

ISSUE

The issue is whether OWCP properly reduced appellant's compensation effective December 10, 2014 under 5 U.S.C. § 8113(b) for failing to cooperate with vocational rehabilitation efforts.

On appeal counsel argues that the decision is contrary to fact and law.

FACTUAL HISTORY

On July 11, 1997 appellant, then a 47-year-old general clerk, filed an occupational disease claim (Form CA-2) alleging that on July 24, 1996 she first became aware that her bilateral thumb arthritis had been aggravated by her employment duties. OWCP accepted the claim for aggravation of bilateral thumb arthritis and aggravation of bilateral wrist arthritis.³ It placed appellant on the periodic rolls for temporary total disability effective April 10, 2011.⁴

On June 28, 2012 OWCP referred appellant to Dr. David K. Halley, a Board-certified orthopedic surgeon, for a second opinion evaluation as to whether appellant continued to have residuals from her accepted employment injuries and to determine her disability status. In a July 16, 2012 report, Dr. Halley opined that appellant no longer had any residuals or disability due to her accepted employment injuries and could return to work with no restrictions. He based this opinion on a review of the employment injury history, medical evidence, statement of accepted facts, and physical examination. Physical examination findings included 20 percent right hand pinch strength when compared with the left hand, equal grip strength for kilogram force, no sensory loss on light touch, no swelling of the thumbs, wrists, or fingers, no thenar atrophy, negative bilateral Phalen's test, negative bilateral squeeze test, and negative bilateral Tinel's sign. Dr. Halley opined that appellant's complaints were subjective as there was no supporting objective evidence of any residuals from the accepted aggravation of arthritis.

On August 30, 2012 OWCP received an April 24, 2012 attending physician's report (Form CA-20) from Dr. Joseph A. Ottaviano, a treating Board-certified family medicine physician, indicating that appellant continued to have residuals and disability from her accepted employment injuries. Dr. Ottaviano reported that she had severe osteoarthritis in the triscaple and first carpometatarsal joints which cause her to be disabled from performing repetitive work. He noted his disagreement with Dr. Halley's opinion that appellant's accepted conditions had resolved.

Dr. Ottaviano, in September 6, 2012 and March 20, 2013 reports, noted appellant's history of employment-related bilateral thumb and wrist arthritis. He noted that he concurred with the opinion of Dr. James H. Rutherford, a second opinion Board-certified orthopedic

³ OWCP assigned File No. xxxxxx485. On October 16, 2015 it combined File Nos. xxxxxx728 and xxxxxx103 with xxxxxx485 as the master File No. Under File No. xxxxxx103, OWCP accepted the claim for temporary aggravation of bilateral wrist arthritis which resolved effective May 10, 1994. It denied appellant's claim for aggravation of bilateral wrist arthritis under File No. xxxxxx728.

⁴ In a December 29, 2010 letter, the employing establishment notified OWCP that no work was available for appellant within her restrictions due to the National Reassessment Process.

surgeon, that her aggravation was permanent.⁵ Dr. Ottaviano indicated that he disagreed with Dr. Halley's opinion that appellant no longer had any residuals or disability due to her accepted employment conditions.

On February 28, 2013 OWCP referred appellant for participation in vocational rehabilitation services based on Dr. Halley's opinion. By letter dated April 7, 2013, appellant was referred to Georgia Boggs, a rehabilitation counselor, for development of a rehabilitation program. OWCP determined that there was a conflict in the medical opinion evidence and closed vocational rehabilitation efforts until resolution of the conflict. Ms. Boggs closed appellant's vocational rehabilitation file on April 17, 2013.

On June 13, 2013 OWCP referred appellant to Dr. Ralph G. Rohner, Jr., a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Drs. Halley and Ottaviano on the issues of whether appellant continued to have residuals from her accepted employment conditions and her work capability.

In a June 27, 2013 report, Dr. Rohner, based upon a review of the medical evidence, statement of accepted facts, and physical examination, noted accepted conditions of aggravation of bilateral carpometacarpal joint thumb arthritis and aggravation of bilateral wrist arthritis. He concluded that appellant continued to have residuals and disability from her accepted conditions. Dr. Rohner concurred with the restrictions set by Dr. Ottaviano, which included no repetitive motion use of her thumbs.

On March 17, 2014 OWCP referred appellant for vocational rehabilitation services. It informed the vocational rehabilitation counselor, Gordon McNamee, that Dr. Rohner's opinion represented the weight of medical evidence with respect to her ability to work.

On a March 22, 2014 Rehabilitation Action Form (Form OWCP-44), Mr. McNamee provided details regarding appellant's response to his telephone contact. He contacted appellant on March 17, 2014 by telephone, she stated that she would not talk to him as she did not know who he was. Appellant also requested to be called the following morning at 8:00 a.m., at that time she requested to be contacted only in written communication and not by the telephone. Mr. McNamee sent her a letter introducing himself on March 18, 2014 which was followed up by text messages on March 18, 2014 and telephone calls on March 20, 21, and 22, 2014. Messages were left on her answering machine on March 20, 21, and 22, 2014 as appellant did not answer his repeated telephone calls. Mr. McNamee noted that he informed appellant that if she did not respond by March 22, 2014 he would inform OWCP of her lack of cooperation and that her benefits would be affected.

By letter dated March 27, 2014, an OWCP claims examiner advised appellant that section 8113(b) of FECA provided that, if an individual, without good cause, fails to apply for and undergo vocational rehabilitation when so directed, and OWCP 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

⁵ Dr. Rutherford, in a January 7, 1998 report, diagnosed bilateral thumb arthritis and aggravation of bilateral wrist arthritis. He opined that the aggravation by appellant's repetitive work duties was permanent.

individual's wage-earning capacity had he not failed to apply for and undergo vocational rehabilitation. The claims examiner further noted:

“Also, [s]ection 10.519 of Title 20 of the Code of Federal Regulations provide that if an individual without good cause fails or refuses to participate in the essential preparatory efforts as described above, OWCP will assume, in the absence of evidence to the contrary, that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity, and compensation will be reduced accordingly. In effect, this will result in a reduction of compensation to zero.”

In a May 16, 2014 letter addressed to Mr. McNamee, appellant summarized statements she believed that he made during a May 7, 2014 conversation.

On a May 19, 2014 Form OWCP-44, Mr. McNamee reported that appellant had obstructed vocational rehabilitation by failing to appear at scheduled meetings and failing to carry out agreed actions. He reported that her May 16, 2014 letter requested all communication be written and was unresponsive to his telephone calls. Appellant did attend a scheduled vocational evaluation on May 12, 2014, which Mr. McNamee noted still required his review. Mr. McNamee reported that he sent her a letter dated May 19, 2014 informing her that her request for written communication was unacceptable and that they needed to meet to discuss vocational goals and select job titles to get her job search started.

By letter dated May 21, 2014, OWCP directed appellant to make a good faith effort to participate in the rehabilitation effort within 30 days or, if she believed that she had good cause for not participating in the effort, to provide reasons and supporting evidence of such good cause within 30 days. It indicated that if these instructions were not followed within 30 days action would be taken to reduce her compensation.

On a June 11, 2014 Form OWCP-44, Mr. McNamee reported that appellant had obstructed vocational rehabilitation by failing to appear at scheduled meetings and failing to carry out agreed actions. He reported a meeting was scheduled for June 12, 2014, which she rescheduled to June 17, 2014.

Mr. McNamee, in a July 14, 2014 Form OWCP-44, reported that appellant had obstructed vocational rehabilitation by failing to appear at scheduled meetings and failing to carry out agreed actions. He reported that she changed her mind regarding two selected job titles which had been verbally agreed upon and she refused to sign her vocational rehabilitation plan.

By letter dated July 15, 2014, OWCP again directed appellant to make a good faith effort to participate in the rehabilitation effort within 30 days or, if she believed that she had good cause for not participating in the effort, to provide reasons and supporting evidence of such good cause within 30 days. It indicated that if these instructions were not followed within 30 days action would be taken to reduce her compensation.

In an August 7, 2014 letter, Mr. McNamee advised appellant that she was required to work with him to develop an employment plan, meet with him, and discuss goals and needs.

Next, he noted that he left messages for her on August 6 and 7, 2014 asking her to call him and requesting that she call him.

On August 14, 2014 appellant called and informed OWCP that she had returned to part-time work on August 12, 2014.

On September 15, 2014 appellant filed a claim for wage-loss compensation for intermittent wage loss from August 12 to September 10, 2014.

By letter dated October 8, 2014, OWCP noted that the employing establishment indicated that appellant had not returned to work at the employing establishment. It requested that she provide pay stubs from her new employing establishment to verify dates of employment and her earnings.

Mr. McNamee, in an October 23, 2014 Form OWCP-44, reported that appellant had obstructed vocational rehabilitation by failing to appear at scheduled meetings and failing to carry out agreed actions. He noted that she has not replied by telephone or in writing to his request for confirmation of her employment.

By letter dated October 24, 2014, OWCP again advised appellant of its determination that she had obstructed vocational rehabilitation efforts. It reiterated instructions from prior letters sent regarding her obstruction of mandatory vocational rehabilitation services. Appellant was again provided with 30 days to make a good effort to participate in vocational rehabilitation with Mr. McNamee.

Subsequently, OWCP received a letter from appellant's counsel stating that she had returned to two part-time jobs on August 12, 2014. In the October 24, 2014 letter, received by October 29, 2014, appellant detailed her employment and pay rates, with appropriate pay stubs, for HR Imaging Partners, Inc. and Delaware County Center YMCA. On October 30 and December 9, 2014 she submitted additional pay stubs to OWCP from HR Imaging Partners and the YMCA.

By decision dated December 10, 2014, OWCP reduced appellant's compensation to zero under 5 U.S.C. § 8113(b) as her failure to undergo essential preparatory rehabilitation efforts did not allow OWCP to determine what her wage-earning capacity would have been if she had undergone testing and rehabilitation. It further found that she had been advised by letter dated October 24, 2014 that she was to make a good faith effort to participate in vocational rehabilitation, but she did not respond to the letter. Therefore, appellant had not shown good cause for noncompliance.

On December 16, 2014 appellant requested an oral hearing before an OWCP hearing representative, which her counsel changed to a request for a telephonic hearing by letter dated January 7, 2015. A telephonic hearing was held on September 16, 2015. Appellant testified that she returned to seasonal part-time work in July 2014 with HR Imaging Partners Inc. as a photo assistant and started working part time for the YMCA on September 6, 2014.

Subsequent to the hearing appellant submitted evidence covering the period 1993 to 2007 and the assignment to a different vocational rehabilitation counselor in 2013. She detailed the errors she believed were made in her case.

By decision dated December 1, 2015, the hearing representative affirmed the December 10, 2014 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.⁶ Section 8113(b) of FECA provides that if an individual, without good cause, fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of FECA, OWCP, 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.⁷

Section 10.519 of OWCP's regulations provides:

"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--

(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, interviews, testing, counseling, functional capacity evaluations [(FCE)], 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 until such time as the employee acts in good faith to comply with the direction of OWCP."⁸

OWCP procedures provide that specific instances of noncooperation during the early stages of vocational rehabilitation include a failure to appear for the initial interview, counseling sessions, an FCE, other interviews conducted by the rehabilitation counselor, vocational testing

⁶ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁷ 5 U.S.C. § 8113(b).

⁸ 20 C.F.R. § 10.519.

sessions and work evaluations, as well as lack of response or inappropriate response to directions in a testing session after several attempts at instruction.⁹

OWCP's procedures provide that a case which has been referred for vocational rehabilitation can be closed if the injured worker has successfully returned to work or will return to work shortly without benefit of rehabilitation intervention; or if the injured worker is not able to work four hours per day and there is no possibility of improvement.¹⁰

ANALYSIS

OWCP accepted the claim for aggravation of bilateral thumb arthritis and aggravation of bilateral wrist arthritis. Appellant was properly referred to Dr. Rohner to resolve the conflict in the medical opinion evidence between Drs. Halley and Ottaviano on the issue of whether she continued to have residuals and disability due to her accepted conditions. On March 6, 2014 OWCP referred appellant to vocational rehabilitation services based on Dr. Rohner's impartial medical examination who opined that she continued to experience employment-related residuals and disability and could work with restrictions. By decision dated December 10, 2014, it reduced appellant's compensation under 5 U.S.C. § 8113(b) to zero for failing to show good faith in participating with the early and necessary stages of vocational rehabilitation services as directed. In a December 1, 2015 decision, an OWCP hearing representative affirmed its December 10, 2014 decision adjusting appellant's compensation effective October 19, 2014.

The Board finds that OWCP improperly reduced appellant's compensation effective December 10, 2014 as it did not consider that she had found employment.

While the record does reflect that appellant was not entirely compliant with her vocational counselor's efforts to initiate vocational rehabilitation, the statute does provide that she can claim good cause for failure to participate in vocational rehabilitation. The December 10, 2014 decision to reduce appellant's compensation benefits found that she had not established good cause for not complying with vocational rehabilitation because she had not responded to OWCP's October 24, 2014 letter. However, appellant did respond to the October 24, 2014 letter, by letter dated October 23, 2014, received by OWCP on October 29, 2014 and with follow-up pay information received by OWCP on October 30, 2014 and December 9, 2014 indicating that she returned to work in two part-time jobs within her physician-imposed restrictions. OWCP did not evaluate or make findings as to whether this information constituted good cause.

OWCP's procedures state that once a claimant finds employment with the previous employer, or a new employing establishment, the vocational rehabilitation effort moves to "Employed" status.¹¹ As noted above, OWCP's procedures state that OWCP can close a case where there has been referral for vocational rehabilitation if the employee successfully finds

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.17(b) (February 2011); see *Sam S. Wright*, 56 ECAB 358 (2005).

¹⁰ *Id.* at Part 8 -- Referrals for Rehabilitation, *Referral Outcome*, Chapter 8.200.7(a) (November 2013).

¹¹ *Supra* note 8 at Chapter 2.813.11 (February 2011).

work without rehabilitation assistance.¹² OWCP's procedures also provide that, if a question remains as to whether employment obtained by a claimant during the vocational rehabilitation process fairly and reasonably represents wage-earning capacity, OWCP can confer the issue with the claimant.¹³ On August 14, 2014 appellant called and advised OWCP that she had returned to part-time work with two employing establishments on August 12, 2014. She subsequently submitted evidence regarding her hourly pay rate and pay stubs for the two employers, HR Imaging Partners, Inc. and Delaware County Center YMCA.

OWCP failed to follow its procedures once the appellant informed OWCP that she had returned to work and did not determine whether she had established good cause for failure to cooperate with vocational rehabilitation efforts. The Board finds that OWCP failed to meet its burden proof to reduce her monetary compensation to zero.

CONCLUSION

The Board finds that OWCP improperly reduced appellant's compensation to zero effective December 10, 2014 under 5 U.S.C. § 8113(b) for failing to cooperate with vocational rehabilitation efforts.

¹² *Supra* note 9.

¹³ *Supra* note 8, *Vocational Rehabilitation Services*, Chapter 2.813.14(d)(7) (February 2011).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 1, 2015 is reversed.

Issued: August 8, 2016
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board