

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

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**D.T., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Rainier, OR, Employer**

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**Docket No. 16-1590  
Issued: January 17, 2018**

*Appearances:*  
*Frankie L. Sanders, for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On August 1, 2016 appellant, through his representative, filed a timely appeal from a June 9, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.<sup>2</sup>

**ISSUE**

The issue is whether OWCP properly reduced appellant's compensation under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 for failing to cooperate with vocational rehabilitation efforts.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The record on appeal includes evidence received after OWCP issued its June 9, 2016 decision. The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c)(1). Therefore, evidence not before OWCP at the time of the June 9, 2016 decision cannot be considered by the Board for the first time on appeal. *Id.*

## **FACTUAL HISTORY**

On May 17, 2004 appellant, then a 49-year-old rural letter carrier, filed an occupational disease claim (Form CA-2) for carpal tunnel syndrome, which she attributed to her employment duties. She indicated that she first became aware of her employment-related condition on February 10, 2004. On August 17, 2004 OWCP accepted the claim for bilateral carpal tunnel syndrome.<sup>3</sup> Appellant underwent a left carpal tunnel release on August 25, 2005, followed by a right carpal tunnel release on September 22, 2005.<sup>4</sup> She received wage-loss compensation for temporary total disability beginning August 25, 2005, and OWCP placed her on the periodic compensation rolls effective November 26, 2006. For more than a decade, appellant continued to receive wage-loss compensation for temporary total disability.

In a January 13, 2015 report, Dr. Eric S. Furie, a Board-certified orthopedic surgeon and OWCP referral physician, noted the history of injury as reported by appellant and noted his review of the diagnostic testing of record. He reported that the x-rays of the bilateral wrists revealed no fracture, dislocation or other deformity and indicated that the September 21, 2011 electromyogram (EMG) revealed no F-reflex evidence of cervical radiculopathy bilaterally, no nerve conduction velocity evidence of other neuropathy bilaterally, and only mild carpal tunnel syndrome bilaterally. Dr. Furie also set forth examination findings. He opined that appellant had complex regional pain syndrome secondary to right carpal tunnel syndrome. Objective findings included weakness on grip and decreased strength in abduction as well as flexion of her fingers. Dr. Furie noted that diagnostic studies were not helpful with complex regional pain syndrome except for sympathetic block, which appellant indicated relieved her pain. He indicated that appellant was unable to physically perform her date-of-injury position as a rural letter carrier as she could not lift 70 pounds. Dr. Furie opined, however, that she was capable of performing sedentary or light duty with limitations of no lifting, pushing or pulling more than 10 pounds with the right hand and no driving secondary to the narcotic medications she was taking. He advised that those restrictions could be alleviated if she was to get a sympathetic ganglion block. Dr. Furie further opined that she was a good candidate for vocational rehabilitation. In a February 6, 2015 work capacity evaluation (Form OWCP-5c), he indicated that appellant had reached maximum medical improvement and her limitations were related to complex regional pain syndrome.

On March 2, 2015 OWCP advised appellant that her claim was expanded to include right upper limb complex regional pain syndrome as an accepted condition.<sup>5</sup>

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<sup>3</sup> Under OWCP File No. xxxxxx979, appellant has an accepted occupational disease claim for right lateral epicondylitis, which arose on or about November 6, 2000. She also has an accepted claim for bilateral lateral epicondylitis under OWCP File No. xxxxxx943, with a June 14, 2002 date of injury. Appellant's three upper extremity occupational disease claims have been combined, and OWCP File No. xxxxxx974, the file on appeal, has been designated the master file. She also has an accepted claim for lumbar and left gluteal conditions, which arose on or about March 9, 2002 (OWCP File No. xxxxxx938). This later occupational disease claim is not part of the current combined case record.

<sup>4</sup> OWCP authorized both surgical procedures.

<sup>5</sup> OWCP also accepted narcotic-induced constipation. On September 24, 2015 it additionally accepted chronic pain-induced insomnia.

On March 9, 2015 OWCP advised appellant that her case had been referred for vocational rehabilitation services based on Dr. Furie's January 13, 2015 examination results. It further advised her that she was expected to cooperate fully with the rehabilitation and reemployment effort.

On June 12, 2015 appellant underwent a vocational evaluation. The vocational evaluator, Amy M. Meacham, identified 10 potential jobs as vocational alternatives. She indicated that those jobs required skills which appellant would be able to learn with certificate level and/or on-the-job training of 30 days to a maximum of six months to become proficient in the necessary skills.

On September 18, 2015 Lane Westcott, OWCP's designated rehabilitation counselor, indicated that the positions of receptionist and information clerk were the best employment options for appellant. She noted that those positions required computer skills in order for appellant to be a qualified candidate and to satisfactorily perform the tasks of current semi-skilled clerical positions. Therefore, Ms. Westcott recommended, and OWCP approved a rehabilitation plan for a computer training course (MS Windows, Word and Excel). The period of training was from October 14, 2015 through January 30, 2016 and would take place through Goodwill and Ed2go/UGA.

In a September 30, 2015 letter, OWCP informed appellant of the rehabilitation plan developed by Ms. Westcott for her return to work as a receptionist, Department of Labor, *Dictionary of Occupational Titles* (DOT) No. 237.367-038, and information clerk, DOT No. 237.367-022.<sup>6</sup> It also noted that those job duties were within her medical limitations. Appellant was advised that she was expected to cooperate fully so that she may return to work in the specified job or one similar to it. She was informed that, if she failed to cooperate fully, OWCP would assume that the vocational services would have resulted in a wage-earning capacity and therefore may reduce her compensation in accordance with 20 C.F.R. § 10.519.

In an October 16, 2015 report, Ms. Westcott indicated that she had left messages for appellant that she would receive 12 weeks of training as preparation for job goals, which will begin October 14, 2015 through January 30, 2016. She indicated that appellant left one message for her on October 6, 2015 indicating that she had received her calls, but that her husband had been in the hospital for heart problems and that she would call back as soon as she could. Ms. Westcott indicated that appellant sent her e-mails on October 11 and 12, 2015 indicating that she had been trying to catch up with telephone messages from friends and family concerning her husband's hospitalization. Appellant indicated that she had to type one-handed and would like Dragon Voice activation system included in her training program. She also stated that she did not have cable or Internet service at home and had to go to the library. Appellant indicated that she expected OWCP to cover the cost for internet if she had to take on-line courses. She also expressed concern over OWCP expecting her to do jobs which would exacerbate her injuries and expressed much skepticism over OWCP. Appellant noted that she had a back injury and wanted to know if the selected positions would impact her back issues.

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<sup>6</sup> The labor market studies for both jobs listed the physical demands as sedentary -- less than 10 pounds occasionally.

Ms. Westcott indicated that she called appellant on October 15, 2015 to talk about training and setting her up for classes, but her call was not returned. She noted that appellant had sent e-mails indicating additional limitations that she did not believe would allow appellant to physically manage a job without worsening her symptoms.

In an October 19, 2015 letter, OWCP noted appellant's reason for not undergoing the approved training as stated to her rehabilitation counselor. Appellant was advised of the provisions of section 8113(b) of FECA and was instructed to contact OWCP or her rehabilitation specialist within 30 days to make necessary arrangements to enter into the approved training programs or to provide reasons for her refusal with any supporting evidence to OWCP. If, during the allotted period, she did not comply with the instruction to undergo the approved training program or failed to show good cause for not undergoing the training program, appellant was notified that the rehabilitation effort would be terminated and her compensation reduced to reflect her probable wage-earning capacity had she completed the training program.

In a November 17, 2015 statement, appellant indicated that Ms. Westcott falsely advised OWCP that she had refused to participate in an OWCP-approved training program and that she was not returning her telephone calls. She provided a detailed account of her experience with Ms. Westcott.

In a January 28, 2015 report, Dr. Kevin Sheahan, a Board-certified pain specialist, indicated that appellant had right upper extremity pain since carpal tunnel surgery but that she has not had physical therapy, stellate ganglion block or ketamine therapy for this. He indicated in his report that appellant had been out of work for several years due to work-related injuries.

Treatment notes from Dr. Kamal Kabakibou, a Board-certified anesthesiologist, dated October 16 and 26, November 25 and 30, and December 4, 2015, and January 8, 2016 diagnosed complex regional pain syndrome of the right upper limb. In his November 25, 2015 report, Dr. Kabakibou indicated that appellant suffered from regional pain syndrome of the right upper extremity secondary to a work-related injury. He stated that her injury caused significant pain and disability and had not resolved. Dr. Kabakibou opined that appellant was unable to perform any type of work at this time.

Treatment notes dated September 18, October 16, November 16, and December 21, 2015 from Dr. Kevin A. Williams, an orthopedic surgeon, diagnosed chronic pain syndrome. Dr. Williams indicated that appellant's complex regional pain syndrome was under control.

Evidence pertaining to appellant's accepted condition of chronic pain-induced insomnia and her drug usage were received, along with an October 16, 2015 physical therapy note and chiropractic treatment notes dated October 29, 2015 and January 19, 2016.

By decision dated January 25, 2016, OWCP finalized the proposed reduction of appellant's compensation. It reduced her compensation effective February 7, 2016 based on her ability to earn wages as an information clerk, DOT # 237.367-022, at the rate of \$534.80 per week.

On March 16, 2016 appellant requested reconsideration. She contended that she did not refuse to participate in the vocational rehabilitation program. Appellant indicated that she was in

communication with Ms. Westcott, had returned her calls, and had attempted to meet each requirement. She also expressed her belief that the request for Dragon software was reasonable given her medical condition that she was only able to type with one hand. Appellant argued that Dr. Kabakibou's November 25, 2015 finding that she was incapable of working created a conflict in medical opinion with Dr. Furie's findings, and thus, required referral to an impartial medical examiner. She indicated that she did not score well on several of the 11 critical vocational aptitudes and that eye-hand-foot coordination was not scored. Appellant further indicated that, based on her diagnoses of carpal tunnel syndrome and reflex sympathetic dystrophy, she was unable to perform the duties of an information clerk as the position required a great deal of computer skills. She also noted that OWCP was aware of her psychological condition(s), but had not yet referred her for a second opinion evaluation.<sup>7</sup>

OWCP received several physical therapy notes from October 16, 2015 through June 2, 2016 along with medical evidence.

Medical reports from Dr. Kabakibou dated November 25, 2015 through May 25, 2016 were received. In his November 25, 2015 report, Dr. Kabakibou noted that appellant suffers from reflex sympathetic dystrophy of the right upper extremity secondary to a work-related injury. He indicated that the injury was not an aggravation of a preexisting condition and that appellant had significant pain as a result of the injury. Dr. Kabakibou opined that appellant was unable to perform any type of work at this time.

In a March 31, 2015 report, Dr. Lyles indicated that appellant had been under his care since October 2008. He noted that she struggled with anxiety and depression related to chronic pain. Dr. Lyles stated that appellant had not worked since 2004 due to chronic pain.

In a March 31, 2016 report, Dr. Zouheir Shama, a general surgeon, indicated that appellant was seen for follow-up regarding bilateral wrist pain. Examination findings were provided and Dr. Shama opined that, based on appellant's job duties, physical examination and history, she sustained an occupational injury.

By decision dated June 9, 2016, OWCP reviewed the merits of the claim and affirmed the January 25, 2016 decision as modified.<sup>8</sup> It found that appellant failed to establish good cause for not participating in an OWCP-approved training program. The reasons appellant provided did not establish good cause for her failure to participate in the on-line training and the medical evidence failed to establish that appellant was unable to participate in the on-line training. Therefore, OWCP properly reduced appellant's wage-loss compensation pursuant to 5 U.S.C. § 8113(b).

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<sup>7</sup> In its August 6, 2015 letter, OWCP indicated that on July 17, 2015 Dr. Michael Lyles, a psychiatrist, diagnosed appellant with attention deficit hyperactivity disorder (ADHD). It indicated that appellant would be referred for a second opinion evaluation to determine whether there was a causal relationship between her preexisting ADHD and the February 10, 2004 work injury.

<sup>8</sup> OWCP previously cited 5 U.S.C. §§ 8106 and 8115 as authority for the reduction of wage-loss compensation. On reconsideration, the senior claims examiner noted that neither statutory provision applied to the current situation.

## LEGAL PRECEDENT

FECA provides that the Secretary of Labor may direct a permanently disabled individual whose disability is compensable to undergo vocational rehabilitation.<sup>9</sup> If an individual, without good cause, fails to apply for and undergo vocational rehabilitation when so directed, 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.<sup>10</sup> The reduction of compensation remains in effect until the individual in good faith complies with OWCP's directive.<sup>11</sup>

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:

“(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 the OWCP nurse and the employer. The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.”<sup>12</sup>

An employee may fail to cooperate with vocational rehabilitation efforts in various ways. General examples of noncooperation include lack of response to letters or telephone calls from OWCP's rehabilitation specialist and/or rehabilitation counselor (RC); failure to show up for appointments, interviews, or testing (*e.g.*, vocational testing, functional capacity evaluation) arranged by the RC; and failure to attend an approved training program.<sup>13</sup> Specific examples of noncooperation during the training 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.<sup>14</sup>

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<sup>9</sup> 5 U.S.C. § 8104(a).

<sup>10</sup> *Id.* at § 8113(b).

<sup>11</sup> *Id.*

<sup>12</sup> 20 C.F.R. § 10.519(a).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.17 (February 2011).

<sup>14</sup> *Id.* at Chapter 2.813.17c.

If the employee refuses or impedes rehabilitation training, the claims examiner (CE) 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.<sup>15</sup> The letter should advise the injured worker to comply or provide a written explanation of his or 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.<sup>16</sup> This letter satisfies the requirement to provide a 30-day prereduction notice.<sup>17</sup>

### ANALYSIS

The Board finds that OWCP properly reduced appellant's wage-loss compensation effective February 7, 2016 as she failed, without good cause, to participate in prescribed vocational rehabilitation efforts. OWCP accepted the current occupational disease claim for bilateral carpal tunnel syndrome, complex regional pain syndrome reflex sympathetic dystrophy (RSD), narcotic-induced constipation, and chronic pain-induced insomnia. Appellant had been receiving wage-loss compensation for temporary total disability dating back to August 25, 2005, when she underwent OWCP-approved left wrist surgery.

In a January 13, 2015 report, Dr. Furie, an OWCP second opinion examiner, opined that appellant had complex regional pain syndrome secondary to the right carpal tunnel syndrome. He found, however, that appellant could work with restrictions of no lifting, pushing or pulling more than 10 pounds with the right hand for eight hours per day and no driving secondary to the narcotic medications. He indicated that her limitations were related to complex regional pain syndrome.

The Board has reviewed Dr. Furie's opinion and finds that it had reliability, probative value and convincing quality with respect to his conclusions reached regarding appellant's work ability. Dr. Furie reviewed the statement of accepted facts and the medical record and noted his examination findings. He indicated that appellant was capable of working at sedentary or light duty with limitations because of her complex regional pain syndrome, which OWCP subsequently accepted. While appellant argued that the statement of accepted facts had changed a couple of months later, the Board notes that OWCP merely accepted additional conditions of constipation, other insomnia, and complex regional pain syndrome/reflex sympathetic dystrophy of the right upper limb, which Dr. Furie had accounted for when providing his opinion. Thus, Dr. Furie's opinion is rationalized and based on a proper medical and factual history, and represents the weight of the medical evidence.<sup>18</sup>

Based on Dr. Furie's findings, OWCP referred appellant for vocational rehabilitation. The vocational rehabilitation counselor identified the position of receptionist and information clerk as the best employment options for appellant and indicated that appellant required a

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *See C.C.*, Docket No. 16-0318 (issued May 2, 2016).

computer training course in order to be a qualified candidate to perform the tasks of the identified semi-skilled clerical positions. The counselor prepared a training plan, which OWCP authorized.

By decision dated June 9, 2016, OWCP modified and affirmed its January 25, 2016 decision reducing appellant's compensation under section 8113(b) effective February 7, 2016 as she failed to establish good cause for not participating in an OWCP-approved training program. Appellant believed that she was cooperating with vocational rehabilitation. The issue, therefore, was whether she failed to continue participation in vocational rehabilitation without good cause.

The Board finds that the evidence of record does not establish that appellant's failure to participate in the on-line training during the period October 14, 2015 through January 30, 2016 was medically warranted. The physical therapy notes from October 16, 2015 through June 2, 2016 do not support that appellant's medical condition prevented her from participating in the training program in Microsoft Office Suite through Ed2go at UGA.

The reports from Dr. Kabakibou from November 25, 2015 through May 25, 2016 consisted of objective medical evidence from appellant's office visits. In his medical report dated November 25, 2015, Dr. Kabakibou noted that appellant suffers from RSD of her right upper extremity secondary to a work-related injury. He stated that the injury was not an aggravation of a preexisting condition and that appellant had significant pain as a result of the injury. While Dr. Kabakibou opined that appellant was unable to perform any type of work at that time, he failed to provide a rationalized medical opinion, supported by specific findings, clearly showing that appellant was disabled from all activity or that her RSD prevented participation in the on-line training during the period October 14, 2015 through January 30, 2016.<sup>19</sup>

In his March 31, 2015 report, Dr. Lyles noted that appellant had been under psychiatric care since October 2008 and that she struggled with anxiety and depression related to chronic pain. He stated that she had not worked since 2004 due to chronic pain. Dr. Lyles, however, did not provide a medical opinion based on objective findings to support that appellant's medical condition prevented her from participating in the on-line training during the period October 14, 2015 through January 30, 2016. 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.<sup>20</sup>

In his March 31, 2016 medical report, Dr. Shama noted that appellant was seen on that date for a follow-up visit regarding pain in bilateral wrists. While he opined that appellant had an occupational injury, Dr. Shama did not provide a medical opinion to support that appellant

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<sup>19</sup> See *D.A.*, Docket No. 11-0871 (issued January 27, 2012); see also *C.P.*, Docket No. 15-0781 (issued April 5, 2016).

<sup>20</sup> See *id.*

was unable to participate in the on-line training during the period October 14, 2015 through January 30, 2016.<sup>21</sup>

The Board accordingly finds that OWCP properly found that appellant had, without good cause, failed to continue vocational rehabilitation.<sup>22</sup> 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 identified the position of information clerk, DOT No. 237.367.02, with wages of \$534.80 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. Furie. 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.<sup>23</sup>

The Board finds that OWCP properly reduced appellant's compensation in this case. Had appellant completed the training program, she would have had the capacity to earn \$534.80 per week as an information clerk. OWCP may reduce her compensation in accord with the *Shadrick* decision to reflect her wage-earning capacity.<sup>24</sup>

On appeal appellant's representative reiterated arguments made before OWCP. For the reasons noted above, the Board 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 an information clerk. 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 wage-loss compensation effective February 7, 2016 for failing to cooperate with vocational rehabilitation.

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<sup>21</sup> *Id.*

<sup>22</sup> See *M.K.*, Docket No. 16-1676 (issued February 16, 2017).

<sup>23</sup> See *S.B.*, Docket No. 15-0106 (issued March 15, 2016).

<sup>24</sup> 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).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 9, 2016 decision of the Office of Workers' Compensation Programs is affirmed.<sup>25</sup>

Issued: January 17, 2018  
Washington, DC

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

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

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<sup>25</sup> Colleen Duffy Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.