



employment. OWCP accepted her claim for left shoulder rotator cuff tear and left shoulder weakness. Appellant received compensation for temporary total disability on the periodic rolls.

OWCP directed appellant to undergo vocational rehabilitation. OWCP's rehabilitation counselor developed a training plan for the position of medical secretary, and OWCP notified appellant of her responsibilities to cooperate.

When the rehabilitation counselor advised that appellant had abandoned her approved training program, OWCP issued a notice on April 12, 2007 advising her of the penalty under 5 U.S.C. § 8113(b) for failing without good cause to undergo vocational rehabilitation when so directed: "If, within 30 days from the date of this letter, you do not comply with the instruction to undergo the approved training program, or you do not show good cause for not undergoing the training program, the rehabilitation effort will be terminated and action will be initiated to reduce your compensation to reflect your probable wage-earning capacity had you completed the training program."

The rehabilitation counselor conducted a labor market survey for the position of medical secretary. The entry-level wage in appellant's area, as reported by the State of California, was \$8.59 per hour. The most consistently reported wage from employer contacts, however, was \$10.00 per hour or \$400.00 per week. The rehabilitation counselor selected the latter.

The rehabilitation specialist advised that the targeted job remained vocationally and medically appropriate as a rehabilitation goal, but that appellant willingly abandoned her approved training. "The claimant's own intransigence effectively precluded any potential for success in the rehabilitation placement process."

On July 25, 2007 OWCP proposed to reduce appellant's compensation under section 8113(b). It noted that she had moved to Reno to be with her daughter, who was experiencing a difficult pregnancy. After OWCP provided appellant the computer and training material she had left behind in Crescent City, she engaged in online school courses but did not complete outstanding assignments. Appellant advised that she was unable to proceed due to her daughter's pregnancy. When she came back home to Crescent City, she left part of the school material behind due to limited space on the plane and advised it would be another month or more before her husband could drive her back to Reno to pick up the material. "Based on the circumstances described it is found that the claim has not fulfilled her statutory obligation for an active and good faith participation in Vocational Rehabilitation and return to gainful employment and that had training been completed employment would have been likely with a substantial increase in wage[-]earning capacity."

In a September 4, 2007 decision, OWCP reduced appellant's compensation based on the \$400.00 per week that it found would likely have been her wage-earning capacity had she undergone vocational rehabilitation. It notified appellant that she had one calendar year from the date of that decision to request reconsideration.

On June 22, 2010 appellant, through her attorney, requested modification of the September 4, 2007 decision on the grounds that the original rating was in error. OWCP explained that the September 4, 2007 decision was not a wage-earning capacity determination

under section 8115 of FECA. As was explained in the prereduction notice, it was a sanction under section 8113(b) for noncompliance with the vocational rehabilitation process after a training plan was approved. As such, if appellant complied with OWCP's direction to undergo vocational rehabilitation, her compensation would be reinstated prospectively at the previous rate. OWCP suggested several options: (1) appellant could notify OWCP that she was willing to participate; (2) she could request reconsideration; or (3) she could claim total disability if her medical condition had changed such that she could no longer participate in rehabilitation.

On March 3, 2011 appellant requested reconsideration of OWCP's September 4, 2007 decision. She referred to the opinion of an independent vocational rehabilitation consultant, who found that she was precluded from successfully performing the tasks of a medical secretary. Appellant took issue with the notice of proposed reduction and final decision for not making clearer that the decision was not a constructed wage-earning capacity decision, citing *David W. Green*, 43 ECAB 883 (1992). She also contended that she could not be expected to understand the reasons for the decision or her appeal rights or what she might do to change the outcome. Appellant argued that serious family health issues forced her to deviate from the planned training. She also contended that the identified position was inappropriate. Appellant noted that the entry-level wage was \$8.59 per hour, but OWCP used \$10.00 per hour or \$400.00 per week.

In a decision dated June 1, 2011, OWCP denied appellant's request for reconsideration. It found that her request was untimely and did not present clear evidence of error in the September 4, 2007 decision. OWCP noted that while the cover letter of the sanction decision did not cite section 8113(b), the April 12 and July 25, 2007 letters very clearly explained that appellant's compensation was being reduced because she failed to comply with her training program.

Appellant's attorney argued on appeal that the Board has jurisdiction to review the merits of the case. The primary issue, he argues, is whether OWCP properly terminated appellant's wage-loss benefits. Appellant's attorney argued that the selected position was not vocationally or educationally suitable and that the wage-earning capacity determination must be modified. He stated that it is not clear that appellant did not cooperate with vocational rehabilitation efforts or that the training was suited to her educational ability and accomplishments. Appellant's attorney argued that he was forced into the "clear evidence of error" path, and that the Director's suggestion to submit new evidence was tantamount to a tacit agreement to review the 2007 decision. He asked the Board to find that the June 1, 2011 reconsideration decision failed to adequately review the case on the Director's own motion, and to return the case for payment of appropriate compensation, including retroactive compensation from the date of the wage-earning capacity decision forward.

## LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretion to review an award for or against the payment of compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”<sup>2</sup>

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of OWCP’s decision for which review is sought. OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.<sup>3</sup>

The term “clear evidence of error” is intended to represent a difficult standard.<sup>4</sup> If clear evidence of error has not been presented, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.<sup>5</sup>

## ANALYSIS

On September 4, 2007 OWCP reduced appellant’s compensation. As the attached appeal rights made clear, appellant had one calendar year, or until September 4, 2008, to request reconsideration of that decision. Her March 3, 2011 reconsideration request was therefore untimely. The only issue presented on this appeal is whether appellant’s untimely request showed clear evidence of error in OWCP’s September 4, 2007 decision.

In her reconsideration request, appellant referred to the opinion of an independent vocational rehabilitation consultant. She did not attempt to explain the significance of this evidence. The independent counselor found that appellant was precluded from successfully performing the tasks of a medical secretary. But this was not the issue. OWCP’s September 4, 2007 decision was not a wage-earning capacity determination. It was a sanction decision issued under section 8113(b) for failing without good cause to continue her vocational rehabilitation. To the possible extent that the independent counselor’s opinion conflicts with that of OWCP’s

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.607.

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.c (January 2004).

<sup>5</sup> *Id.*, Chapter 2.1602.3.d(1).

rehabilitation counselor and rehabilitation specialist, who found that the targeted position remained vocationally and medically appropriate as a rehabilitation goal, such a conflict fails to establish clear error in the reduction of appellant's compensation.

Appellant argued that the September 4, 2007 decision did not mention section 8113(b), leading her to believe that the decision was a constructed wage-earning capacity decision "and nothing more." But as OWCP explained in denying reconsideration, letters dated April 12 and July 25, 2007 provided notice that her compensation was being reduced for lack of cooperation until such time as she demonstrated her willingness to resume her online training. A partially disabled employee in vocational rehabilitation is subject to the sanction under section 8113(b) should he or she not cooperate with rehabilitation efforts without good cause. OWCP provided an April 12, 2007 notice letter and the July 25, 2007 notice of proposed reduction. Both letters clearly addressed appellant's refusal to participate in OWCP-approved training. Both letters informed her that she could resume further training or, if good cause was not shown, her compensation would be reduced to reflect her probable wage-earning capacity had training been completed. There is no clear error on the notices provided appellant by OWCP prior to the reduction of her benefits.

Appellant cited *David W. Green*, 43 ECAB 883 (1992), where the Board could not discern the precise basis for the reduction of compensation, whether it was a wage-earning capacity determination under section 8115 or a sanction decision under section 8113. The Board found that OWCP improperly reduced the claimant's compensation regardless. As to the former, OWCP failed to give proper notice. As to the latter, the claimant took affirmative steps to comply with OWCP's notice of sanction.

The basis for the reduction of wage-loss compensation was clear. There is no evidence that appellant took affirmative steps to comply with OWCP's notice letter. Indeed, as appellant stated in her request for reconsideration, she was "unwilling to resume vocational rehabilitation."

As for appellant's argument that she could not be expected to understand her appeal rights, the September 4, 2007 decision set forth her appeal rights. It clearly spelled out that she had one calendar year from the date of that decision to request reconsideration.

Appellant argued that serious family health issues forced her to deviate from the planned training. OWCP addressed this argument in its notice of proposed reduction. Simply repeating the same argument does not show clear error in OWCP's decision. Appellant argued that the identified position was inappropriate, but her lay disagreement with OWCP's vocational rehabilitation specialist, who is an expert in such matters and upon whose opinion OWCP may rely,<sup>6</sup> does not establish clear evidence of error in the reduction of her compensation for failing to continue her online training.

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<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8.b(2) (October 2009) (because the rehabilitation specialist is an expert in the field of vocational rehabilitation, OWCP may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable).

Appellant noted that the entry-level wage of the targeted position was \$8.59 per hour, but OWCP reduced her compensation by \$10.00 per hour or \$400.00 per week. The record shows that the rehabilitation counselor conducted a labor market survey, and contacts most consistently reported an entry-level wage \$10.00 per hour. Appellant's request does not clearly show that it was error for OWCP to use the entry-level wage most consistently reported by employers within her commuting area.

The Board finds that appellant's March 3, 2011 request for reconsideration did not establish, on its face, that OWCP's September 4, 2007 reduction of compensation was clearly erroneous. Appellant is therefore not entitled to a merit review of her case. The Board will affirm OWCP's June 1, 2011 decision denying her untimely reconsideration request.

Appellant's attorney argued that the Board has jurisdiction to review the merits of appellant's case. The most recent OWCP decision on the merits of appellant's case was the September 4, 2007 decision reducing her compensation. Appellant had no more than one year to file an appeal of that decision with the Board. Her August 23, 2011 appeal allows the Board no jurisdiction to review the merits of the reduction. The only decision the Board may review is OWCP's June 1, 2011 nonmerit decision denying her untimely reconsideration request.

The issue is whether appellant's untimely reconsideration request established that the September 4, 2007 conditional reduction of compensation was clearly erroneous. The options given to appellant in no way committed OWCP to conduct a merit review of her case. The September 4, 2007 decision was not a wage-earning capacity determination under section 8115, and arguments that might be at least relevant to such a determination are immaterial to whether OWCP properly denied appellant's March 3, 2011 request for reconsideration.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's March 3, 2011 request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 1, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 19, 2012  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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