



OWCP accepted her claim for right wrist tendinitis and de Quervain's disease, right wrist sprain and strain and right carpal tunnel syndrome (CTS). OWCP paid appellant compensation for lost wages.

Appellant returned to work on September 30, 2006 as a modified mail handler. She continued to work in modified assignments pursuant to restrictions provided by her treating physician, Dr. Max H. Matos, a Board-certified orthopedic surgeon. On February 23, 2010 Dr. Matos noted an increase in appellant's right upper extremity symptoms, including limited range of motion and decreased sensation in her right wrist. On April 1, 2010 he increased her work restrictions to include no repetitive use of the right upper extremity, no pulling or pushing greater than 10 pounds and no filing.

In a letter dated April 5, 2010, the employing establishment informed appellant that it was unable to identify enough available necessary tasks within her medical restrictions to complete a full day's work. Appellant requested, and OWCP began paying, compensation for wage loss effective April 5, 2010.

On October 25, 2010 OWCP referred appellant to a rehabilitation counselor for vocational rehabilitation services. It informed the rehabilitation counselor that a functional capacity evaluation was necessary in order to determine her work capacity. In a letter dated November 19, 2010, OWCP informed appellant that she was expected to cooperate fully with her rehabilitation counselor in an effort to return to work.

On December 8, 2010 the rehabilitation counselor notified appellant that a functional capacity evaluation had been scheduled for December 22, 2010 at 2:00 p.m. In a letter dated December 10, 2010, appellant's representative informed OWCP that she did not believe that she was capable of completing a functional capacity evaluation because she had not been released from her physician's care. He requested that the study be postponed until she was able to discuss the advisability of the proposed evaluation with her doctor on January 14, 2011, the date of her next scheduled examination.

Appellant attended the scheduled functional capacity examination on December 22, 2010. In a December 22, 2010 report, Lisa Fitzpatrick, an occupational therapist, stated that appellant provided inconsistent responses, was combative and was verbally abusive to her during the evaluation. Appellant refused to complete the examination due to pain, stating that her doctor stated that she did not have to undergo the examination. Ms. Fitzpatrick stated that, since the test could not be completed, she was unable to ascertain appellant's true work capacity.

In a letter dated January 6, 2011, an OWCP claims examiner noted appellant's failure to cooperate during the functional capacity evaluation and, therefore to fully cooperate with vocational rehabilitation efforts. OWCP informed appellant that her request to postpone the evaluation was denied and that another date would be selected for the evaluation and informed her that her failure to cooperate could be cause to suspend her compensation benefits.

In a letter dated January 19, 2011, OWCP notified appellant that her failure to cooperate with, and fully participate in, the December 22, 2010 functional capacity evaluation constituted refusal to undergo vocational rehabilitation. It notified her that 5 U.S.C. § 8113(b) provided that,

if an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed, and it finds that, in the absence of the failure the individual's wage-earning capacity would probably have substantially increased, it may reduce prospectively the compensation based on what probably would have been the individual's wage-earning capacity had she not failed to apply for and undergo vocational rehabilitation. Appellant was informed that, within 30 days, another functional capacity evaluation would be scheduled; that she was directed to fully participate in the evaluation; and that if she believed she had a good reason for not participating, she should so advise OWCP within 30 days, with reasons for noncompliance and any supporting evidence. OWCP advised her that, after any evidence submitted was evaluated, further action would be taken, without additional notice to her. If appellant did not comply with the instructions contained within the letter within 30 days, the rehabilitation effort would be terminated and her compensation reduced in accordance with 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.

On February 18, 2011 the rehabilitation counselor notified appellant that a functional capacity evaluation had been scheduled for February 28, 2011 at 9:00 a.m. In a March 9, 2011 report, L. Michelle Smith, a physical therapist, stated that she was unable to accurately assess appellant's work capacity due to inconsistencies in her test responses. Appellant demonstrated severely limited range of motion with the goniometer with functional activities; however, she was observed moving her right arm into 85 to 90 degrees of shoulder flexion while applying analgesic cream. With pronation/supination, she demonstrated functional range of motion during gross range of motion assessment and during the manual muscle testing; however, when attempting to obtain a measurement with the goniometer, she was only able to perform 20 to 30 percent of full motion. Appellant demonstrated very low full hand grip strength on the right, but demonstrated pinch strength on the right slightly less than (less than 1 percent) her maximum grip strength. This was atypical, as pinch strength generally 30 to 35 percent weaker than the full maximum grip. Additionally, the five-rung grip test was not consistent. Appellant was able to hold the dynamometer in the right hand without support, but reported that she was unable to hold the force meter (similar in weight to the dynamometer) in the right hand alone for lift strength testing. With dexterity testing, she demonstrated functional range of motion in the forearm and wrist; however, when asked to perform a typing activity, she did not perform normal palm down typing position and pushed the keys with hunt and peck with index and middle finger. The evaluator concluded that due to these inconsistencies, she was unable to determine her capacity.

In a March 11, 2011 decision, OWCP reduced appellant's compensation to zero finding that she had, without good cause, failed to undergo vocational rehabilitation when so directed under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.

On April 5, 2011 appellant, through her representative, requested a review of the written record. Counsel contended that appellant had complied with OWCP's request to attend the work capacity evaluation and made a good faith effort to perform the requested activities to the best of her ability. He stated that the evaluator refused to postpone the evaluation until appellant's physician had an opportunity to examine her. Counsel argued that appellant's compensation benefits were improperly terminated because she did not refuse to undergo vocational rehabilitation.

The record contains a December 10, 2010 report of a functional capacity evaluation performed by a Ronald Kelly, at the request of Dr. Matos. After performing function, pinch strength and static strength testing, Mr. Kelly opined that appellant could push and pull up to eight pounds occasionally up to 30 percent of the workday. She should not pinch, grasp or turn and pick up very small objects with her right hand, reach above the waist level with her right arm or lift or carry.

In a December 20, 2010 report, Dr. Matos stated that appellant was extremely sensitive to evaluation of her right upper extremity with range of motion, sensory or strength testing. He opined that the results of the testing performed pursuant to the December 10, 2010 functional capacity evaluation were reliable and valid. Dr. Matos stated that appellant should not be asked to repeat the functional capacity evaluation at that time but, should her pain reduce, it might be repeated.

On January 6, 2011 Dr. Matos provided a 33 percent whole person impairment rating. Examination revealed reduced cervical range of motion due to pain; tenderness over the right wrist and forearm and lateral aspect of the elbow; pain on wrist flexion and extension. Dr. Matos diagnosed arm pain and indicated that his examination was limited due to appellant's discomfort. He opined that appellant could work with restriction, including no lifting, pushing or pulling more than 10 pounds; limited use of the right upper extremity; and no repetitive grasping or gripping with the right upper extremity.

In a report dated January 14, 2011, Dr. Matos provided a review of the medical record and examination findings. He diagnosed right wrist residual CTS and de Quervain's tenosynovitis; right thumb carpometacarpal sprain/strain; right upper extremity hypersensitivity; status post right first dorsal compartment release and post right carpal tunnel release; right middle finger pulley release; borderline right carpal tunnel syndrome and mild right ulnar neuropathy at the elbow; mild effusion of the right lateral radiocarpal joint; and major depressive disorder and sleep disorder due to chronic pain. Dr. Matos opined that appellant had a 57 percent right upper extremity impairment. Regarding appellant's functional capacity, he noted that appellant was "forced to stop a functional capacity examination on February 13, 2010 as it was significantly exacerbating her pain." Appellant underwent a functional capacity examination on December 10, 2010, which resulted in the following work restrictions: no reaching above the waist level with the right arm; no grasping or turning with the right hand; no picking up very small objects with the right hand; no pinching with the right hand; and no lifting or carrying.

In a June 10, 2011 letter to Vice President Biden, appellant contended that she had both appeared for and fully cooperated with the evaluator in the two required functional capacity evaluations. In a letter dated June 22, 2011, OWCP informed appellant that her compensation benefits had been reduced because she had failed to show good cause for failing to fully participate in the functional capacity evaluations and had failed to express a willingness to do so.

By decision dated July 29, 2011, an OWCP hearing representative affirmed the March 11, 2011 decision, finding that she had refused to cooperate in the preliminary stages of vocational rehabilitation.

On August 29, 2011 appellant requested reconsideration, contending that she had made a good faith effort to participate in the vocational rehabilitation process and had complied with OWCP's requests. In a July 22, 2011 report, Dr. Matos noted her continued complaints of pain. Appellant also submitted copies of medical reports and other documents previously reviewed by OWCP, as well as prescriptions for various medications and fiscal statements.

By decision dated December 5, 2011, OWCP denied modification of the July 29, 2011 decision. The claims examiner found that appellant had not fully participated in the required functional capacity evaluation or presented rationalized medical evidence establishing that she was unable to do so.

### **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.”<sup>2</sup>

20 C.F.R. § 10.519 provides in pertinent part:

“If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue to participate in a vocational rehabilitation effort when so directed, [OWCP] will act as follows:”

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“(b) Where a suitable job has not been identified, because the failure or refusal occurred in the early but necessary stages of a vocational rehabilitation effort (that is, meetings with [OWCP] nurse, interviews, testing, counseling, functional capacity evaluations, and work evaluations) [OWCP] cannot determine what would have been the employee's wage-earning capacity.

“(c) Under the circumstances identified in paragraph (b) of this section, in the absence of evidence to the contrary, [OWCP] will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity, and [OWCP] will reduce the employee's monetary compensation accordingly (that is, to zero). This reduction will remain in effect

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<sup>2</sup> *Id.* at § 8113(b). See *J.E.*, 59 ECAB 606 (2008).

until such time as the employee acts in good faith to comply with the direction of [OWCP].”<sup>3</sup>

OWCP’s procedure manual states that specific instances of noncooperation include a failure to appear for the initial interview, counseling sessions, a functional capacity evaluation, other interviews conducted by the rehabilitation counselor, vocational testing sessions, and work evaluations, as well as lack of response or inappropriate response to directions in a testing session after several attempts at instruction.<sup>4</sup>

### ANALYSIS

The Board finds that OWCP properly reduced appellant’s compensation benefits to zero based on her failure to cooperate with vocational rehabilitation.

Appellant received wage-loss benefits because the employing establishment was unable to provide necessary tasks within her medical restrictions to complete a full day’s work. OWCP properly referred her to vocational rehabilitation to develop a vocational plan to assist her in returning to gainful employment within her medical limitations. As an initial step in the process, appellant was directed to attend and fully participate in a functional capacity evaluation on December 22, 2010. Although she attended the examination, the evaluator’s report reflects that she provided inconsistent responses, was combative and verbally abusive during the evaluation and refused to complete the examination due to pain, contending that her doctor stated she did not have to undergo the examination. As the test could not be completed, the evaluator was unable to ascertain appellant’s work capacity.

Appellant was notified that her failure to cooperate without good cause was reason to reduce her compensation benefits. She was directed to attend and fully participate in a functional capacity evaluation scheduled on February 28, 2011. The record reflects that appellant again attended the evaluation, but failed to fully cooperate. The evaluator stated that she was unable to accurately assess appellant’s work capacity due to gross inconsistencies in appellant’s test responses, which she delineated in detail.

OWCP procedures recognize that specific instances of noncooperation include a failure to appear for a functional capacity evaluation, as well as lack of response or inappropriate response to directions in a testing session after several attempts at instruction.<sup>5</sup> The Board finds that appellant’s refusal to participate in the December 22, 2010 evaluation and her inappropriate and inconsistent responses to the February 28, 2011 evaluation constitute noncooperation with the initial stages of vocational rehabilitation.

The Board finds that appellant failed to show good cause for her failure to fully participate. Appellant first contended that she was physically unable to complete a functional

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<sup>3</sup> 20 C.F.R. § 10.519 (2011).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11(a) (November 1996); see *Sam S. Wright*, 56 ECAB 358 (2005).

<sup>5</sup> *Id.*

capacity evaluation. She did not, however, submit medical evidence to establish good cause for her failure to complete the evaluation. In a December 20, 2010 report, Dr. Matos stated that appellant was extremely sensitive to evaluation of her right upper extremity with range of motion, sensory or strength testing and opined that appellant should not be asked to repeat the functional capacity evaluation at that time, but that should her pain reduce, it might be repeated. He did not adequately explain why she was not able to undergo the required evaluation. Dr. Matos did not address the December 10, 2010 report of Mr. Kelly or contrast the findings he made with those of Ms. Smith. Therefore, his opinion is of limited probative value. The Board notes that the purpose of a functional capacity evaluation is to determine a claimant's physical capacity, not to exceed that capacity. The remaining medical evidence of record does not contain an opinion regarding appellant's ability to participate in the functional capacity evaluation.

Appellant argued that she did not refuse to undergo vocational rehabilitation and that she made a good faith effort to perform the requested activities to the best of her ability, short of causing injury to herself and at a pain level that she could tolerate. The evidence of record does not establish that she cooperated to the best of her ability. Ms. Fitzpatrick noted inconsistent responses, that appellant became combative and verbally abusive and refused to complete the first examination. In the second examination, Ms. Smith was unable to accurately assess appellant's work capacity due to inconsistencies in her test responses. The Board finds that appellant's failure to participate in vocational rehabilitation was without good cause.

In this case, the failure to participate was clearly in the early but necessary stage of vocational rehabilitation, prior to the identification of a suitable job. Under this circumstance OWCP will assume, in the absence of contrary evidence that the rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity. Pursuant to 20 C.F.R. § 10.519, OWCP will reduce compensation to zero until such time as appellant in good faith complies with its direction. The Board finds OWCP properly applied the provisions of FECA and the implementing regulations in reducing appellant's compensation to zero.

On appeal, appellant contends that the evidence is sufficient to show good cause for her inconsistent responses during the functional capacity evaluation. For reasons stated, the Board finds that appellant's failure to fully participate in vocational rehabilitation was without good cause.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that OWCP properly reduced appellant's compensation to zero pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated December 5 and July 29, 2011 are affirmed.

Issued: August 8, 2012  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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