

FACTUAL HISTORY

OWCP accepted that appellant, a 28-year-old letter carrier (casual), sustained sciatica and a herniated lumbar disc as a result of almost falling while delivering mail on an icy driveway on December 27, 2002. It placed appellant on the periodic rolls and authorized a lumbar spine fusion performed on April 6, 2004.

OWCP referred appellant to Dr. Michael Olin, a Board-certified neurosurgeon, for a second opinion evaluation to determine the nature and extent of her employment-related injuries. In his May 25, 2011 report, Dr. Olin opined that appellant continued to suffer residuals of her employment-related conditions, and although she was unable to perform the full duties of a letter carrier, she was able to perform a light-duty sedentary position with restrictions on bending, lifting, and twisting. He noted that if this was not something the employing establishment could offer, then vocational rehabilitation counseling could assist her in returning to employment.

On August 10, 2011 appellant agreed to engage in the vocational rehabilitation process. However, on September 28, 2011 vocational rehabilitation services were closed due to her refusal to cooperate with the rehabilitation counselor to schedule an initial interview.²

Appellant, through counsel, submitted an authorization request for a second back surgery and submitted a February 14, 2012 report from Dr. Curtis Doberstein, a Board-certified neurosurgeon, who recommended an L5-S1 laminectomy, discectomy, and fusion. Dr. Doberstein noted that appellant suffered from low back pain with radiation into her legs bilaterally, right greater than left, and opined that she was totally disabled from work.

On March 30, 2012 OWCP denied appellant's authorization request as the evidence was insufficient to authorize the proposed surgery.

Appellant underwent an unauthorized back surgery on May 15, 2012.

OWCP determined that a conflict in medical evidence arose between treating physician Dr. Doberstein and second opinion physician Dr. Olin regarding appellant's work restrictions and whether she was able to participate in vocational rehabilitation. It referred her to Dr. Francis Rockett, a Board-certified neurosurgeon, for an impartial medical evaluation. In reports dated August 28 and September 10, 2012, Dr. Rockett opined that appellant had reached maximum medical improvement as of August 7, 2012 and did not need spinal surgery. He advised that appellant was capable of part-time, sedentary work beginning at four hours per day and increasing to eight hours per day with the following restrictions: pushing, pulling, and lifting no more than two hours per day; no twisting, bending, or climbing.

On September 13, 2012 OWCP again referred appellant for vocational rehabilitation services. Appellant was sent a copy of the September 25, 2012 letter OWCP provided to Sue Chase, a certified rehabilitation and vocational counselor, which stated that appellant's

² OWCP previously referred appellant for vocational rehabilitation services on April 29, 2008 and June 13, 2011. On October 23, 2008 and August 8, 2011 it notified appellant that vocational rehabilitation services were closed due to her refusal to cooperate with the rehabilitation counselor.

cooperation and participation in vocational rehabilitation was compulsory under 5 U.S.C. § 8113(b).

In an October 18, 2012 status report, Ms. Chase informed OWCP that she called appellant on September 27, 2012 and scheduled an initial meeting for October 3, 2012. She met with appellant at her home on October 3, 2012 and again on October 18, 2012 for a follow-up meeting.

In a November 7, 2012 rehabilitation action report, Ms. Chase informed OWCP that appellant left a message at 11:45 a.m. on November 1, 2012 to cancel a meeting scheduled for 12:00 p.m. that same day. As Ms. Chase did not receive the message prior to leaving for this appointment, she went to appellant's home for the scheduled meeting. Appellant's husband reported that she was out picking up her children at preschool. Appellant arrived home 15 minutes later and stated that she needed to reschedule the meeting as she had tried to cancel because she was not feeling well. Thus, the meeting was rescheduled to November 9, 2012 at 11:30 a.m.

By letter dated November 9, 2012, OWCP informed appellant that it had been advised by her rehabilitation counselor that she had refused to meet with her on the scheduled appointment of "November 1, 2012."³ 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 November 11, 2012 Ms. Chase informed OWCP that she received a telephone message from appellant on November 9, 2012 to cancel a vocational rehabilitation meeting scheduled for that same day due to an illness.

On December 13, 2012 Ms. Chase informed OWCP that appellant reported that she had to cancel the last meeting on November 9, 2012 because she had a bad reaction to medication that she was taking. Appellant contacted Ms. Chase on November 30, 2012 to reschedule the meeting. A meeting was held at appellant's home on December 7, 2012. Ms. Chase provided appellant a copy of her transcript, which showed that she needed to enroll in four more courses to complete an Associate's Degree in General Studies. Appellant was registered to take a math class and an art class during the Spring semester. She planned to take a placement test in Spanish to enable her to place out of a foreign language and transfer to Rhode Island College in the Fall of 2013. Appellant stated that she was unable to complete a rough draft of her resume because her computer was not working and agreed to write her resume on paper prior to the meeting scheduled for December 19, 2012.

Appellant submitted a December 19, 2012 report from Dr. Doberstein who advised that she was status post L5-S1 laminectomy and fusion performed on May 15, 2012 and presented with persistent leg pain, as well as numbness and tingling into her legs and feet. Dr. Doberstein diagnosed lumbar stenosis and advised that appellant was out of work until March 1, 2013.

³ This date appears to have been a typographical error as the record indicates that the appointment was scheduled for November 9, 2012.

On January 9, 2013 vocational rehabilitation services were closed due to appellant's refusal to cooperate with the rehabilitation counselor.

By decision dated January 10, 2013, OWCP reduced appellant's compensation to zero effective February 10, 2013 under the provisions of 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519. It found that appellant failed to participate in vocational rehabilitation, which would permit OWCP to determine her wage-earning capacity. OWCP noted that appellant met with Ms. Chase on December 7, 2012, but failed to prepare a resume as directed and then canceled her appointment scheduled for December 19, 2012. On January 4, 2013 appellant presented Ms. Chase with a December 19, 2012 report from Dr. Doberstein and OWCP found that it provided no explanation with medical rationale for why she was unable to work or whether this disability was causally related to her accepted injuries. OWCP further 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.

On February 5, 2013 appellant, through counsel, requested an oral hearing before an OWCP hearing representative, arguing that she was cooperating with rehabilitation efforts.

In a January 13, 2013 report, Ms. Chase informed OWCP that she rescheduled a December 14, 2012 appointment with appellant to December 19, 2012 due to a scheduling conflict. On December 19, 2012 she received a telephone call from appellant asking to reschedule the meeting because she did not realize she had a doctor's appointment to attend. The meeting was rescheduled to January 4, 2013. On January 4, 2013 Ms. Chase attempted to meet with appellant. However, this meeting ended due to appellant providing a note from her treating physician, Dr. Doberstein, noting that she was unable to work until her next evaluation on March 1, 2013. Ms. Chase forwarded the out of work note to OWCP for review. OWCP found that Dr. Doberstein's report was insufficient to establish appellant's disability and closed her file for further vocational rehabilitation services.

An oral hearing was held before an OWCP hearing representative on June 13, 2013.

Appellant submitted reports dated March 26 and July 30, 2013 from Dr. Ann Munoz, a pain medicine specialist, Board-certified in pain medicine and anesthesiology, who diagnosed lumbosacral spondylosis, acute facet arthropathy, and acute sacroiliitis with marked muscle spasms. Dr. Munoz indicated that appellant visited the emergency room on July 13, 2013 where she was given Motrin and Valium. She found that the Motrin was helpful, but caused stomach upset, reflux, gastritis, and worsening abdominal pain. The Valium helped, but she did not like how it made her feel and wanted to avoid it if at all possible.

By decision dated September 6, 2013, an OWCP hearing representative affirmed the January 10, 2013 decision, finding that appellant did not cooperate with vocational rehabilitation or provide adequate reasons for her failure to cooperate. The hearing representative found that appellant failed to provide any probative evidence to support that she made a good faith effort to participate in rehabilitation services or that she was medically unable to participate in these services. She found that the December 19, 2012 report from Dr. Doberstein had no probative value as it failed to establish that appellant was unable to work and failed to address whether

appellant could continue to participate in the rehabilitation program. The hearing representative further found that appellant returned to school in January 2013, took four classes to obtain her Associate's Degree, and graduated in May 2013. Thus, she considered this further evidence to establish that appellant was not totally disabled from sedentary activities and could have continued to participate in the rehabilitation process.

On June 17, 2014 appellant, through counsel, requested reconsideration and submitted a September 13, 2013 report from Dr. Doberstein who indicated that it had been 18 months since her lumbar spinal fusion surgery and opined that she was "able to return to work in a light-duty capacity."

By decision dated August 19, 2014, OWCP denied modification of its prior decision.

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 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 provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.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 her wage-earning capacity had she undergone vocational rehabilitation.⁷ 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, interviews, testing, counseling, functional capacity evaluations, and work evaluations), it cannot determine what would have been the employee's wage-earning capacity.⁸ OWCP will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity reduce the employee's monetary compensation accordingly (that is, to zero).⁹

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

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

⁶ 20 C.F.R. § 10.519.

⁷ *Id.* at § 10.519(a).

⁸ *Id.* at § 10.519(b).

⁹ *Id.* at § 10.519(c).

The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.¹⁰

ANALYSIS

The Board finds that OWCP properly reduced appellant's compensation benefits to zero effective February 10, 2013 based on her refusal to undergo vocational rehabilitation as directed.

Appellant failed, without good cause, to participate in vocational rehabilitation efforts. Upon receiving medical evidence establishing that appellant was able to perform sedentary work with restrictions, OWCP properly referred her to vocational rehabilitation services. Appellant, however, refused to cooperate with this rehabilitation effort as documented in the record by her rehabilitation counselor. On January 13, 2013 Ms. Chase informed OWCP that she rescheduled a December 14, 2012 appointment with appellant to December 19, 2012 due to a scheduling conflict. On December 19, 2012 she received a telephone call from appellant asking to reschedule the meeting because she did not realize she had a doctor's appointment. The meeting was rescheduled to January 4, 2013.

On January 4, 2013 Ms. Chase attempted to meet with appellant. However, this meeting ended due to appellant providing a note from her treating physician, Dr. Doberstein, noting that she was unable to work until her next evaluation on March 1, 2013. 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.¹¹ However, appellant did not submit any probative medical evidence to establish her inability to participate in the January 4, 2013 vocational rehabilitation meeting.¹² Dr. Doberstein failed to provide a rationalized opinion explaining how appellant's medical condition restricted her from participating in vocational rehabilitation. Moreover, in his September 13, 2013 report, he indicated that it had been 18 months since appellant's lumbar spinal fusion surgery and opined that she was "able to return to work in a light-duty capacity." Thus, appellant did not establish good cause for her failure to participate in the January 4, 2013 appointment.¹³

The Board further finds that the reports from Dr. Munoz do not demonstrate good cause for appellant's failure to cooperate with vocational rehabilitation. In her reports, Dr. Munoz diagnosed lumbosacral spondylosis, acute facet arthropathy, and acute sacroiliitis with marked muscle spasms and indicated that appellant visited the emergency room on July 13, 2013 where she was given Motrin and Valium. Appellant found that the Motrin was helpful, but caused

¹⁰ *Id.*

¹¹ See *Carolyn M. Leek*, 47 ECAB 3745 (1996); *Linda M. McCormick*, 44 ECAB 958 (1993).

¹² See *J.W.*, 58 ECAB 419 (2007).

¹³ See *C.C.*, Docket No. 14-1042 (issued August 20, 2014) (where the employee informed the rehabilitation counselor that she would not attend a scheduled vocational rehabilitation interview due to fatigue and pain and requested that the interview be rescheduled, but failed to respond to the counselor's telephone messages or letters to reschedule the interview and did not submit any evidence to establish her attempts to reach the counselor to reschedule her appointment, the Board found that the claimant's contentions for failing to report to the scheduled vocational rehabilitation interview did not constitute good cause).

stomach upset, reflux, gastritis, and worsening abdominal pain. The Valium helped, but she did not like how it made her feel and wanted to avoid it if at all possible. The Board finds that Dr. Munoz's reports do not adequately explain how appellant's accepted conditions of sciatica and herniated lumbar disc required her to take medication and caused her inability to participate in vocational rehabilitation services.

The Board finds that appellant refused to participate in vocational rehabilitation without good cause. The vocational rehabilitation counselor's records demonstrate that appellant's actions or inaction, were obstructive and uncooperative. It was appellant's responsibility to fully engage in her vocational rehabilitation program, 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 meetings. Therefore, OWCP properly found that vocational training would probably have substantially increased her wage-earning capacity and properly reduced her compensation benefits to zero effective February 10, 2013 in accordance with what would have probably been her wage-earning capacity had she completed the program.

On appeal counsel contends that appellant underwent three unsuccessful back surgeries, which establishes that the reason for the failure of rehabilitation services was not due to noncooperation on the part of appellant but the effects of her employment injury. The Board finds, however, that OWCP authorized only one back surgery, which was a lumbar spine fusion performed on April 6, 2004. Subsequently, appellant agreed to engage in the vocational rehabilitation process. She requested authorization for a second back surgery, but this request was denied by OWCP on March 30, 2012 as the medical evidence submitted was insufficient to authorize the proposed treatment. Nevertheless, appellant underwent an unauthorized back surgery on May 15, 2012. She failed to submit sufficient evidence to establish that the reason she failed to cooperate with vocational rehabilitation was causally related to her authorized back surgery or her employment injury. The medical evidence of record fails to establish that appellant's accepted conditions or authorized surgical treatment prohibited her from participating in a vocational rehabilitation program. Thus, the Board finds that counsel's argument is not substantiated.

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 February 10, 2013, based on her refusal to undergo vocational rehabilitation as directed.

ORDER

IT IS HEREBY ORDERED THAT the August 19, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 5, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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