

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

S.B., Appellant)	
)	
and)	Docket No. 19-0781
)	Issued: February 2, 2022
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, PORTLAND)	
INTERNATIONAL AIRPORT, Portland, OR,)	
Employer)	
)	

Appearances:
*John Eiler Goodwin, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 26, 2019 appellant, through counsel, filed a timely appeal from a September 4, 2018² merit decision of the Office of Workers' Compensation Programs (OWCP).³

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 The case record also contains a September 13, 2018 merit decision of OWCP regarding the suspension of appellant's wage-loss compensation. As counsel did not appeal from that decision, it is not presently before the Board. *See* 20 C.F.R. § 501.3.

³ Appellant, through counsel, submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R.

CONTINUED

Pursuant to the Federal Employees' Compensation Act⁴ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁵

ISSUE

OWCP has met its burden of proof to reduce appellant's compensation, effective December 18, 2017, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, for failure to cooperate with vocational rehabilitation without good cause.

FACTUAL HISTORY

This case has previously been before the Board.⁶ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are set forth below.

On December 19, 2003 appellant, then a 48-year-old transportation security screener, filed a traumatic injury claim (Form CA-1), alleging that on December 9, 2003 she injured her back when she leaned forward in a broken chair and "almost fell." She stopped work on December 15, 2003 and did not return. OWCP accepted the claim for disc protrusion at L5-S1, lumbosacral strain, and chronic pain syndrome. It paid appellant wage-loss compensation on the supplemental rolls as of January 29, 2004 and on the periodic rolls as of January 23, 2005.

In May 2012, appellant was referred for vocational rehabilitation. The rehabilitation counselor identified the positions of office clerk, general, and receptionist and completed a labor market survey for each position on August 6, 2012. A vocational rehabilitation plan for computer skills training for these positions was approved and computer training was to begin. Appellant refused to sign the rehabilitation plan and did not begin computer training.

By decision dated January 3, 2014, OWCP finalized a December 3, 2013 proposed reduction of appellant's compensation, based on her capacity to earn wages in the constructed position of an office clerk, general, Department of Labor, *Dictionary of Occupational Titles* (DOT) #209.562-010, effective January 12, 2014.

§ 501.5(a). In support of her oral argument request, appellant asserted that oral argument should be granted due to contradictions in the medical evidence with regard to whether she could perform the selected position of order clerk. The Board, in exercising its discretion, denies appellant's request for oral argument because this matter requires an evaluation of the medical evidence required. As such, the arguments on appeal can be adequately addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

⁴ 5 U.S.C. § 8101 *et seq.*

⁵ The Board notes that, following the September 4, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "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. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

⁶ Docket No. 15-1060 (issued March 15, 2016), Docket No. 15-1060, *aff'd as modified* (issued March 20, 2017).

On January 30, 2014 appellant, through counsel, timely requested a hearing before a representative of OWCP's Branch of Hearings and review. By decision dated December 3, 2014, the hearing representative found that OWCP considered the proper factors in determining that the constructed position reflected appellant's wage-earning capacity and had properly reduced her compensation, effective January 12, 2014.

On April 14, 2015 appellant, through counsel, filed a timely appeal with the Board. By decision dated March 15, 2016, the Board reversed the December 3, 2014 decision, finding that OWCP did not meet its burden of proof.⁷ OWCP thereafter returned appellant to the full compensation wage-loss benefits retroactive to January 12, 2014.

In December 2014, while the prior appeal was pending before the Board, appellant began pain management treatment with Dr. Paul K. Won, Board-certified in public health and preventive medicine.

In a June 2, 2015 report, Dr. Derrick K. Yoshinaga, a treating osteopath specializing in occupational and preventive medicine, described appellant's physical examination findings, diagnosed chronic nonmalignant low back pain, and recommended that she continue her present medications. He advised that she could work in the light category with permanent restrictions of lifting and carrying 15 pounds occasionally and 8 pounds frequently; pushing and pulling 19 pounds occasionally and 10 pounds frequently; with sitting limited to 60 minutes at a time for a total of 6 hours/8-hour day; standing and walking limited to 90 minutes with small breaks for 6 hours/8-hour day; with occasional bending, squatting, kneeling, crawling, reaching, and stair climbing. Dr. Yoshinaga repeated his findings and conclusions on January 20, 2016.

On May 2, 2016 OWCP referred appellant to Mary d'Autremont, a certified rehabilitation counselor for vocational rehabilitation services. It notified Ms. d'Autremont that, although appellant's physician indicated that appellant could perform light duties, his physical limitations were, in fact, sedentary.

By letter dated June 9, 2016, Ms. d'Autremont forwarded an interest inventory to appellant for her completion. She noted that appellant, and a computer skills training representative had met to go over computer and software skill training. On July 5, 2016 Ms. d'Autremont completed a transferrable skills analysis and forwarded her report to OWCP. She indicated that appellant had not worked for 13 years and listed Dr. Yoshinaga's physical limitations. The rehabilitation counselor noted that appellant's work restrictions were outdated and that she had sedentary work capacity. Ms. d'Autremont recommended six months of concentrated computer training followed by a three- to six-month internship for appellant to gain actual on-the-job experience.

On July 19, 2016 Ms. d'Autremont wrote Dr. Won noting that appellant had previously been treated by his colleague, Dr. Yoshinaga, who had retired, and asked that Dr. Won complete an attached work capacity evaluation (Form OWCP-5c). Ms. d'Autremont noted that the restrictions provided by Dr. Yoshinaga were considered sedentary.

⁷ *Id.*

In a July 29, 2016 report, Dr. Won discussed appellant's pain management plan and advised that her modified work restrictions were permanent and would continue.

Dr. Kathy Chang, Board-certified in preventive medicine, submitted a Form OWCP-5c dated October 25, 2016. She advised that appellant could not return to her usual employment due to status post lumbar fusion with chronic low back pain. Dr. Chang indicated that maximum medical improvement had been reached, and that appellant could work eight hours daily with permanent restrictions. She specified restrictions that appellant could sit and walk for no more than six hours daily, could bend, stoop, squat, knee, and climb for no more than two hours daily, and had a 10-pound restriction on pushing, pulling, and lifting.

On December 7, 2016 OWCP informed Ms. d'Autremont that a formal vocational assessment was needed.

By report dated January 24, 2017, Dr. Chang noted seeing appellant for pain medication review. She related that appellant's work restrictions were permanent and would continue.

Vocational testing was conducted on February 15, 2017. The vocational rehabilitation counselor completed an updated transferrable skills analysis on March 7, 2017, again recommending six months of computer training to be followed by a three- to six-month internship. On March 28, 2017 Ms. d'Autremont completed labor market surveys for the positions of order clerk and receptionist.

On April 12, 2017 OWCP approved the proposed plan for appellant to take six months of computer and office skills training, to begin May 1, 2017 at a community college. It noted that the training would provide her with the necessary skills for reemployment as a receptionist or an order clerk or similar positions.

On May 8, 2017 Ms. d'Autremont informed OWCP that appellant had not attended training, noting that she maintained that she was not well enough to participate.

By notice dated May 19, 2017, OWCP proposed to reduce appellant's wage-loss compensation because she did not begin training. It noted that the results of tests and evaluations performed by Dr. Yoshinaga dated January 20, 2017 and his restrictions on October 25, 2016 clearly showed that she could complete the training program. OWCP provided appellant 30 days to contact her rehabilitation counselor and begin the approved training, and informed her that, if she did not comply, the rehabilitation effort would be terminated and action initiated to reduce appellant's compensation to reflect her probable wage-earning capacity had she completed the training.

In a May 30, 2017 report, Dr. Chang repeated Dr. Yoshinaga's restrictions that advised that appellant was restricted to lifting and carrying no more than 15 pounds occasionally and 8 pounds frequently; pushing and pulling no more than 19 pounds occasionally and 10 pounds frequently; sitting no more than 60 minutes at a time for a total of 6 hours/8-hour day; standing and walking no more than 90 minutes with small breaks for 6 hours/8-hour day; and occasional bending, squatting, kneeling, crawling, reaching, and stair climbing.

On June 30, 2017 Ms. d'Autremont informed OWCP that she had heard nothing further from appellant, and vocational rehabilitation services were closed.

By letter dated July 17, 2017, OWCP informed appellant that an updated medical report was required and described what the medical report should contain.

In reports dated July 24 and November 28, 2017, Dr. Chang noted seeing appellant for medication review and opioid taper. She described examination findings of mild tenderness to the back with strength 5/5, sitting straight leg raise negative bilaterally, and sensation subjectively diminished to the legs, especially the great toe. Squat was decent, and gait was within normal limits. Dr. Chang diagnosed history of lumbosacral spine surgery and chronic nonmalignant pain and noted that appellant's opioid medication was being tapered.⁸

By decision dated December 18, 2017, OWCP finalized the May 19, 2017 proposed reduction of appellant's wage-loss compensation, pursuant to 5 U.S.C. §§ 8104 and 8113(b), because she failed without good cause to undergo vocational rehabilitation as directed OWCP included the DOT #249.362-026, position description for order clerk, as follows:

“Processes orders for material and merchandize received by mail, telephone, or personally from customer or company employees, manually or using a computer or calculating machine. Edits orders received for price and nomenclature. Informs customers of unit price, shipping date, anticipated delays, and any additional information needed by the customer, using mail or telephone. Writes or types order forms, or enters data into a computer to determine total cost for customers.”

The notice further indicated that the order clerk position had a sedentary strength level with frequent reaching, handling, and fingering, and no kneeling, crouching, stooping, climbing, or balancing, which did not exceed appellant's current work restrictions as provided by Dr. Chang on May 30, 2017, and was therefore medically suitable. OWCP indicated that had appellant successfully completed the approved vocational rehabilitation program, she would have been capable of securing reemployment as an order clerk, which had an entry-level wage of \$12.15 per hour, or \$487.64 per week. It noted that, following a labor market survey dated March 28, 2017, the rehabilitation counselor confirmed that positions of order clerk remained reasonably available within appellant's commuting distance and represented her wage-earning capacity. OWCP applied the *Shadrick* formula,⁹ finding that she had a 75 percent wage-earning capacity, or 25 percent loss of wage-earning capacity. It reduced appellant's wage-loss compensation effective that day.

On January 13, 2018 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on June 19, 2018. Counsel asserted during the hearing that OWCP tried to get appellant to sign a contract for a full-time job search which did not exclude weekends or holidays, and that the selected position required frequent reaching. No further evidence was received.

⁸ On December 13, 2017 OWCP issued an amended proposed reduction of benefits. This was redacted on December 14, 2017.

⁹ *Albert C. Shadrick*, 5 ECAB 376(1953); codified at 20 C.F.R. § 10.403.

By decision dated September 4, 2018, the hearing representative affirmed the December 18, 2017 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to establish that the disability has ceased or lessened before it may terminate or modify compensation benefits.¹⁰ Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.¹¹

Section 8113(b) of FECA¹² 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.”¹³

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 [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.”¹⁴

¹⁰ S.C., Docket No. 19-1680 (issued May 27, 2020); *Betty F. Wade*, 37 ECAB 556 (1986).

¹¹ 5 U.S.C. § 8104(a).

¹² *Supra* note 3.

¹³ 5 U.S.C. § 8113(b).

¹⁴ 20 C.F.R. § 10.519(a).

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to reduce appellant's compensation, effective December 18, 2017, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.

On remand from the Board's March 15, 2016 decision,¹⁵ OWCP retroactively returned appellant to the periodic compensation rolls. In April 2016, it again referred her for vocational rehabilitation services. As noted above, appellant refused to attend recommended computer skills training, and OWCP reduced her compensation effective December 18, 2017, finding that she could earn wages in the selected position of order clerk.

The issue of whether an employee has the physical ability to perform a selected position is a medical question that must be resolved by probative medical evidence.¹⁶ In this case, the selected position of order clerk requires frequent reaching, whereas the medical evidence of record establishes that appellant can only reach occasionally.

With respect to the issue of medical suitability of the selected position, OWCP relied on the physical restrictions provided by attending physicians Dr. Yoshinaga and Dr. Chang. In reports dated June 2, 2015 and January 20, 2016, Dr. Yoshinaga restricted appellant's activity to lifting and carrying no more than 15 pounds occasionally, 8 pounds frequently; pushing and pulling no more than 19 pounds of force occasionally, 10 pounds frequently; sitting no more than 60 minutes at a time 6 hours/8-hour day; standing and walking no more than 90 minutes at a time for 6 hours/8-hour day; and occasionally bend, squat, kneel, crawl, reach, and stairs. In a work capacity evaluation dated October 25, 2016, Dr. Chang placed no restriction on reaching. However, on May 30, 2017 she adopted Dr. Yoshinaga's restrictions. OWCP did not seek clarification from Dr. Chang regarding this discrepancy.

OWCP's procedures state that, "if the medical evidence is not clear and unequivocal, or is old enough to be considered stale (generally greater than eighteen months old), the [claims examiner] should seek clarification from the attending physician, Second Opinion or Referee specialist as appropriate."¹⁷ The Board finds that the medical evidence herein "is not clear and unequivocal", as the selected position of order clerk requires frequent reaching, and the medical evidence indicates that appellant is limited to occasional reaching.¹⁸ As such, the claims examiner should have sought clarification from Dr. Chang.¹⁹ Thus, the Board finds that OWCP failed to meet its burden of proof.

¹⁵ *Supra* note 5.

¹⁶ *See G.M.*, Docket No. 18-1236 (issued June 18, 2019); *Maurissa Mack*, 50 ECAB 498 (1999).

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity*, Chapter 2.8164(d) (June 2013).

¹⁸ *Id.* at Chapter 2.816.4(d) (June 2013); *see also B.C.*, Docket No. 15-1861 (issued October 3, 2016).

¹⁹ *Id.*

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to reduce appellant's compensation, effective December 18, 2017, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.

ORDER

IT IS HEREBY ORDERED THAT the September 4, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 2, 2022
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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