

employment on January 14, 2008. Appellant stopped work on January 14, 2008 and returned on January 17, 2008. OWCP accepted her claim for aggravation of bilateral carpal tunnel syndrome, bilateral de Quervain's syndrome, and bilateral hand arthritis.

Appellant underwent authorized carpal tunnel surgery and incision of the tendon sheath on May 4, 2009. She stopped work and received wage-loss compensation benefits. On September 18, 2009 OWCP placed appellant on the periodic rolls.

On October 6, 2010 OWCP referred appellant for vocational rehabilitation services.

OWCP informed the rehabilitation counselor on December 29, 2010 that a functional capacity evaluation (FCE) was necessary in order to determine appellant's work capacity. In a letter also dated December 29, 2010, it informed her that she was expected to cooperate fully with her rehabilitation counselor in an effort to return to work.

On April 18, 2011 appellant underwent right carpal tunnel release surgery.

On June 15, 2011 the rehabilitation counselor determined that due to appellant's current level of disability her vocational rehabilitation case would be closed.

Appellant continued to receive treatment from Dr. I. Grant Orlin, a Board-certified family practitioner, for complaints of numbness in the left thumb and in the right wrist. In reports dated October 24, 2011 to October 9, 2012, Dr. Orlin observed slight tenderness over the first dorsal extensor compartment and pain on full dorsi and volar flexion. He reported positive Tinel's sign on the left and right. Dr. Orlin diagnosed status post left carpal tunnel release, status post left de Quervain's release, and bilateral arthritis of the hands. He authorized appellant to work modified duty with restrictions of lifting no more than five pounds bilaterally.

Appellant also received treatment from Dr. Charles Herring, a Board-certified orthopedic surgeon. In reports dated November 17, 2011 to April 26, 2012, Dr. Herring observed positive Tinel's sign of the right wrist and hypersensitivity over the incision site of the right wrist. He reported mild Tinel's sign, carpal tunnel compression, and Phalen's tests of the left wrist. Dr. Herring diagnosed bilateral carpal tunnel syndrome and status post right and left carpal tunnel release. He noted that appellant continued to be symptomatic primarily in the right hand. Dr. Herring opined that she could work with restrictions.

By letter dated April 13, 2015, OWCP informed appellant that she had been referred for a second opinion evaluation with Dr. Gary J. La Tourette, a Board-certified orthopedic surgeon, to determine the extent of her work-related condition. In questions to Dr. La Tourette, dated April 13, 2015, OWCP asked that he address the physical demand/strength levels at which appellant was currently able to work or participate in vocational rehabilitation, describe her physical limitations and restrictions, and complete a work capacity evaluation form (Form OWCP 5c).

On April 13, 2015 appellant resumed vocational rehabilitation services.

OWCP informed the rehabilitation counselor on April 17, 2015 that a FCE was necessary in order to determine appellant's current work capacity. In a letter dated April 17, 2015, it

informed her that she was expected to cooperate fully with her rehabilitation counselor in an effort to return to work.

On April 20, 2015 Marcia Brier, the rehabilitation counselor, notified appellant that an FCE was scheduled for May 6, 2015 at 10:00 a.m. Appellant rescheduled her FCE to May 4, 2015.

Appellant attended the scheduled evaluation on May 4, 2015. In a May 11, 2015 report, Doug Ellis, a physical therapist, noted that the FCE was unreliable and invalid. He explained that there were inconsistencies in appellant's performance and that he observed self-limiting pain behavior. Mr. Ellis reported that any permanent work restrictions should be based upon objective findings only. He also noted that, for a variety of reasons, the results of the current testing were less than what would be required for a safe return to work. Mr. Ellis observed that appellant could not complete the activity of lifting 10 pounds from floor to shoulder height. He reported that lifting activities were discontinued due to increased symptoms, but he pointed out that there were no signs of any observed breakdown of her body mechanics or any other noted signs of a maximum effort other than using a decreased speed of motion. Mr. Ellis also observed that appellant did not produce the minimally expected elevation of heart rate of over 10 percent with the static push and pull tests and lifting activities. He explained that these findings would be indications of a probable less than maximum effort.

On May 12, 2015 the rehabilitation counselor noted in a rehabilitation action report that appellant obstructed the rehabilitation process because the May 4, 2015 FCE was determined to be unreliable and invalid.

In a letter dated May 12, 2015, an OWCP claims examiner informed appellant that her failure to cooperate during the FCE constituted a refusal to undergo vocational rehabilitation. It notified her that 5 U.S.C. § 8113(b) provides 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 FCE 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, providing 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 vocational 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 May 13, 2015 Ms. Brier notified appellant that a second FCE had been scheduled for May 27, 2015 at 12:30 p.m. with the same physical therapist, Mr. Ellis, who had conducted the first FCE on May 4, 2015.

In a May 27, 2015 report, Mr. Ellis noted that he went over the results of the previous evaluation and explained the importance of appellant's full participation with all testing

activities. He advised her that she could stop a test or procedure if she felt this was necessary due to increased symptoms, level of endurance, or difficulty performing the activity. Upon examination, Mr. Ellis observed no atrophy of appellant's upper extremities. He also reported no swelling or increased skin temperature or discoloration of her wrists and hands. Mr. Ellis related that appellant demonstrated no difficulty with the handling and fingering of small objects other than using a decreased speed of motion. Appellant also demonstrated no difficulty with sitting, standing, or walking. Mr. Ellis also provided test results for grip strength, noting inconsistent results between the various tests. He noted that appellant stopped with various activities, such as lifting and carrying tests, due to reports of increased symptoms, but he did not observe any breakdown of her body mechanics or other signs of maximum effort. Mr. Ellis explained that there was not the expected elevation of heart rate of over 10 percent even though she claimed that the object was heavy and that she was experiencing increased symptoms, which indicated a probable less than maximum effort. He concluded that "there does exist the probability of a less than maximum effort" and again found the FCE unreliable and invalid.

Appellant was examined again by Dr. Orlin and in a May 15, 2015 report, he noted that she continued to have discomfort over the first dorsal extensor compartment bilaterally as well as numbness and tingling in both hands. Upon examination, Dr. Orlin observed residual tenderness over the dorsum of the bilateral wrists and tenderness over the first dorsal extensor compartments bilaterally, right greater than left. Tinel's sign was positive bilaterally. Dr. Orlin diagnosed status post left carpal tunnel release and left de Quervain's release, bilateral de Quervain's syndrome, and bilateral arthritis of the hands. He authorized appellant to return to modified duty.

On June 11, 2015 appellant informed OWCP *via* telephone that she disputed the finding by Mr. Ellis and claimed that she had put forth effort during the May 27, 2015 evaluation. She was informed to discuss what occurred during the May 27, 2015 FCE with her rehabilitation counselor.

OWCP advised appellant on June 16, 2015 to put her concerns about the FCE in writing and submit them to OWCP for review. Two days later, in a decision dated June 18, 2015, it reduced her compensation, effective that day, to zero under section 8113(b) of FECA and 20 C.F.R. § 10.519. OWCP found that appellant had failed to participate as required with vocational rehabilitation efforts and that she did not show good cause for failing to fully comply.

LEGAL PRECEDENT

FECA provides that the Secretary of Labor may direct a permanently disabled individual whose disability is compensable to undergo vocational rehabilitation.² According to 5 U.S.C. § 8113(b) if an individual, without good cause, fails to apply for and undergo vocational rehabilitation when so directed under 5 U.S.C. § 8104, OWCP may, after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, reduce prospectively the monetary compensation of the individual. The reduction of compensation is performed in accordance with what would probably have been his

² *Id.* at § 8104(a).

or her wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction to undergo vocational rehabilitation. It is OWCP's burden of proof with respect to any reduction of compensation, including the reduction of compensation pursuant to 5 U.S.C. § 8113(b).³

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, [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."⁴

OWCP procedures provide that specific instances of noncooperation include a failure to appear for the initial interview, counselling sessions, a FCE, 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. Its procedures recognize that specific instances of noncooperation include a failure to appear for a FEC, as well as lack of response or inappropriate response to directions in a testing session after several attempts at instruction.⁵

ANALYSIS

The Board finds that OWCP improperly reduced appellant's compensation to zero for failing, without good cause, to participate in the vocational rehabilitation efforts.

OWCP accepted that appellant sustained a temporary aggravation of bilateral carpal tunnel syndrome, bilateral de Quervain's syndrome, and bilateral hand arthritis as a result of her employment duties as a mail clerk. Appellant stopped work and was placed on the periodic rolls.

³ See *D.A.*, Docket No. 14-375 (issued May 28, 2014).

⁴ 20 C.F.R. § 10.519.

⁵ *Id.*

On April 13, 2015 OWCP referred appellant for a second opinion evaluation to determine her work restrictions and to vocational rehabilitation to develop a vocational plan to assist her in returning to gainful employment within her medical limitations. As part of the vocational rehabilitation process appellant was directed to attend and fully participate in an FCE on May 4, 2015. Although she attended the examination, the evaluator's report reflected that she provided inconsistent responses and failed to demonstrate maximum effort. The evaluator concluded that the evaluation was unreliable and invalid.

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 second FCE scheduled for May 27, 2015. The second FCE was scheduled with the same physical therapist who had conducted the first FCE and who had found her effort was less than maximum. Appellant attended the evaluation, but the evaluator, Mr. Ellis, again reported that he was unable to accurately assess her full work capacity due to inconsistencies in her test responses and probable less than maximum effort. The evaluator reported that the second FCE was also unreliable and invalid.

The Board finds, however, that the FCE report of May 27, 2015 is of limited probative value because it is speculative and inconsistent. Mr. Ellis specifically noted that he had discussed the results of the prior test with appellant prior to the May 27, 2015 examination and had advised her that she could stop any test if she had increased symptoms, lacked endurance, or could not complete the activity. He then reported the activities that appellant could perform, such as fingering small objects, sitting, walking, and standing, and those that she could not perform, such as lifting, but with reports of increased symptoms. Mr. Ellis had instructed her to report increased symptoms or to stop any test if she could not complete the activity, however, when she did stop performing an activity due to increased symptoms, he determined that was invalid because he did not notice signs of maximum effort, such as a breakdown of body mechanics or elevation of her heart rate. Based on this, he concluded that there was a "probability" that appellant's test results were invalid. The Board notes that Mr. Ellis offered no opinion regarding appellant's ability to perform work activities given the tests she was able to perform which would have provided guidance to the vocational rehabilitation counselor of her actual work ability for certain tasks. The Board finds that the May 27, 2015 FCE report was internally inconsistent and speculative in nature. It is therefore of limited probative value.

The Board further finds that the second FCE result dated May 27, 2015 is also of diminished probative value as to appellant's ability to perform employment duties. It was scheduled with the same physical therapist, Mr. Ellis, who had conducted the previous FCE. Although OWCP procedures do not require that a second FCE be conducted with one not already affiliated with the case, in such circumstances the physical therapist could have a predisposition for a particular result. The Board notes that the second FCE is virtually identical to the first one in both format and results, and remains internally inconsistent, subject to predisposition, and speculative in nature. As such, the Board finds that it, too, is of limited probative value. To avoid the appearance of a predisposition for any result and to obtain a fair and impartial

reporting, the second FCE should have been scheduled with an independent physical therapist or other medical professional not already affiliated with the case to perform the second FCE.⁶

The Board therefore finds that OWCP improperly reduced appellant's compensation benefits to zero, for failure to cooperate in vocational rehabilitation, based upon the FCE report which was of limited probative value without scheduling a second, independent FCE.

CONCLUSION

The Board finds that OWCP improperly reduced appellant's compensation to zero pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 for failing to cooperate with vocational rehabilitation efforts.

ORDER

IT IS HEREBY ORDERED THAT the June 18, 2015 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 3, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁶ See *E.S.*, Docket No. 12-467 (issued August 8, 2012) (a second, independent physical therapist was scheduled to perform an FCE after an initial physical therapist reported that appellant provided inconsistent responses and failed to otherwise comply with the FCE testing).