which the claimant can perform and which are sufficiently available in the commuting area, the CE should refer the case to the RS. The jobs should be identified by number from the *Dictionary of Occupational Titles* (DOT), and the file should document the source of the information concerning availability. The CE should select one of these jobs

² OWCP noted that, since appellant had elected OPM benefits, she was not entitled to wage-loss compensation.

on the basis of the claimant's previous education and vocational experience as reflected in the file and issue a 30-day prereduction notice based on the claimants constructed LWEC."³

ANALYSIS

Appellant began vocational rehabilitation at the direction of OWCP. After waiting for the employing establishment to make a job offer, an OWCP rehabilitation specialist directed the rehabilitation counselor to develop a job placement plan and noted job search efforts would begin no later than April 12, 2009 and continue for 90 days. Appellant submitted a written election of OPM retirement benefits dated April 7, 2009 and effective June 1, 2009.

OWCP has found that appellant failed to participate in vocational rehabilitation without good cause and was subject to reduction of wage-loss compensation under 5 U.S.C. § 8113(b). While appellant believed she was cooperating, it is clear that she did not wish to continue in the job search placement plan since she elected to retire and receive OPM benefits. The issue, therefore, was whether she failed to continue participation in vocational rehabilitation without good cause.

A May 4, 2009 OWCP letter to appellant stated that her election of OPM benefits was not considered a valid reason for her lack of participation in vocational rehabilitation, without further explanation. To the extent that OWCP equated her election of OPM benefits as a failure to participate in vocational rehabilitation without good cause, no authority was provided for such a determination. The Federal (FECA) Procedure Manual notes that an election of OPM benefits should not be delayed or discouraged, and that once OPM benefits have begun a claimant is not entitled to vocational rehabilitation. In this case, appellant made an election of OPM benefits, as of April 7, 2009. OWCP did not explain why she was required to continue in a job search plan for an additional 90 days when she would no longer be eligible for vocational rehabilitation as of June 1, 2009.

OWCP's claims examiner and hearing representative referred procedures when a claimant elects retirement benefits.⁴ The hearing representative cited 2.813.11(c)(3), which discusses when a claimant elects OPM benefits instead of pursuing a job placement plan. This appeared to be the relevant section, as a job placement plan had been initiated. As noted, this section provides only that OWCP may further develop the issue of wage-earning capacity and, if appropriate, issue such a decision, as a claimant may later elect FECA benefits. OWCP may refer the case to the rehabilitation specialist and issue a constructed wage-earning capacity decision. The section cited does not stand for the proposition that the election of OPM benefits constitutes a failure to undergo in vocational rehabilitation as required under 5 U.S.C. § 8113(b).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Vocational Rehabilitation Services*, Chapter 2.813.11(c)(3) (November 1996). The Board notes that this chapter was revised in February 2011 subsequent to the decision on appeal.

⁴ The May 8, 2009 letter referred to 2.813(a)(5). This section is under the heading "refusing or impeding early vocational rehabilitation efforts." OWCP did not explain why this section would be applicable, since appellant had appeared for initial interviews and telephone conferences.

The Board finds that OWCP did not establish that appellant failed “without good cause” to continue participation in vocational rehabilitation. Accordingly, appellant’s compensation should not have been reduced pursuant to 5 U.S.C. § 8113(b).

CONCLUSION

The Board finds that OWCP did not properly determine that appellant failed to undergo vocational rehabilitation without good cause under 5 U.S.C. § 8113(b).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated March 1, 2010 is reversed.

Issued: June 6, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees’ Compensation Appeals Board

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