

ISSUE

The issue is whether OWCP properly reduced appellant's compensation, effective May 29, 2016, under 5 U.S.C. § 8113(b) for failure, without good cause, to undergo vocational rehabilitation efforts, as directed.

FACTUAL HISTORY

On January 27, 2012 appellant, then a 46-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging a low back injury on January 26, 2012 due to lifting and adjusting a patient in bed while in the performance of duty. She stopped work that same day.

OWCP accepted appellant's claim for sciatica, left-sided lumbar radiculopathy, lumbar spondylosis, and lumbago. It paid her disability compensation on the daily rolls beginning March 21, 2012 and on the periodic rolls beginning August 26, 2012.

On April 22, 2013 Dr. Peter G. Whang, an attending Board-certified orthopedic surgeon, performed OWCP-approved low back surgery, including anterior lumbar interbody fusion with instrumentation and bone graft substitute at L5-S1, and posterior fusion with instrumentation, bone graft substitute, and laminotomy at L5-S1.

Appellant participated in physical therapy sessions and continued to periodically visit Dr. Whang for treatment of her back condition. In an October 1, 2015 report, Dr. Whang noted that her low back condition was responding well to conservative treatment without a need for steroid injections. He diagnosed lumbar strain and chronic low back pain secondary to L5-S1 disc degeneration (status post fusion) and indicated that appellant could return to work "under light-duty conditions at least temporarily."

OWCP referred appellant for a second opinion examination to Dr. Balazs B. Somogyi, a Board-certified orthopedic surgeon. It requested that Dr. Somogyi provide an opinion on appellant's employment-related residuals and ability to work.

In an October 14, 2015 report, Dr. Somogyi detailed the findings of his physical examination he conducted on that date. Appellant did not report low back pain at the time of examination, but indicated that at times she had such pain at the 7/10 level. Dr. Somogyi advised that the examination revealed normal results upon bilateral straight leg raising and that appellant had no sensory abnormalities in her back or lower extremities. He diagnosed history of lumbosacral sprain/strain, degenerative arthritis of the lumbosacral spines, and status post anterior fusion at L5-S1, and he indicated that appellant could return to full-time work in accordance with his attached work restrictions. In an attached October 23, 2015 work capacity evaluation form (Form OWCP-5c), Dr. Somogyi indicated that appellant could work eight hours per day with restrictions of lifting up to 40 pounds for four hours per day, twisting for two hours per day, and bending/stooping for two hours per day.

In October 2015 OWCP referred appellant to an OWCP-sponsored vocational rehabilitation program designed to return her to work. It indicated that the opinion of Dr. Somogyi

showed that appellant was physically capable of performing work on a full-time basis subject to his restrictions.

Appellant's vocational rehabilitation counselor initially met with appellant on November 17, 2015. He discussed appellant's educational and vocational background, noting that she obtained a nursing assistant certificate from the University of New Haven and worked as a nursing assistant since the 1980s. Appellant reported using computers for her work with the employing establishment and advised that she was familiar with Microsoft Word and Excel software. In December 2015, the counselor conducted a transferable work skills analysis and noted that appellant expressed dismay that the employing establishment was unable to identify a position for her at her former worksite. He began to evaluate potential positions outside the employing establishment which he felt were within her physical and vocational capabilities.

On February 1, 2016 appellant's vocational rehabilitation counselor conducted a state labor market survey and determined that appellant was capable of working on a full-time basis as an office assistant/office clerk, a position which was reasonably available in appellant's commuting area with an average wage of \$480.00 per week.³ According to the Department of Labor's *Dictionary of Occupational Titles* (DOT), the position was sedentary in nature and required occasional lifting of up to 10 pounds. The position involved entering information into a computer, preparing correspondence on a computer, and performing other clerical duties such as photocopying and filing documents.

In a February 22, 2016 rehabilitation action report (Form OWCP-44), appellant's vocational rehabilitation counselor indicated that on February 11, 2016 he texted appellant on her mobile telephone advising her to contact him in order to discuss a training program under consideration, but that appellant did not respond to the text message.⁴ On February 15, 2016 the counselor sent a letter to appellant's address of record asking that she contact him as soon as possible. He noted in his February 22, 2016 report that appellant had not responded to his inquiries and that he was recommending placing appellant's rehabilitation case in interrupted status until clarification was obtained regarding her noncommunication.

In a February 23, 2016 letter, OWCP advised appellant of its determination that she had failed to participate in vocational rehabilitation efforts. It informed her that an individual who refuses or impedes a vocational rehabilitation effort without good cause after testing has been accomplished will have his or her compensation reduced based on what would have been his or her wage-earning capacity had the training been successfully completed. OWCP directed appellant to make a good faith effort to participate in the rehabilitation effort within 30 days or, if she believed she had good cause for not participating in the effort, to provide reasons and supporting evidence of such good cause within 30 days. It advised that if these instructions were not followed within 30 days action would be taken to reduce her compensation.

³ The counselor indicated that the results of the transferable skills analysis showed that appellant was capable of performing the position of office assistant/office clerk. However, he felt that additional training in a medical coder/assistant program might provide further incentive for employers to hire her.

⁴ The counselor initially telephoned appellant's landline, but the voice mail was full and he was unable to leave a message.

Appellant telephoned her vocational rehabilitation counselor on February 23, 2016 and asserted that she did not receive his February 11, 2016 text message because she did not know how to receive and send text messages on her mobile telephone. She also asserted that she did not know how to delete messages from her landline voice mail. Appellant advised her counselor that she had not been feeling well with respect to her back and that she did not know whether she could attend any vocational rehabilitation training program due to her condition. She continued to express her hope that she would be able to return to work for the employing establishment. The counselor explained to appellant that the opinion of Dr. Somogyi defined her work capabilities at present and advised her that she needed to take steps so she could receive telephone messages.⁵ In a March 1, 2016 vocational rehabilitation report, she indicated, "Given the [injured workers'] current complaints and stated limitation, it is difficult to move ahead with any vocational planning training or job placement." He indicated that he was placing appellant's case in interrupted status as of March 17, 2016.

Appellant submitted a February 18, 2016 report from Dr. Whang who noted that appellant presented with complaints of back pain. Dr. Whang reported the findings of his examination on that date, diagnosed lumbar strain and L5-S1 disc degeneration (status post minimally invasion fusion), and indicated that appellant could return to light-duty work. Appellant also submitted June 8 and July 8, 2015 reports from Amy Morocco, an attending physical therapist, and a March 20, 2016 report from Rebecca J. Juliano, another attending physical therapist.⁶

In an April 4, 2016 vocational rehabilitation report, appellant's vocational rehabilitation counselor indicated that he telephoned appellant on April 4, 2016 at which time she advised that she could not attend any vocational rehabilitation training program due to her back condition. Appellant noted that she assumed that her attending physician was providing reports about her back condition. The counselor again advised appellant that the opinion of Dr. Somogyi defined her work capabilities at present. In a May 3, 2016 report, he indicated that he was closing appellant's vocational rehabilitation file because she had reported that she could not attend any vocational rehabilitation training program due to her back condition.

By decision dated May 5, 2016, OWCP reduced appellant's compensation effective May 29, 2016 under 5 U.S.C. § 8113(b) to reflect her loss of wage-earning capacity had she continued to participate in vocational rehabilitation efforts. It determined that she had failed, without good cause, to undergo vocational rehabilitation as directed. With respect to her wage-earning capacity, it further found that, if appellant had participated in good faith in vocational rehabilitation, she would have been able to perform the position of office assistant/office clerk and it reduced her compensation based on her ability to earn wages in this position.

On September 23, 2016 appellant requested reconsideration of OWCP's May 5, 2016 decision. OWCP submitted a June 2, 2016 report from Dr. Whang who reported the findings of

⁵ Appellant indicated that an employing establishment official advised her that she could return to work for the employing establishment after her attending physician had "released" her to work, but the counselor advised her she should not wait for such a report to participate in vocational rehabilitation efforts because the opinion of Dr. Somogyi showed that she could currently work with restrictions.

⁶ The March 20, 2016 report of Ms. Juliano was countersigned by Dr. Adedayo Adetola, an attending Board-certified internist.

his examination on that date. Dr. Whang advised that the examination showed some limitation of back motion, but that motor and sensory testing of the lower extremities was normal. He indicated that appellant was motivated to return to work in some capacity and that he would do what he could to facilitate the process. On July 18, 2016 Dr. Whang noted that appellant had worsening back pain complaints, but posited that it was possible for her to return to work “with certain limitations.” He reported examination findings similar to those obtained on June 2, 2016.⁷

In an August 10, 2016 report, Dr. Whang noted that the diagnostic testing of record showed that appellant had a solid fusion at L5-S1, but that she had recently been complaining of increased back and left lower extremity symptoms. He reported examination findings similar to those obtained on June 2 and July 18, 2016. Dr. Whang indicated, “With her recent exacerbation, the patient does not feel as if she would be able to return to work in any capacity at this point, so I will reevaluate her again with the hopes that we can at least get her cleared for light-duty work or some other type of work activity with restrictions.” In an August 10, 2016 letter, he noted, “[Appellant] was seen in my clinic on August 10, 2016. She is not cleared to return to work until September 12, 2016, pending recheck.” On September 1, 2016 Dr. Whang indicated that he hoped to get appellant back to work at some point, at least in some capacity. On October 21, 2016 he noted that it would be difficult for appellant to return to work in her previous capacity at the employing establishment.⁸

By decision dated January 4, 2017, OWCP denied modification of its May 5, 2016 decision. It found that OWCP had properly determined that appellant had failed, without good cause, to undergo vocational rehabilitation as directed, and that it had properly reduced her compensation based on her ability to earn wages in the position of office assistant/office clerk. OWCP noted that the medical reports submitted by appellant did not show that she could not participate in vocational rehabilitation efforts.

On December 11, 2017 appellant, through counsel, requested reconsideration of OWCP’s January 4, 2017 decision. She submitted a December 16, 2016 report from Dr. Whang who noted that appellant continued to complain of increased back and left lower extremity symptoms. Dr. Whang indicated that appellant should avoid any activities which exacerbated her symptoms. On February 1, 2017 he posited that it would be difficult for appellant to return to work in her previous capacity at the employing establishment. On March 8, April 26, June 7, September 22, 2017, and January 19, 2018 reports, Dr. Whang indicated that he would not make any change in appellant’s work status.⁹ Appellant also submitted computerized tomography (CT) and magnetic

⁷ Appellant submitted an April 3, 2012 report from Dr. Adetola who recommended that appellant use an interferential stimulator device for her back.

⁸ Appellant also submitted a December 12, 2016 report of Gregory Kane, an attending physical therapist.

⁹ In his June 7, 2017 report, Dr. Whang noted, “[T]he patient states that she clearly would not be able to return to work at this time because of her pain, so I will make no changes to her work status, pending recheck after her injections.” In his January 19, 2018 report, he indicated that January 12, 2018 electromyogram (EMG) and nerve conduction velocity (NCV) testing of appellant’s left lower extremity showed no radiculopathy. The record contains a copy of the January 12, 2018 testing. In each of the examination reports submitted in connection with the December 11, 2017 reconsideration request, Dr. Whang provided examination findings which were similar to those contained in his previously submitted reports.

resonance imaging (MRI) scans of the lumbosacral and cervical spines, dated between 2014 and 2017, which showed degenerative changes at multiple disc levels.

By decision dated April 5, 2018, OWCP denied modification of its January 4, 2017 decision. It again indicated that the medical reports submitted by appellant did not show that she could not participate in vocational rehabilitation efforts.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.¹⁰ 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.¹¹

Section 10.519 of Title 20 of the Code of Federal Regulations details the actions OWCP will take when 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. Section 10.519(a) provides, in pertinent part:

“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. [It] 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.”¹²

ANALYSIS

The Board finds that OWCP properly reduced appellant’s compensation, effective May 29, 2016, under 5 U.S.C. § 8113(b) for failure, without good cause, to undergo vocational rehabilitation efforts, as directed.

In October 2015, OWCP referred appellant for participation in an OWCP-sponsored vocational rehabilitation program designed to return her to work. In December 2015, appellant’s vocational rehabilitation counselor conducted a transferable work skills analysis to help determine what types of jobs appellant could perform. Beginning in early-February 2016, the counselor began to have difficulty in communicating with appellant through the established telephonic

¹⁰ *Betty F. Wade*, 37 ECAB 556, 565 (1986).

¹¹ 5 U.S.C. § 8113(b).

¹² 20 C.F.R. § 10.519(a).

channels. Although appellant contacted the counselor by telephone on February 23, 2016, she advised that she did not know whether she could participate in any vocational rehabilitation training program recommended by the counselor due to her back condition. On April 4, 2016 she explicitly advised the counselor that she could not attend any vocational rehabilitation training program due to her back condition.

After OWCP issued a February 23, 2016 letter requesting that appellant provide “good cause” for not participating in vocational rehabilitation efforts, appellant submitted medical evidence which she later suggested was sufficient to establish that she was physically incapable of participating in vocational rehabilitation efforts.¹³ The Board finds, however, that this medical evidence does not clearly show that appellant’s physical condition prevented her from participating in vocational rehabilitation efforts. For example, appellant submitted a February 18, 2016 report from Dr. Whang, an attending physician, who indicated that appellant could return to light-duty work. Moreover, on July 18, 2016 Dr. Whang posited that it was possible for appellant to return to work with restrictions. In an August 10, 2016 letter, he noted that appellant was not cleared to return to work until September 12, 2016. However, Dr. Whang did not provide any opinion that appellant’s physical condition prevented her from participating in vocational rehabilitation efforts. In later reports, dated between late-2016 and early-2018, he indicated that appellant could not return to her date-of-injury nursing assistant position for the employing establishment, but these reports do not contain any opinion on appellant’s ability to participate in vocational rehabilitation efforts. Appellant failed to submit a rationalized medical report establishing that her physical condition prevented her from participating in her vocational rehabilitation program.¹⁴

For these reasons, the Board finds that there is no evidence that appellant’s failure to fully participate in vocational rehabilitation efforts, particularly in her failure to participate in any vocational rehabilitation training program designed to aid in her return to the workforce, was based on “good cause.”¹⁵

The Board further finds that the reduction of appellant’s compensation effective May 29, 2016 was properly based on her loss of wage-earning capacity had she continued to participate in vocational rehabilitation efforts, as shown by her ability to earn wages as an office assistant/office clerk. On February 1, 2016 appellant’s vocational rehabilitation counselor conducted a state labor market survey and determined that appellant was capable of working on a full-time basis as an office assistant/office clerk, a position which was reasonably available in appellant’s commuting

¹³ Appellant did not provide any statement to OWCP in response to OWCP’s February 23, 2016 letter requesting that she provide “good cause” for not participating in vocational rehabilitation efforts. However, she suggested to her vocational rehabilitation counselor that the medical evidence of record showed that she was physically incapable of participating in vocational rehabilitation efforts.

¹⁴ See *D.R.*, Docket No. 16-0528 (issued August 24, 2016) (finding that a report is of limited probative value on a given medical issue if it does not contain adequate medical rationale). Appellant submitted a March 20, 2016 report of Dr. Adetola, an attending physician, but this report does not contain any opinion on appellant’s ability to participate in vocational rehabilitation efforts. She also submitted reports of Ms. Morocco and Mr. Kane, attending physical therapists, which were dated between June 2015 and December 2016. However, these reports are of no probative value on the relevant issue of this case because the report of a physical therapist does not constitute probative medical evidence as a physical therapist is not a physician under FECA. See *S.T.*, Docket No. 17-0913 (issued June 23, 2017).

¹⁵ See *Michael D. Snay*, 45 ECAB 403, 410-12 (1994).

area with an average wage of \$480.00 per week. According to the Department of Labor's *Dictionary of Occupational Titles* (DOT), the position was sedentary in nature and required occasional lifting of up to 10 pounds.¹⁶

The Board notes that the medical evidence of record shows that appellant was physically capable of working as an office assistant/office clerk. The physical requirements were within the restrictions delineated in reports of Dr. Somogyi, an OWCP referral physician who provided the most detailed assessment in the case record of appellant's ability to work.¹⁷ Moreover, the Board notes that OWCP properly relied on the expert opinion of appellant's vocational rehabilitation counselor that appellant would have been vocationally capable of working as an office assistant/office clerk.¹⁸

For these reasons, OWCP properly reduced appellant's compensation, effective May 29, 2016, under 5 U.S.C. § 8113(b) to reflect her loss of wage-earning capacity had she continued to participate in vocational rehabilitation efforts.

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, effective May 29, 2016, under 5 U.S.C. § 8113(b) for failure, without good cause, to undergo vocational rehabilitation efforts, as directed.

¹⁶ Sedentary work, according to the DOT, involves exerting up to 10 pounds of force occasionally and sitting most of the time, but may involve walking or standing for brief periods of time. Occasionally performing an activity means that the activity is performed up to 1/3 of the time during the workday. The position of office assistant/office clerk involved entering information into a computer, preparing correspondence on a computer, and performing other clerical duties such as photocopying and filing documents.

¹⁷ In an October 23, 2015 work capacity evaluation form (OWCP-5c), Dr. Somogyi indicated that appellant could work eight hours per day with restrictions of lifting up to 40 pounds for four hours per day, twisting for two hours per day, and bending/stooping for two hours per day.

¹⁸ See *M.P.*, Docket No. 18-0094 (issued June 26, 2018) (finding that the vocational rehabilitation counselor is an expert in the field of vocational rehabilitation and that OWCP may rely on his or her opinion in determining whether the job is vocationally suitable and reasonably available).

ORDER

IT IS HEREBY ORDERED THAT the April 5, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 2, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy 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