

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

M.K., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Miami, FL, Employer**

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**Docket No. 16-1676
Issued: February 16, 2017**

Appearances:
Stephanie Leet, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 15, 2016 appellant, through counsel, filed a timely appeal from a February 18, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 for failure to participate in vocational rehabilitation.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 7, 1992 appellant, then a 36-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that she sustained injuries in a motor vehicle accident on June 22, 1992.³ The claim was accepted for multiple head injuries, skull fracture, concussion, lumbar sprain, cervical sprain, focal motor seizure, right elbow contusion, vertigo, anxiety, permanent aggravation of lumbar disc disease, lumbar disc displacement, and permanent aggravation of cervical disc disease. Appellant was placed on the periodic compensation rolls. She returned to light duty as a clerical worker at four hours per day, on September 7, 1994. The employing establishment withdrew this position on October 1, 2006 and the claimant began receiving compensation for temporary total disability.

In an attempt to determine appellant's capacity for work, OWCP referred her for a second opinion examination with Dr. Brad Cohen, a Board-certified orthopedic surgeon. In a report dated February 20, 2012, Dr. Cohen provided a history and results on examination. He indicated that appellant was scheduled for a functional capacity evaluation (FCE). In a March 27, 2012 report, Dr. Cohen indicated that he had reviewed a March 14, 2012 FCE report. He opined that appellant was currently performing at a sedentary physical demand level. Dr. Cohen reported that she was able to sit continuously, frequently walk, stand and alternate sit/stand, occasionally able to reach above shoulder, and all with five pounds lifting. He also opined that there was no objective evidence of disability or residuals from the employment injuries.

By decision dated June 5, 2012, OWCP terminated appellant's wage-loss compensation. It found that the medical opinion of Dr. Cohen represented the weight of the medical evidence. Appellant, through counsel, requested a hearing before an OWCP hearing representative on June 14, 2012. A hearing was held on November 7, 2012.

In a decision dated January 29, 2013, OWCP's hearing representative set aside the termination decision. The hearing representative indicated that the statement of accepted facts (SOAF) failed to document that appellant had a 1991 injury accepted for a herniated disc. The case was remanded for further development.

OWCP prepared a new SOAF and referred appellant to Dr. Gilbert Beauperthuy-Rojas, an osteopath. In a report dated April 5, 2013, Dr. Beauperthuy-Rojas provided a history and results on examination. He indicated that appellant continued to have employment-related residuals, but could return to the light-duty job she held until 2006. Dr. Beauperthuy-Rojas completed an OWCP-5c report and provided restrictions of sitting for eight hours, with a 10-pound lifting restriction, and one hour of walking and standing.⁴

³ Appellant also had a claim accepted for herniated disc on August 5, 1991 when she was closing a door to her vehicle. This claim has been administratively combined with the current claim.

⁴ Dr. Beauperthuy-Rojas indicated that appellant could operate a motor vehicle at work, but also indicated that she was unable to operate a motor vehicle to and from work. A rehabilitation counselor requested clarification, and Dr. Beauperthuy-Rojas indicated that she could operate a motor vehicle to and from work.

Appellant submitted a January 24, 2014 report from Dr. Randall Blinn, an orthopedic surgeon. Dr. Blinn indicated that she had right shoulder pain, and that it was causally related to employment. He felt that appellant was not capable of working, although cervical and lumbar injuries were beyond the scope of his practice. Dr. Blinn completed a Form CA-17, duty status report, dated January 24, 2014 which provided that she was unable to work.

A vocational rehabilitation counselor completed a report dated February 6, 2014. She indicated that the vocational goal was to prepare appellant for a position as a receptionist or appointment clerk. A labor market survey for the position of receptionist, *Dictionary of Occupational Titles* No. 237.367.038 was provided. The position was a sedentary position with a 10-pound lifting requirement. The weekly wage was \$360.00. The rehabilitation counselor recommended a training program at a local training center. An OWCP rehabilitation specialist acknowledged in an April 24, 2014 note that the training program was 17 weeks, and confirmed the projected earnings as a receptionist of \$360.00 per week.

Appellant submitted a March 5, 2014 letter asserting that Dr. Blinn's January 24, 2014 report had indicated that she should not work, and this included school. According to her, it was difficult to be on a computer for any length of time as it caused neck pain and headaches.

A March 12, 2014 rehabilitation counselor report indicated that appellant was to begin the four-hour a day training class on March 12, 2014. The report indicated that on March 11, 2014 she had been advised that OWCP found the weight of the medical evidence rested with Dr. Beauperthuy-Rojas, and appellant should contact OWCP's claims examiner regarding additional medical evidence. According to the report, appellant did attend class on March 12, 2014. A school transcript indicated that she was absent March 21, 2014, but otherwise attended class at four hours per day through March 31, 2014. An April 2014 transcript indicated that appellant did not attend class the week of April 7 to 14, 2014.

In a report dated March 21, 2014, Dr. Amar Rajadhyaksha, a Board-certified orthopedic surgeon, provided a history and results on examination. He indicated that he did not have prior medical records and deferred to prior physicians as to work restrictions based on the prior FCE.

A June 9, 2014 rehabilitation counselor report noted that, on May 23, 2014, the school where appellant was taking the training class had indicated that she was two credits behind and had been absent May 2, 9, 22, and 23. According to the school, appellant was a good student, but had requested to reduce her schedule. A June 5, 2014 note indicated that she had reported that she was in a lot of pain during training and she could not attend 20 hours per week. The counselor also referenced a report from a Dr. Marilyn Marcus, an osteopath, writing that appellant could not attend training from June 9 to 13, 2014 due to neck pain.

By letter to appellant dated June 13, 2014, OWCP noted that it had been advised that she was refusing to cooperate with vocational rehabilitation. It explained that the medical evidence did not show a worsening of her cervical degenerative disc disease or clinical findings to support disability for attending school. OWCP advised appellant of the provisions of 5 U.S.C. § 8113(b) and directed her to undergo the approved training program. If appellant believed that she could not continue participation, she should submit her reasons and supporting documentation within 30 days.

On June 17, 2014 appellant submitted a June 13, 2014 report from Dr. Ramon Berenguer, who provided a history and results on examination. Dr. Berenguer diagnosed cervical and lumbar degenerative disc disease, cervical and lumbar disc herniations, and cervical radiculopathy. He opined that the computer training “will probably aggravate [appellant’s] cervical condition given the constant positioning required.” Dr. Berenguer wrote that the “training and job” were not ideal for appellant due to her physical state and she would have tests to determine her current status. He also submitted a June 13, 2014 note that her absence should be excused as she would be undergoing diagnostic testing from June 16 to 20, 2014.

Appellant submitted a June 24, 2014 report from Dr. Richard Blecha, a Board-certified orthopedic surgeon. Dr. Blecha provided a history and results on examination. He indicated that appellant complained of neck pain when she kept her head in marked flexion for 10 or 15 minutes. Dr. Blecha wrote that appellant was unable to sit and keep her neck flexed, or stay in a sitting position. He recommended that she stay out of work and begin physical therapy. Appellant also submitted a June 30, 2014 “thoracic outlet syndrome evaluation” from Dr. Blecha, who reported an abnormal study suggesting anterior scalene muscles involved in a partial inconstant entrapment of neurological structures. In a July 1, 2014 nerve conduction velocity report, Dr. Sonya Tolgyesi, a Board-certified neurologist, reported an abnormal study of the upper extremities. Dr. Tolgyesi wrote that findings were consistent with double crush syndrome involving C8-T1 radiculopathy and right carpal tunnel syndrome.

The rehabilitation counselor wrote, in a July 22, 2014 report, that appellant had not returned to the training class since June 5, 2014. The counselor opined that students are allowed to change position as much as needed.

By decision dated July 28, 2014, OWCP found that appellant had failed, without good cause, to undergo vocational rehabilitation as directed. It reduced her compensation to reflect wage-earning capacity of \$360.00 per week as a receptionist.

Appellant requested a hearing before an OWCP hearing representative on August 19, 2014. A hearing was held on March 16, 2015. At the hearing appellant discussed the training class and asserted that she had to perform reaching activities, including typing, writing, and reading. She indicated that she also had to stoop and bend. Appellant reported that, on May 21, 2014, her neck was hurting at the training class and as she stood up from her chair, she slipped back into the chair and jarred her back. She indicated that she completed a recurrence of disability claim form (Form CA-2a).⁵

With respect to medical evidence, appellant submitted a March 12, 2015 report from Dr. Jan Hommen, an orthopedic surgeon. Dr. Hommen provided a history of the 1992 injury and results on examination. He diagnosed C5-6 degenerative disc disease, “lumbago-L4 compression fracture May 2014.” In a report dated June 10, 2015, Dr. Hommen opined that appellant’s cervical and lumbar conditions were exacerbated by a work-related injury in 2014, but he could not comment on the 1992 injury given the time elapsed.

⁵ The record contains a CA-2a, claim for recurrence of disability, dated September 15, 2014 with May 20, 2014 as the date of recurrence.

By decision dated June 22, 2015, the hearing representative affirmed the July 28, 2014 decision. The hearing representative found that appellant had missed classes and failed to respond to telephone calls from the rehabilitation counselor. In addition, the hearing representative found that the receptionist position was medically and vocationally suitable.

Appellant, through counsel, requested reconsideration on December 3, 2015. Counsel argued that the report from Dr. Beaupertuy-Rojas should be disregarded or, if given probative value, a conflict in the medical evidence should be found. Appellant resubmitted medical evidence.

By decision dated February 18, 2016, OWCP reviewed the merits of the claim and denied modification. It found that the evidence was insufficient to warrant modification of the decisions reducing appellant's compensation for failure to participate in vocational rehabilitation.

LEGAL PRECEDENT

5 U.S.C. § 8113(b) provides:

“If an individual without good cause fails to apply for an 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.”

Section 10.519 of the implementing regulations of 5 U.S.C. § 8113(b), 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--

- (a) 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. OWCP will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with OWCP nurse and the [employing establishment]. The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.”

OWCP's procedure state:

“Refusing or Impeding Training: Specific instances of noncooperation during this phase of vocational rehabilitation include: failure to attend classes; failure to

apply appropriate effort to succeed in such classes; failure to maintain a ‘C’ average; and failure to undergo training after a training program has been approved. If the claimant refuses or impedes rehabilitation training, the CE [claims examiner] shall notify the injured worker, in writing, of the provisions of 5 U.S.C. § 8113(b) and direct the injured worker to apply for, participate in, or resume participation in the training program. The letter should advise the injured worker to comply or provide a written explanation of [her] failure to comply within 30 days, or the provisions of 5 U.S.C. § 8113(b) will be applied and benefits will be reduced based on the jobs targeted in the approved training plan.”⁶

ANALYSIS

Appellant was directed to undergo a 17-week computer training class as vocational rehabilitation. She began attending the class in March 2014, but had stopped by June 5, 2014 and did not finish the class.

The initial issue is whether appellant failure to continue was without good cause. She has argued that she was physically unable to continue the computer training class. However, the Board has held that a physician must provide a rationalized opinion, supported by specific findings, clearly showing that a claimant was disabled from all activity or that his or her medical condition prevented participation in vocational rehabilitation efforts, including attending classes or taking tests.⁷

The Board finds that the evidence of record does not establish that appellant’s failure to continue the training class was medically warranted. Dr. Blinn submitted a report prior to the start of the training class on January 24, 2014. He briefly opined that appellant could not “work,” but referred generally to right shoulder pain and acknowledged he did not treat cervical and lumbar injuries.

Appellant referred to an incident on May 21, 2014 while attending the training class, but she provided little detail regarding the alleged incident and no contemporaneous medical evidence. Dr. Hommen reports in his March 12, 2015 report that she sustained an L4 compression fracture in May 2014, without providing any description of the alleged incident, a medical history, or other explanation. As well, the June 10, 2015 report does not provide any additional detail.

Dr. Berenguer’s June 13, 2014 report referred to computer training, but opined only that it would “probably” aggravate appellant’s condition given the “constant positioning required.” Medical opinions that are speculative and not supported by medical rationale are generally of

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.17(c) (February 2011).

⁷ See *D.A.*, Docket No. 11-0871 (issued January 27, 2012); see also *C.P.*, Docket No. 15-0781 (issued April 5, 2016).

diminished probative value.⁸ The Board notes that the rehabilitation counselor clearly indicated that appellant could get up as needed and change positions if necessary in the training class. Dr. Berenguer's June 13, 2014 report does not establish that she was unable to attend the computer training class.

Dr. Blecha provided a report dated June 24, 2014, opining that appellant was unable to sit and keep her neck flexed or stay in a sitting position. He does not refer to the training class or otherwise provide a rationalized medical opinion. As noted, the record does not establish that the training class required appellant to keep her neck flexed. In addition, Dr. Blecha provides no medical rationale to explain why he felt that she was unable to work in a seated position. The record contains a June 30, 2014 thoracic outlet syndrome evaluation, but thoracic outlet syndrome was not an accepted condition and no additional explanation is provided.

The Board accordingly finds that OWCP properly found that appellant had, without good cause, failed to continue vocational rehabilitation. OWCP followed its procedures and advised her that if she did not continue vocational rehabilitation, her compensation would be reduced. Pursuant to 5 U.S.C. § 8113(b) and the implementing regulations, OWCP may reduce appellant's compensation based on the amount which would likely have been her wage-earning capacity had he or she undergone vocational rehabilitation.

The rehabilitation counselor had identified the position of receptionist, with wages of \$360.00 per week. This represents the amount which would likely have been appellant's wage-earning capacity had she undergone vocational rehabilitation. The job was a sedentary job, with occasional lifting of 10 pounds, within the work restrictions of the second opinion physician Dr. Beauperthuy-Rojas. The medical evidence does not establish that the position was medically unsuitable, and the deficiencies of the reports from the attending physicians are discussed above. The Board has held that the medical evidence of record must show that an accepted condition, or a preexisting condition, prohibited appellant from performing the selected position.⁹ To the extent that Dr. Blecha was basing his opinion that she was disabled on a diagnosis of thoracic outlet syndrome, he would have to provide a proper history and a rationalized medical opinion on the issue.

The Board finds that OWCP properly reduced appellant's compensation in this case. Had appellant completed the computer training, she would have had the capacity to earn \$360.00 per week as a receptionist. OWCP may reduce her compensation in accord with the *Shadrick* decision to reflect her wage-earning capacity.¹⁰

On appeal, counsel argues that the report of Dr. Beauperthuy-Rojas could not establish work restrictions as it was over two years old.¹¹ The report of Dr. Beauperthuy-Rojas was dated

⁸ *Carolyn F. Allen*, 47 ECAB 240 (1995).

⁹ *See S.B.*, Docket No. 15-0106 (issued March 15, 2016).

¹⁰ *See R.S.*, Docket No. 14-1484 (issued November 10, 2014); *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(d).

¹¹ Counsel cited *Gabriela E. Christie*, Docket No. 01-1275 (issued March 5, 2002), where reports approximately two years old were found to be stale evidence.

April 5, 2013 and OWCP's decision was dated July 28, 2014, and thus the report is not considered stale evidence. The Board thus finds that appellant had, without good cause, failed to continue participation in vocational rehabilitation, and her compensation was properly reduced to reflect a wage-earning capacity as a receptionist.

Counsel also argues that appellant has been willing to continue participation in vocational rehabilitation. As noted above, the reduction in compensation continues until the individual in good faith complies with the direction of OWCP. Appellant may pursue the issue with OWCP.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation for failure to participate in vocational rehabilitation.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 18, 2016 is affirmed.

Issued: February 16, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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