

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

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<b>S.C., Appellant</b>	)	
	)	
<b>and</b>	)	
	)	<b>Docket No. 11-1665</b>
	)	<b>Issued: March 13, 2012</b>
<b>U.S. POSTAL SERVICE, SOUTHERN</b>	)	
<b>CONNECTICUT P &amp; DC, Wallingford, CT,</b>	)	
<b>Employer</b>	)	
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*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 13, 2011 appellant filed a timely appeal from an April 26, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 reduced appellant's compensation to zero, effective December 19, 2010, on the grounds that she failed, without good cause, to cooperate with vocational rehabilitation efforts.

On appeal, appellant asserts that there is no evidence of record proving that she was contacted by telephone or mail regarding vocational rehabilitation.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

On April 22, 2005 appellant, then a 35-year-old mail processor (clerk), injured her left knee when picking up a mail tray off the floor. She stopped work that day. OWCP accepted that she sustained a medial meniscus tear of the left knee. Appellant returned to modified duty on July 2, 2005 and to regular duty on August 9, 2005. OWCP accepted several brief recurrences of disability and she stopped work on August 13, 2007 when Dr. Philip Luchini, an attending Board-certified orthopedic surgeon, performed arthroscopic shaving of the left patella. Appellant was placed on the periodic compensation rolls. She returned to modified duty on November 12, 2007. On November 5, 2008 she was granted a schedule award for a three percent impairment of the left lower extremity.

Appellant filed a recurrence claim on November 17, 2009. The employing establishment advised that her job was withdrawn that day under the National Reassessment Process (NRP). Appellant provided her address of record and telephone number. In a December 23, 2009 treatment note, Dr. Luchini advised that she was seen for follow up and could continue working limited duty. On February 5, 2010 OWCP accepted the November 17, 2009 recurrence and expanded the claim to include chondromalacia patella, left. Appellant received appropriate compensation and was returned to the periodic compensation rolls.

On March 9, 2010 appellant was referred to Kerry A. Skillen, a rehabilitation counselor, for vocational rehabilitation services. OWCP's letter, addressed to Ms. Skillen, described the responsibilities of the counselor and the responsibilities of the injured worker. A copy of the letter was forwarded to appellant. A summary of case information was attached. In an April 29, 2010 report, Ms. Skillen advised that she had been unable to contact appellant. She stated that she telephoned appellant on March 24 and 26, 2010, that she spoke with an unidentified male on both occasions and left messages that were not returned. The vocational rehabilitation counselor indicated that a certified letter was sent to appellant on April 1, 2010 and that on April 26, 2010 the certified letter was returned to the counselor as unclaimed. She attached a copy of the letter, dated and sent to appellant by certified mail on April 1, 2010. The letter emphasized the importance of appellant contacting Ms. Skillen and included a toll-free telephone number. Ms. Skillen also attached a copy of a certified mail receipt and the certified letter envelope, which indicated that the letter was sent to the address of record, with postal notations dated April 8 and 18, 2010 and a stamp indicating that it was returned to sender on April 21, 2010 as unclaimed.<sup>2</sup> In reports dated June 1 and July 29, 2010, Dr. Luchini indicated that appellant had experienced a flare-up in her left knee with swelling and tenderness and advised that she could continue working.

In an August 17, 2010 letter, OWCP proposed to suspend appellant's monetary compensation on the grounds that she failed to cooperate in rehabilitation efforts. Appellant was notified of the penalty provisions of section 8113(b) of FECA and section 10.519 of OWCP's regulations.<sup>3</sup> OWCP informed her that it was assumed that vocational rehabilitation would have

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<sup>2</sup> The certified mail receipt and the certified mail sticker affixed to the envelope showed the same scan number, 7008-3230-0000-5624-9232.

<sup>3</sup> 20 C.F.R. § 10.519.

resulted in a return to work with no loss of wage-earning capacity and, accordingly, compensation would be reduced to zero. Appellant was directed to make a good faith effort to participate in vocational rehabilitation and given 30 days in which to respond.

In a September 29, 2010 report, Dr. Luchini indicated that appellant's left knee was symptomatic with anterior knee pain and that she had difficulty stair climbing, squatting, kneeling or walking for an extended period of time. He noted patellofemoral crepitus with pain on examination. Dr. Luchini advised that appellant's symptoms were consistent with recurrent post-traumatic chondromalacia patella and recommended another arthroscopic procedure. OWCP authorized the surgery and on November 8, 2010 Dr. Luchini performed arthroscopic shaving of the patella and trochlea of the left knee.

On December 8, 2010 OWCP noted that appellant had made no attempt to contact vocational rehabilitation or indicate her willingness to engage in rehabilitation services.

By decision dated December 14, 2010, OWCP found that appellant did not contact OWCP or respond in any way to the August 17, 2010 letter and had therefore not shown good cause for not complying with vocational rehabilitation efforts. It noted that, although she had surgery on November 8, 2010, there was no medical evidence establishing that she could not return to full-time work when the noncooperation occurred. OWCP advised appellant that her failure to undergo the essential preparatory effort of vocational testing did not permit a determination of her wage-earning capacity, had she undergone the testing and rehabilitation effort and that, in the absence of evidence to the contrary, the vocational rehabilitation effort would have resulted in her return to work at the same or higher wages than for the position held when injured and, under the provisions of section 8113(b) of FECA and section 10.519 of OWCP's regulations, reduced her compensation to zero for failing to cooperate with vocational rehabilitation efforts or showing good cause for not complying. Appellant was informed that the reduction would continue until she, in good faith, participated in directed vocational testing or showed good cause for not complying, at which time the reduction of compensation would cease. On December 30, 2010 she requested a review of the written record.

Dr. Luchini submitted reports describing appellant's postoperative condition and on December 29, 2010 advised that she could return to work on January 3, 2011 with primarily sedentary duties. On January 20, 2011 he advised that she could return to regular work with a restriction that bending, stooping and squatting were limited to four hours daily.

On January 31, 2011 appellant called OWCP and stated that she was never contacted by a rehabilitation counselor. An OWCP claims examiner informed her that she should address the December 14, 2010 decision through the appeals process.

In a February 9, 2011 report, Dr. Luchini advised that appellant's knee pain persisted with no substantial improvement from the recent surgery. He recommended a patellofemoral arthroplasty and advised that she could continue her regular work duties with a four-hour restriction on kneeling and squatting. On March 10, 2011 an OWCP medical adviser indicated that the recommended surgery was warranted. By letter dated March 11, 2011, appellant was

informed that the additional condition of traumatic patellofemoral arthritis of the left knee was accepted and that a patellofemoral arthroplasty procedure was authorized.<sup>4</sup>

By decision dated April 26, 2011, an OWCP hearing representative affirmed the December 14, 2010 decision.

### **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>5</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

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<sup>4</sup> On March 28, 2011 appellant filed a schedule award claim. By letter dated March 30, 2011, OWCP informed her that, as the medical evidence did not establish that she was at maximum medical improvement, no action would be taken on the schedule award claim. In a telephone call on April 8, 2011, appellant stated that she was going forward with the recommended surgery. An OWCP claims examiner advised her that once her condition had reached maximum medical improvement following surgery, the schedule award claim could be reactivated.

<sup>5</sup> 5 U.S.C. § 8113(b).

reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.”<sup>6</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>7</sup>

### ANALYSIS

The Board finds that OWCP improperly reduced appellant’s compensation. The accepted conditions in this case include left knee torn medial meniscus and chondromalacia patella. Appellant worked modified duty until November 17, 2009 when her job was withdrawn under the NRP. OWCP thereafter accepted that she sustained a recurrence of disability and she was placed on the periodic compensation rolls. On March 9, 2010 appellant was referred to Ms. Skillen, a rehabilitation counselor, for vocational rehabilitation services. In reports dated December 23, 2009 through July 29, 2010, appellant’s attending orthopedist, Dr. Luchini, advised that she could continue at modified duties.

OWCP’s December 14, 2010 decision reducing appellant’s compensation will be reversed. Its procedures provide that overall management of medical issues rests with the claims examiner and not with the vocational rehabilitation counselor and specifically state that the claims examiner should develop any questions regarding the nature and extent of injury-related disability, work limitations or medical treatment plans with the attending or OWCP referral physician, until a resolution is obtained.<sup>8</sup> The August 17, 2010 letter afforded appellant 30 days to provide good cause for her failure to participate in vocational rehabilitation efforts. Even though she did not respond to the letter, OWCP did not issue a final decision reducing her compensation until December 14, 2010, almost four months later. In a September 29, 2010 report, received by OWCP on October 6, 2010, Dr. Luchini advised that appellant needed additional left knee surgery. OWCP authorized the procedure and Dr. Luchini performed arthroscopic surgery on November 8, 2010. At the time the surgery was recommended, OWCP did not address whether it was still medically appropriate for appellant to participate in vocational rehabilitation efforts at that time due to this change in her accepted medical condition. Following her timely request for a review of the written record, Dr. Luchini advised on February 9, 2011 that she needed another left knee procedure, which was approved by an OWCP medical adviser on March 10, 2011. On March 11, 2011 OWCP informed appellant that the additional condition of patellofemoral arthritis of the left knee was accepted.

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<sup>6</sup> 20 C.F.R. § 10.519; *see R.H.*, 58 ECAB 654 (2007).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.17(b) (February 2011).

<sup>8</sup> *Id.* at Chapter 2.813.15(a), (b)(3).

OWCP did not fully establish that appellant was medically capable of participating in the vocational rehabilitation process beginning September 29, 2010, when the initial surgery was recommended, prior to reducing her compensation to zero effective December 19, 2010. As such, the Board finds that OWCP did not meet its burden to justify the penalty under section 8113(b) of FECA.<sup>9</sup>

**CONCLUSION**

The Board finds that OWCP improperly reduced appellant's compensation to zero, effective December 19, 2010, for failing to cooperate with vocational rehabilitation efforts.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 26, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 13, 2012  
Washington, DC

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

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

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

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<sup>9</sup> See *R.C.*, Docket No. 10-1845 (issued April 6, 2011).