

FACTUAL HISTORY

OWCP accepted that on March 12, 2004 appellant, then a 57-year-old security screener, sustained a lumbar strain, lumbar radiculopathy and a herniated disc at L4-5 when she lifted a heavy baggage item. Appellant stopped work in March 2004 and did not return. She received total disability wage-loss compensation beginning on May 16, 2004. Appellant was separated from the employing establishment in January 2008. She underwent an anterior C5-6 discectomy on June 4, 2008.

In December 12, 2008 reports, Dr. Martti Kahkonen, an attending physician specializing in occupational medicine, found that appellant could perform full-time duty with lifting, pulling and pushing permanently limited to 20 pounds and no bending or twisting.

Based on Dr. Kahkonen's opinion that appellant was no longer totally disabled for work, OWCP referred her for vocational rehabilitation on February 6, 2009 and appointed a vocational rehabilitation counselor. Appellant met with the counselor on February 18, 2009. She provided information about her medical history, education and work experience. The counselor recommended that she participate in a work hardening program. In a February 24, 2009 letter, Dr. Kahkonen advised the counselor that appellant required imaging studies and electrodiagnostic testing before she could participate in a work hardening program.

Appellant completed vocational aptitude testing on February 26 and 27, 2009 as directed. She tested below average in all occupational skill clusters. Appellant's skills and background were found most suited to an entry level information clerk or cashier position. In a March 2, 2009 letter, the employing establishment advised the vocational counselor that there was no work available within her restrictions. OWCP directed the counselor to institute plan development based on the vocational goals identified by testing.

Appellant met with the vocational rehabilitation counselor on March 16 and 25, 2009. She stated that she would accept any job the counselor offered her and signed a job placement plan on April 7, 2009.

In an April 26, 2009 letter, the counselor advised appellant to meet her at a local library on May 4, 2009 at 10:00 a.m. to sign a new placement plan. In a May 5, 2009 report, she stated that she called appellant at 8:00 a.m. on May 4, 2009 asking appellant to call her as she had to reschedule the meeting for another time that day. The counselor advised that appellant did not return her call. She asserted that appellant obstructed the vocational rehabilitation process as she failed to appear at the meeting. OWCP placed the vocational rehabilitation effort in "interrupt" status as of May 6, 2009.

In a May 11, 2009 letter, OWCP advised appellant that, if she failed to cooperate with the preliminary stages of vocational rehabilitation, her wage-loss compensation would be reduced to zero based on the assumption that participation in vocational rehabilitation would have resulted in her return to work with no loss of wages. Appellant had 30 days to respond by expressing her willingness to cooperate and resuming the vocational rehabilitation effort.

As of May 15, 2009, appellant selected two job goals and agreed to discuss her medical limitations with her physician. On May 19, 2009 Dr. Kahkonen renewed the restrictions provided on December 12, 2008.

In June 10, 2009 letters, appellant asserted that the counselor accused her of not attending the May 4, 2009 meeting to cover her own absence. She reported to the library on May 4, 2009 at 10:00 a.m. as instructed by the counselor and remained there until 11:26 a.m., but the counselor failed to appear. Appellant enclosed a library receipt demonstrating that she checked out a book at 11:26 a.m. on May 4, 2009.

In an undated letter received by OWCP on June 17, 2009 the counselor acknowledged that she changed the May 4, 2009 meeting time to attend a medical appointment but had notified appellant of the change “in plenty of time.” She alleged that she had a very hard time communicating with appellant and was constantly correcting her statements since appellant would misinterpret what she had stated. On June 19, 2009 OWCP changed the vocational rehabilitation program status back to “plan development.” It assured appellant’s attorney that the counselor would continue to provide professional, quality service.

Appellant attended June 29 and July 7, 2009 meetings as instructed. In a July 7, 2009 letter to OWCP, the counselor noted that appellant exhibited pain behaviors during a meeting that day with James Linkhart, a career counselor, who provided job search training. She asserted that appellant made “barely veiled innuendos,” rude remarks and “nonverbals” that were “unacceptable.” The counselor requested that appellant be reassigned to another counselor.

In a July 10, 2009 letter, Mr. Linkhart advised OWCP that, based on his July 7, 2009 meeting, appellant was not a suitable candidate for job placement as she was 63 years old, had no marketable skills and believed that she was disabled for work.

On September 15, 2009 the vocational counselor identified the sedentary clerical positions of Mail Clerk (U.S. Department of Labor, *Dictionary of Occupational Titles* # 209.689-026) and Receptionist (DOT# 237.367-038) as vocational goals.

The record contains a September 29, 2009 meeting agenda from the vocational counselor. There is no letter of record advising appellant of the meeting. On September 30, 2009 OWCP placed the vocational rehabilitation effort in interrupted status based on the counselor’s assertion that appellant failed to attend a September 29, 2009 meeting. In an October 1, 2009 form, the counselor alleged that appellant obstructed the vocational rehabilitation effort by failing to attend the September 29, 2009 meeting.

In an October 5, 2009 letter, OWCP advised appellant that she had obstructed the vocational rehabilitation plan by failing to attend a scheduled September 29, 2009 meeting. It instructed her to contact the vocational counselor within 30 days and resume cooperating with the program or her monetary compensation would be reduced to zero under section 8113(b) of FECA.

In an October 19, 2009 letter, the vocational counselor asserted that she spoke to appellant by telephone on September 22, 2009 to schedule the September 29, 2009 meeting and that appellant agreed to attend. On October 22, 2009 the counselor stated that she had not

spoken with appellant since July 10, 2009. OWCP closed the vocational rehabilitation effort on November 1, 2009.

In a January 6, 2010 letter, appellant asserted that the vocational counselor cancelled meetings without adequate notice, refused to answer her questions and failed to acknowledge the accepted medical conditions.

By decision dated December 6, 2010, OWCP reduced appellant's compensation to zero under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 to reflect what her wage-earning capacity would have been if she had cooperated with vocational rehabilitation. The reduction would continue until appellant contacted the vocational counselor and agreed to cooperate with vocational rehabilitation. OWCP found that appellant failed to attend May 4 and September 29, 2009 meetings as instructed and failed to respond to OWCP's May 11, 2009 letter. It further found that she failed to show good cause for her failure to undergo vocational rehabilitation as directed.

On December 14, 2010 counsel requested a telephonic hearing. In a January 5, 2011 telephone memorandum, OWCP noted that appellant called that day asking for assistance in contacting the vocational counselor. It advised her that "trying to contact the [v]oc[ational] [r]ehab[ilitation counselor] at this stage will not help her case" and she should wait to "explain her concerns at the hearing."

A telephonic hearing was held on April 13, 2011 at the hearing, appellant asserted that the vocational counselor telephoned her on September 22, 2009 asking her when they could meet. She explained that she might be able to meet on or about September 29, 2009 but did not agree to a specific date or time. The counselor did not state that a September 29, 2009 meeting was scheduled. Appellant submitted an April 13, 2011 letter stating that she would "continue to participate with the vocational rehabilitation program."

By decision dated and finalized on June 29, 2011, an OWCP hearing representative affirmed the December 6, 2010 decision reducing appellant's compensation to zero on the grounds that she failed to cooperate with vocational rehabilitation. The hearing representative directed reinstatement of her compensation retroactively to April 13, 2011 at such time as she "resumed the effort as directed."

LEGAL PRECEDENT

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.³ Once OWCP accepts a claim, it has the burden of

² 5 U.S.C. § 8102(a).

³ 20 C.F.R. § 10.5(f) (1999).

proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.⁴

OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.⁵ If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed, OWCP, on review under 5 U.S.C. § 8128 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 or her wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of OWCP.⁶

Where a suitable job has been identified, OWCP will reduce the employee's 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. It will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with OWCP field nurse and the employer. The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.⁷

ANALYSIS

OWCP accepted that appellant sustained a herniated L4-5 disc, a lumbar strain and lumbar radiculopathy. On December 12, 2008 Dr. Kahkonen, an attending physician, opined that appellant could perform full-time work with restrictions. Upon receiving this evidence, OWCP properly referred her to vocational rehabilitation services on February 6, 2009. It reduced appellant's compensation benefits to zero effective December 6, 2010 under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, on the grounds that she failed to cooperate with vocational rehabilitation by failing to attend scheduled May 5 and September 29, 2009 meetings. The Board finds, however, that OWCP did not meet its burden of proof in establishing that she failed to cooperate as alleged.

Appellant cooperated with the early and necessary stages of the vocational rehabilitation effort. She met with the rehabilitation counselor on February 18, March 16 and 25, 2009 and underwent vocational testing as directed on February 26 and 27, 2009. Appellant signed an agreement to participate in career counseling and expressed willingness to accept any position offered to her.

On May 4, 2009 appellant reported to a local library at 10:00 a.m. for a scheduled meeting with the vocational counselor, but the counselor was not at the library. The counselor then alleged that appellant failed to attend the meeting. OWCP advised appellant by May 11,

⁴ *J.E.*, 59 ECAB 606 (2008); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

⁵ 5 U.S.C. § 8104(a).

⁶ *Id.* at § 8113(b).

⁷ 20 C.F.R. § 10.519(a).

2009 letter that she had failed to cooperate with the vocational rehabilitation process and afforded her 30 days to resume cooperation. The counselor later acknowledged that she attempted to reschedule the May 4, 2009 meeting by leaving a telephone message for appellant at 8:00 a.m. on May 4, 2009. She explained that she had a “VERY HARD communicating” with appellant. After appellant produced a receipt confirming her presence at the library at 11:26 a.m. on May 4, 2009, OWCP reinstated vocational rehabilitation and assured appellant’s attorney that the vocational counselor would provide professional service. The Board finds that OWCP did not establish that appellant failed to attend the May 4, 2009 meeting. Appellant provided factual evidence corroborating her presence at the agreed meeting place and time and the vocational counselor acknowledged an unsuccessful last minute attempt to reschedule the meeting. The May 4, 2009 incident does not constitute obstruction of the vocational rehabilitation process by appellant.

Regarding OWCP’s finding that appellant failed to respond to its May 11, 2009 warning letter, the Board notes that appellant attended a meeting with the vocational counselor on May 15, 2009, selected vocational goals and submitted medical forms to her physician. The Board finds that these actions are persuasive evidence that appellant “resumed” cooperation with the vocational rehabilitation process as of May 15, 2009, in accordance with the May 11, 2009 advisement.

Appellant attended scheduled meetings with the counselor on June 29 and July 7, 2009. The counselor alleged that, during the July 7, 2009 meeting, appellant made “innuendos,” rude remarks and committed “unacceptable” nonverbal acts. She requested that OWCP assign appellant to a different counselor. However, Mr. Linkhart, a job skills trainer present at the July 7, 2009 meeting, did not corroborate the counselor’s allegations of argumentative or inappropriate remarks. Instead, he found that appellant was a poor candidate for vocational rehabilitation due to age, lack of marketable skills and focus on her medical condition. The Board finds that the divergent accounts of the July 7, 2009 meeting cast doubt on the accuracy of the vocational counselor’s allegations against appellant.

OWCP further found that appellant obstructed the vocational rehabilitation process by failing to attend a scheduled September 29, 2009 meeting. However, there is insufficient evidence that the vocational counselor advised her of the date and time of this meeting. The record contains a September 29, 2009 meeting agenda written by the counselor. But there is no letter to appellant advising her of the scheduled meeting. Additionally, the counselor provided divergent accounts of how she advised appellant of the meeting. In an October 19, 2009 letter, the counselor asserted that she scheduled the September 29, 2009 meeting by telephone on September 22, 2009. Yet the counselor stated in an October 22, 2009 letter that she had not spoken with appellant since July 10, 2009. During the April 13, 2011 hearing, appellant testified that the counselor telephoned her on September 22, 2009 and discussed various possible meeting dates, but did not schedule a definite meeting. The Board finds that the vocational counselor’s inconsistent account of events, coupled with the lack of a notification letter, are persuasive evidence that there was no meeting scheduled for September 29, 2009. Therefore, appellant did not obstruct the vocational rehabilitation process.

OWCP has not met its burden of proof to reduce appellant's compensation. The case will be returned to OWCP for reinstatement of appropriate compensation benefits retroactive to December 6, 2010.

CONCLUSION

The Board finds that OWCP improperly reduced appellant's compensation for failing to cooperate with vocational rehabilitation.

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 22, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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