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L.J., Appellant)	
)	
and)	Docket No. 21-0823
)	Issued: June 6, 2022
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, Jamaica, NY, Employer)	
)	

Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 7, 2021 appellant, through counsel, filed a timely appeal from an April 13, 2021 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 to consider the merits of this case.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 an 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.*

³ The Board notes that, following the issuance of the April 13, 2021 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.*

ISSUE

The issue is whether OWCP properly reduced appellant's wage-loss compensation to zero pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, effective October 28, 2020, for failing to cooperate with vocational rehabilitation efforts, without good cause.

FACTUAL HISTORY

On February 23, 2012 appellant, then a 49-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she injured the right upper side of her body when she assisted a sick passenger, while in the performance of duty.⁴ OWCP assigned OWCP File No. xxxxxx812 to the claim and accepted it for right wrist sprain (triangular fibrocartilage tear), right shoulder and upper arm sprain, and right elbow enthesopathy. On April 3, 2013 it accepted that appellant sustained a recurrence of disability on March 5, 2013 because she underwent OWCP-authorized arthroscopic right shoulder surgery; arthroscopic labral debridement; type-1 labral tear; and subacromial decompression, bursectomy which she underwent on that day. Appellant did not return to work following her March 5, 2013 right shoulder surgery. OWCP paid her wage-loss compensation on the periodic rolls effective April 7, 2013.

In an October 19, 2017 attending physician's report (Form CA-20), Dr. Christopher Kyriakides, an osteopath and attending Board-certified physiatrist, diagnosed lumbar and cervical radiculopathy and right shoulder, elbow, and wrist derangement. He indicated that the diagnosed conditions were causally related to appellant's February 23, 2012 employment injury. Dr. Kyriakides opined that she was totally disabled commencing May 17, 2012 to the present. In a narrative report and work capacity evaluation (Form OWCP-5c) of even date, he reiterated his finding that appellant remained totally disabled from work. Dr. Kyriakides also found that she was unable to lift more than 10 to 15 pounds without great difficulty, only able to stand and walk for more than 10 minutes without having to sit down to rest, only able to sit down for 5 to 10 minutes without changing positions, and unable to bend, twist, kneel, or carry.

OWCP referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a series of questions, to Dr. Jeffrey Lakin, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether she had any remaining residuals and disability due to her accepted February 23, 2012 employment injury.

Dr. Lakin, in an October 23, 2017 report, noted a history of appellant's accepted February 23, 2012 employment injury and medical treatment. He found that she had residuals of her accepted right wrist and right shoulder sprains status post surgeries, which included tenderness and decreased range of motion (ROM) and strength of the right shoulder and right wrist. Dr. Lakin opined that appellant could not return to full-time, full-duty work, but she could return to full-time, modified-duty work with restrictions. He reiterated his opinion regarding her work capacity in an

⁴ Appellant has a prior traumatic injury claim for a September 19, 2004 right hand injury. OWCP assigned that claim OWCP File No. xxxxxx281 and processed it as a short form closure case. Appellant filed another traumatic injury claim for a February 25, 2011 right middle finger injury under OWCP File No. xxxxxx672, which was accepted for right hand and right wrist sprains. On May 17, 2012 she underwent OWCP-authorized arthroscopy of right wrist, synovectomy of right wrist, and debridement of right wrist triangular fibrocartilage complex tear. OWCP administratively combined OWCP File Nos. xxxxxx281 and xxxxxx672 with the instant claim, OWCP File No. xxxxxx812, designated as the master file.

October 26, 2017 Form OWCP-5c. Additionally, Dr. Lakin provided appellant's permanent work restrictions, which included no reaching above the shoulder, no pushing, pulling, lifting, squatting, and kneeling up to 10 pounds, and no climbing.

On September 20, 2018 OWCP found a conflict in the medical opinion evidence between Dr. Kyriakides and Dr. Lakin, regarding appellant's work capacity. On October 9, 2018 it referred her to Dr. Edward Krisiloff, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in the case.

In a December 17, 2018 report, Dr. Krisiloff noted his review of a SOAF and the medical record. He reported essentially normal findings on physical examination of the right shoulder, right elbow, and right hand except for limited ROM of the right shoulder and right wrist, which were secondary to appellant's discomfort and not true joint contracture. Dr. Krisiloff also reported that she had somewhat diminished motor strength that was secondary to her discomfort and some degree of symptom magnification. He found that appellant had significant right upper extremity disability. Dr. Krisiloff indicated that it was difficult to determine whether she could return to her prior job. However, he opined that appellant could return to work in a light-duty position. Dr. Krisiloff recommended a functional capacity evaluation (FCE) to determine her work capacity.

On February 24, 2020 the provider, Kinematic Consultants, LLC, advised appellant's rehabilitation specialist that, although she attended an FCE that day, it was unable to complete the FCE in its entirety because she did not take her blood pressure medication and her blood pressure was too high/elevated to complete the test. Appellant was advised to obtain cardiac clearance from her treating physician to complete the FCE.

By letter dated March 6, 2020, OWCP made note of appellant's inability to complete the FCE and advised her that, if she did not participate with the vocational rehabilitation effort, she would be obstructing such effort and further action would be taken against her.

On March 10, 2020 Kinematic Consultants, LLC, provided appellant's rehabilitation specialist a copy of the cardiac medical clearance form it sent by facsimile to Dr. Harleen Kaur, a Board-certified family practitioner. It noted that appellant had a follow-up appointment on March 16, 2020 with Dr. Kaur.

OWCP, by letter dated June 18, 2020, noted appellant's delay in submitting the requested cardiac clearance form. It requested that she follow-up with Dr. Kaur's office and submit the necessary evidence within 30 days. OWCP warned appellant that, if she did not fully cooperate with the medical rehabilitation effort, her compensation would be suspended until she complied in good faith with its directions.

On June 22, 2020 appellant informed OWCP that she would contact Dr. Kaur to obtain the required cardiac clearance form.

Dr. Kaur, in a clearance form dated June 26, 2020, provided cardiac medical clearance for appellant to participate in an FCE.

On August 10, 2020 appellant underwent an FCE performed at Kinematic Consultants Inc. by Leonard G. Bernstein, a licensed physical therapist, and Kevin Dorco, a biomedical engineer. Mr. Bernstein and Mr. Dorco noted that she demonstrated significant sub-maximum effort in relevant FCE event protocols. Coefficient of variation results were compatible with a strong

symptom magnification component to appellant's complaints and/or a conscious effort to portray work ability below actual ability. The evaluators noted that their work recommendations reflected her work capacity demonstrated during the FCE. They concluded that, due to appellant's substantial sub-maximum effort, the FCE results could not guarantee her maximum functional work ability. The evaluators further concluded that the FCE was of limited value in determining true residual functional deficit due to her self-limiting movement and strength effort. They recommended light category work. Additionally, the evaluators related that it was significant that appellant's average coefficients of variation for all test protocols were well above the acceptable 10 percent for normal human variance (15 percent for strength protocols and 15.3 percent for dynamic movement protocols). It was also within a reasonable degree of biomechanical probability that these "c.v." values may be compatible with a symptom magnification component to her complaints, and/or a conscious attempt by her to portray less than maximum effort for this evaluation. The evaluators found that regardless of cause, appellant demonstrated the ability to perform, at a minimum, light category work (occasional lifting up to 20 pounds), administrative duties, and visual inspection of vehicles/cargo, to provide verbal directions, operate equipment with push button/lever controls, perform swab testing, and report maintenance/supply issues, *etc.* She was advised to maintain a neutral wrist/forearm posture during all lifting and work activities and to keep loads close to her center of gravity to minimize stress on her upper extremity joints. The evaluators noted that unfortunately due to appellant's elevated average coefficients of variation for all test protocols, no objective determination could be made with regard to her abilities for heavy right upper extremity (RUE) gripping/grasping, work above chest level for the RUE, periods of prolonged or repetitive RUE activities greater than 10 minutes (*i.e.*, pushing, pulling, lifting, reaching), or heavier physical activities such as independent transfer of heavy materials/supplies or handling loads greater than 20 pounds. It was their understanding as related by her that she did not currently work. The evaluators concluded that if this job information was accurate, then appellant demonstrated the ability to perform, at a minimum, light category work with similar action requirements.

OWCP, in an August 26, 2020 letter, informed appellant that it had been notified that she had impeded medical rehabilitation efforts during the August 10, 2020 FCE. It noted that she demonstrated significant sub-maximum effort with a strong symptom magnification component to her complaints and/or conscious effort to portray work ability below her actual ability. Additionally, appellant exhibited self-limiting movement and strength effort. OWCP afforded her 30 days to contact OWCP and the vocational rehabilitation specialist to make a good faith effort to fully participate in the rehabilitation effort. It warned appellant that her compensation would be reduced to zero pursuant to 5 U.S.C. § 8113 (b) and 20 C.F.R. § 10.519 for failing to cooperate with vocational rehabilitation without good cause.

In an undated letter, appellant disagreed with the evaluators' finding that she showed sub-maximal effort during the August 10, 2020 FCE. She noted that she used a cane for her right knee primarily due to her lumbar and cervical stenosis. Appellant related that she could only walk very short distances on a flat even surface. She could not walk long distances or on uneven outside surfaces due to the danger of falling, which had already happened twice. Additionally, appellant could only bend at the waist a few times before experiencing spasms, pain, and stiffness. She noted having difficulties with bending over and picking up an empty basket and small items from the floor with both hands as instructed by the FCE examiner. After several attempts appellant was finally able to pick up the items. As a result, she experienced spasms, pain, and stiffness. Appellant also had difficulty with continuously raising both arms above the shoulder, straight, and to the side. The more she raised her arms, especially the right arm, they weakened. Appellant

claimed that she developed a cervical spine injury due to her inability to lift above the shoulder. She noted that the more she moved her right arm away from her body it began to weaken and she felt like it was coming out of its socket. Appellant had to hold her shoulder in place to perform the exercises. Additionally, she had difficulty with lifting a long chain with a handle. Appellant had to bend her back and had problems using both hands to reach the handle and the left hand to lift it up. She had a spasm on the left side of her lower back and could only bend up and down a few times before the pain intensified and reached level 10. Appellant contended that she fully cooperated and gave her best effort despite having pain and to strain both arms to perform the FCE test.

In a September 1, 2020 report, Dr. Kyriakides opined that appellant remained totally disabled from work because she had weakness in her right arm with numbness, tingling down her right elbow into her hand, and weakness in her left shoulder.

On September 21, 2020 appellant underwent a second FCE conducted at Kinematic Consultants Inc. by Mr. Bernstein and Mr. Dorco. Once again the evaluators found that the FCE results could not represent her maximum functional work ability due to her substantial sub-maximum effort with a strong symptom magnification component to her complaints and/or conscious effort to portray work ability below her actual ability. Further, they reiterated their opinion that appellant could perform light work and provided her physical restrictions as set forth in the August 10, 2020 FCE.

By decision dated October 28, 2020, OWCP reduced appellant's compensation to zero, effective that date, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, for her failure to cooperate with the early stages of vocational rehabilitation without good cause. It explained that, because she had failed to undergo the preparatory vocational testing, it assumed that she would have returned to work at the same or higher wages than her date-of-injury position. OWCP advised that the reduction in benefits would continue until appellant, in good faith, either underwent the directed vocational testing or showed good cause for not complying with the testing.

On November 3, 2020 OWCP issued a decision which superseded the October 28, 2020 decision. It reduced appellant's compensation to zero, as of November 3, 2020, as she failed to cooperate with the September 21, 2020 FCE.

On November 4, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP received an October 28, 2020 Form CA-20 from Dr. Marc M. Ponzio, a Board-certified physiatrist. Dr. Ponzio related a history of the February 23, 2012 employment injury. He diagnosed cervical and lumbar derangement with radiculopathy and right shoulder, right elbow, and right wrist derangement. Dr. Ponzio checked a box marked "Yes" to indicate that the diagnosed conditions were caused or aggravated by an employment activity. He advised that appellant was totally disabled commencing May 17, 2012 to the present.

In an undated letter, appellant restated her contention that she participated with the FCE to her best ability. She also contended that the FCE caused her physical injury. Appellant noted that she was being seen by a Dr. Chen⁵ for right wrist carpal tunnel syndrome and right trigger finger.

⁵ The Board notes that Dr. Chen's professional qualifications are not contained in the case record.

Dr. Chen recommended surgery to treat her right wrist and finger conditions and prescribed physical therapy to treat her left shoulder impingement/bursitis.

A telephonic hearing was held on February 11, 2021. By decision dated April 13, 2021, OWCP's hearing representative, affirmed the November 3, 2020 decision.

LEGAL PRECEDENT

Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.⁶ Section 8113(b) provides that, if an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under 8104, the Secretary, on review under section 8128 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 or her wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of OWCP.⁷

OWCP's regulations, at 20 C.F.R. § 10.519, provide 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 --

(b) Where a suitable job has not been identified, because the failure or refusal occurred in the early, but necessary stages of a vocational rehabilitation effort (that is, meetings with OWCP nurse, interviews, testing, counseling, [FCE], and work evaluations) OWCP cannot determine what would have been the employee's wage-earning capacity.

(c) Under the circumstances identified in paragraph (b) of this section, in the absence of evidence to the contrary, OWCP will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity, and OWCP will reduce the employee's monetary compensation accordingly (that is, to zero). This reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP."⁸

OWCP's procedures provide that, specific instances of noncooperation include a failure to appear for the initial interview, counseling sessions, an FCE, other interviews conducted by the rehabilitation counselor, vocational testing sessions and work evaluations, as well as lack of

⁶ 5 U.S.C. § 8104(a); *see also J.E.*, 59 ECAB 606 (2008).

⁷ *Id.* at § 8113(b); *R.M.*, Docket No. 16-0011 (issued February 11, 2016).

⁸ 20 C.F.R. § 10.519; *see R.H.*, 58 ECAB 654 (2007).

response or inappropriate response to directions in a testing session after several attempts at instruction.⁹

ANALYSIS

The Board finds that OWCP improperly reduced appellant's wage-loss compensation to zero pursuant to 5 U.S.C. § 8113(b), effective October 28, 2020, for failing to cooperate with a functional capacity evaluation.

OWCP properly found a conflict in the medical opinion evidence between Dr. Kyriakides, appellant's treating physician, and Dr. Lakin, an OWCP second opinion physician, regarding appellant's work capacity and referred her to Dr. Krisiloff for an impartial medical examination, pursuant to 5 U.S.C. § 8123(a).

In a December 17, 2018 report, Dr. Krisiloff opined that appellant had disabling residuals of her accepted right shoulder and right wrist conditions, but she appeared to be emotionally labile and had a degree of symptom magnification. While he maintained that it was difficult to determine whether she could return to her date-of-injury position, he found that she could perform light-duty work. Dr. Krisiloff recommended an FCE.

On February 24, 2020 appellant was scheduled to undergo an FCE, but she was unable to complete the test because her blood pressure was too high/elevated as she had not taken her blood pressure medication. After obtaining cardiac clearance from Dr. Kaur, on August 10, 2020 she underwent an August 10, 2020 FCE at Kinematic Consultants Inc, conducted by Mr. Bernstein and Mr. Dorco. The evaluators reported that appellant's effort was significantly less than maximum with strong symptom magnification component to her complaints and/or a conscious effort to portray work ability below actual ability, but found that she could perform light work with restrictions.

OWCP notified appellant that her failure to cooperate without good cause was reason to reduce her compensation benefits. Appellant was directed to attend and fully participate in another FCE scheduled for September 21, 2020. The third FCE was scheduled with the same evaluators at Kinematic Consultants Inc, Mr. Bernstein and Mr. Dorco who had conducted the prior FCE and found her effort was less than maximum. Appellant attended the evaluation, but the evaluators again reported that they were unable to accurately assess her full work capacity due to her substantial sub-maximum effort with a strong symptom magnification component to her complaints and/or conscious effort to portray work ability below her actual ability. The evaluators, however, again advised that she could perform light work with restrictions.

The Board has previously explained that if a second FCE is virtually identical to the first one in both format and results it is of diminished reliability. To avoid the appearance of a predisposition for any result, and to obtain a fair and impartial reporting, the second FCE should be scheduled with an independent physical therapist or other medical professional not already affiliated with the case to perform the second FCE.¹⁰ In the present case, to avoid the appearance

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.17(b) (February 2011); *see Sam S. Wright*, 56 ECAB 358 (2005).

¹⁰ *L.D.*, Docket No. 18-0205 (issued July 23, 2018); *see R.D.*, Docket No. 16-0936 (issued April 20, 2017); *see also Y.C.*, Docket No. 15-1442 (issued October 3, 2016).

of predisposition, the September 21, 2020 FCE should not have been conducted in the same format by Kinematic Consultants Inc, Mr. Bernstein and Mr. Dorco as the August 10, 2020 FCE. The Board therefore finds that the conclusions reached by Kinematic Consultants Inc, Mr. Bernstein and Mr. Dorco regarding appellant's FCE are of diminished value.

As such, the Board finds that OWCP improperly reduced appellant's compensation benefits to zero, for failure to cooperate with the September 21, 2020 FCE.

CONCLUSION

The Board finds that OWCP improperly reduced appellant's wage-loss compensation to zero pursuant to 5 U.S.C. § 8113(b), effective October 28, 2020, for failing to cooperate with a functional capacity evaluation.

ORDER

IT IS HEREBY ORDERED THAT the April 13, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 6, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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