

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

C.C., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Wentsville, MO, Employer)

**Docket No. 14-1042
Issued: August 20, 2014**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 27, 2014 appellant, through her attorney, filed a timely appeal from the February 24, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) reducing her compensation. 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 reduced appellant's compensation benefits to zero effective June 21, 2013 based on her refusal to undergo vocational rehabilitation as directed.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that appellant a 45-year-old rural carrier, sustained bilateral shoulder strains and bilateral rotator cuff tears as a result of lifting and moving case shelves on November 1, 2011. It authorized a left shoulder arthroscopy performed on March 26, 2012.²

In work capacity evaluations dated February 14 and March 5, 2013, Dr. Richard C. Lehman, a Board-certified orthopedic surgeon, advised that appellant could not perform her usual job. Appellant could work eight hours a day with physical restrictions.

By letters dated March 7, 2013, OWCP inquired whether the employing establishment could offer appellant a light-duty position within Dr. Lehman's restrictions.

On March 7, 2013 OWCP was informed that appellant had returned to limited-duty work, two hours a day on February 26, 2013. The employing establishment looked for additional activities within her restrictions.

On March 11, 2013 OWCP referred appellant for vocational rehabilitation services. Appellant was advised that she was expected to cooperate fully with the rehabilitation and reemployment effort. She was sent a copy of the March 11, 2013 letter OWCP provided to Timothy D. Kaver, a job placement and training director at England and Company, which stated that appellant's cooperation and participation in vocational rehabilitation was compulsory under 5 U.S.C. § 8113(b).

On April 16, 2013 Mr. Kaver informed OWCP that he had made several unsuccessful attempts to reach appellant to schedule an appointment by letters dated March 24, April 1, 8 and 16, 2013, which was on England and Company letterhead and by telephone.

On May 14, 2013 OWCP left appellant a voicemail message asking whether she had contacted her vocational rehabilitation specialist and provided his telephone number for contact. By letter dated May 14, 2013, it also informed her that it had been advised by her rehabilitation counselor that she had failed to contact him to undergo vocational rehabilitation training. Appellant was advised of the sanctions for failure to undergo vocational rehabilitation. She was advised to contact OWCP and the rehabilitation counselor within 30 days.

On May 15, 2013 Mr. Kaver informed OWCP that he had contacted appellant. By letter dated May 16, 2013, he advised appellant that a vocational rehabilitation interview was scheduled for May 29, 2013.

On June 3, 2013 Mr. Kaver informed OWCP that appellant called him on May 29, 2013 to cancel the scheduled interview due to fatigue and pain. Appellant requested that the interview be rescheduled. On May 29 and June 3, 2013 Mr. Kaver left telephone messages for appellant, but she did not reply. Appellant also did not reply to his June 3, 2013 letter.

² In a decision dated January 29, 2014, OWCP granted appellant a schedule award for five percent impairment of the left shoulder.

On June 17, 2013 vocational rehabilitation services were closed due to appellant's refusal to cooperate with the rehabilitation counselor. The closing report prepared by Leslie Nelson, a rehabilitation specialist, noted that services were closed because appellant failed to meet with a rehabilitation counselor after numerous attempts to schedule an initial meeting to conduct a transferable skills analysis and identify skills which may be helpful in identifying full-time work at the employing establishment.

In a June 20, 2013 decision, OWCP reduced appellant's compensation under the provisions of 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 to zero effective June 21, 2013. It found that she failed to participate in the essential preparatory effort of vocational rehabilitation, which would permit OWCP to determine her wage-earning capacity. OWCP found that vocational rehabilitation efforts would have returned her to work at the same or higher wages than the position appellant held when injured. Appellant was advised that this reduction would continue until she underwent the vocational testing or showed good cause for not complying.

In a July 18, 2013 report, Mr. Kaver advised that appellant's appointment was rescheduled for July 1, 2013, however, on June 28, 2013 OWCP advised him to close her file. On June 28, 2013 he informed her about OWCP's request to close her file.

By letter dated December 18, 2013, appellant, through her attorney, requested a review of the written record by an OWCP hearing representative regarding the June 20, 2013 decision.³ In a September 6, 2013 letter, she stated that she had no idea that Mr. Kaver was trying to reach her. Appellant claimed that she was informed by the employing establishment's Office of the Inspector General that her training would take place inside the employing establishment. She stated that a trucking company and the vocational rehabilitation company had the same name, England Company and she thought the trucking company was trying to contact her since she had a commercial driver's license. Appellant believed that the letters from the company were junk mail until she received a call from OWCP. She claimed that she cancelled her May 29, 2013 vocational rehabilitation interview because she was experiencing pain when she got off work. Appellant claimed that she missed Mr. Kaver's telephone call to reschedule her interview. She stated that when she called him back, his voicemail stated that he was on vacation. Thereafter, appellant called three times and left messages. She received a message from OWCP on June 19, 2013, stating that her case was being closed. Appellant called and left a message for Mr. Kaver, who returned her telephone call and rescheduled her appointment for July 1, 2013. On June 29, 2013 she received a call from him stating that he had received an OWCP e-mail canceling her July 1, 2013 appointment and closing her case. Appellant also contended that Mr. Kaver was twice given the wrong telephone numbers.

In a February 24, 2014 decision, an OWCP hearing representative affirmed the June 20, 2013 decision, finding that appellant did not cooperate with vocational rehabilitation or provide adequate reasons for her failure to cooperate. The vocational rehabilitation counselor's records demonstrated that appellant's actions or inaction, were obstructive and uncooperative. The hearing representative found that appellant failed to provide good cause for not responding to the rehabilitation counselor's telephone calls or letters.

³ Appellant initially requested a telephone hearing before an OWCP hearing representative, but subsequently changed her request to a review of the written record.

LEGAL PRECEDENT

Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.⁴ Section 8113(b) provides that, if an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under 8104, the Secretary, on review under section 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 the Secretary.⁵

Section 10.519 of OWCP regulations state that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation. 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. This reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.⁶

ANALYSIS

The Board finds that OWCP properly reduced appellant's monetary compensation to zero effective June 21, 2013. Appellant failed, without good cause, to participate in the early stages of vocational rehabilitation efforts. Upon receiving medical evidence that she was not totally disabled for all work, but was capable of working eight hours a day with restrictions, OWCP properly referred her to vocational rehabilitation services. Appellant refused to cooperate with this rehabilitation effort as documented in the record by her rehabilitation counselor. Mr. Kaver stated that on May 29, 2013 she informed him that she would not attend the vocational rehabilitation interview scheduled on that date due to fatigue and pain. Appellant requested that the interview be rescheduled, but failed to respond to his subsequent telephone messages or letters to reschedule the interview prior to the suspension of her benefits. The Board has recognized that medical inability to participate in vocational rehabilitation, if properly substantiated, may constitute good cause for failure to participate in vocational rehabilitation.⁷ However, appellant did not submit any probative medical evidence to establish her inability to attend the scheduled May 29, 2013 vocational rehabilitation interview.⁸ Thus, she did not establish good cause for her failure to report to the scheduled appointment.

⁴ 5 U.S.C. § 8104(a); *see J.E.*, 59 ECAB 606 (2008).

⁵ *Id.* at § 8113(b); *see Freta Branham*, 57 ECAB 333 (2006).

⁶ 20 C.F.R. § 10.519.

⁷ *Carolyn M. Leek*, 47 ECAB 3745 (1996); *Linda M. McCormick*, 44 ECAB 958 (1993).

⁸ *J.W.*, 58 ECAB 419 (2007).

The Board further finds that, in her September 6, 2013 letter, appellant did not demonstrate good cause for her failure to cooperate. Appellant did not respond to Mr. Kaver's letters and calls because she did not know that he was trying to contact her to undergo vocational rehabilitation. She thought his company, England and Company, was a trucking company with the same name that was trying to contact her because she had a commercial license. Appellant also thought that correspondence from the company was junk mail until she received a call from OWCP. She claimed that she cancelled her scheduled vocational rehabilitation interview because she was in a lot of pain when she got off work. Appellant also claimed that she missed Mr. Kaver's telephone call to reschedule her interview. She contended that when she called him back his voicemail stated that he was on vacation. Appellant also contended that she called Mr. Kaver three times and left messages. She claimed that he was given the wrong telephone numbers twice. Mr. Kaver subsequently returned appellant's call and rescheduled her appointment for July 1, 2013, but later advised her that it was canceled and her case was closed.

The Board finds that appellant's contentions for failing to report to the scheduled vocational rehabilitation interview do not constitute good cause. OWCP notified her by letter dated March 11, 2013 that she was being referred to vocational rehabilitation services and that she was expected to fully cooperate with such services. Appellant was also notified that this letter was being sent to Mr. Kaver at England and Company. In addition, OWCP sent her a copy of its March 11, 2013 letter provided to Mr. Kaver regarding her referral for vocational rehabilitation services and advising him about her compulsory cooperation and participation in vocational rehabilitation under section 8113(b). Appellant was made well aware that England and Company was a vocational rehabilitation services company and not a trucking company as alleged. It was her responsibility to respond to the letters and telephone calls from Mr. Kaver regarding her vocational rehabilitation interview, but she failed to do so. Further, appellant did not submit any probative medical evidence to establish that she was incapable of attending the scheduled vocational rehabilitation interview. In addition, she did not submit any evidence to establish her attempts to reach Mr. Kaver to reschedule her appointment.

The Board finds that appellant refused to participate in vocational rehabilitation with the vocational counselor without good cause. OWCP properly found that vocational training would probably have substantially increased her wage-earning capacity and properly reduced her compensation in accordance with what would have probably been her wage-earning capacity had she completed the program.

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 benefits to zero effective June 21, 2013 based on her refusal to undergo vocational rehabilitation as directed.

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 20, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

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