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

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| **B.D., Appellant** | ) | |
| **and** | ) | **Docket No. 21-1301** |
| **U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Carol Stream, IL, Employer** | ) | **Issued: October 17, 2022** |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

# DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

## *JURISDICTION*

On August 24, 2021 appellant filed a timely appeal from an August 5, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] The Board notes that, during the pendency of this appeal from the August 5, 2021 merit decision, OWCP issued a January 27, 2022 merit decision denying modification of the August 5, 2021 decision. However, the Board and OWCP may not simultaneously exercise jurisdiction over the same issue(s) in a case on appeal. Therefore, OWCP's January 27, 2022 decision is set aside as null and void. 20 C.F.R. §§ 501.2(c)(3), 10.626; *see Order Dismissing Appeal, M.P.*, Docket No. 20-0200 (issued May 25, 2022); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

[2] 5 U.S.C. § 8101 *et seq*.

[3] The Board notes that following the August 5, 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), effective August 5, 2021, for failure to cooperate with the early stages of vocational rehabilitation.

## ***FACTUAL HISTORY***

On February 15, 2015 appellant, then a 53-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained an injury due to factors of her federal employment, including lifting trays of mail. She noted that she first became aware of her condition and realized its relation to her federal employment on December 30, 2014. By decision dated April 22, 2015, OWCP accepted the claim for exacerbation of lumbar intervertebral disc displacement without myelopathy. Appellant was off work for the period December 30, 2014 through December 11, 2017. OWCP paid appellant wage-loss compensation on the supplemental rolls as of February 17, 2015 and on the periodic rolls as of November 15, 2015.

On December 12, 2017 appellant returned to full-time modified work as a mail processing clerk with restrictions of no above shoulder lifting, no lifting greater than five pounds, and sitting for eight hours a day while performing fine manipulation and simple grasping. OWCP accepted that appellant sustained a recurrence of disability on September 19, 2018.

On December 17, 2019 OWCP requested that appellant undergo a second opinion evaluation to provide additional evidence on the nature of her condition, the extent of disability and appropriate treatment.

In a January 30, 2020 report, Dr. Allan Brecher, OWCP's second opinion physician and a Board-certified orthopedic surgeon, noted his review of statement of accepted facts (SOAF), and appellant's medical record. He also provided his physical examination findings. Dr. Brecher indicated that appellant had multiple medical problems, including permanent aggravation of her degenerative disc disease of her lumbar spine. He opined that appellant was capable of working with restrictions of no lifting greater than 25 pounds and that she may benefit from facet injections and future spine surgery. In a January 30, 2020 work capacity evaluation (Form OWCP-5c), Dr. Brecher opined that appellant could work eight hours a day with lifting, pushing, and pulling limited to 25 pounds. He noted that appellant's anxiety and hip replacement may limit her in the future.

On February 20, 2020 OWCP requested that appellant's treating physician, Dr. Jared Kalina, an osteopathic physician and Board-certified anesthesiologist, indicate whether or not he agreed with Dr. Brecher's January 30, 2020 opinion.

In a March 20, 2020 report, Dr. Kalina disagreed with Dr. Brecher that appellant may return to work with restrictions. He indicated that she would not tolerate work and that her condition would worsen. Dr. Kalina also noted that appellant's spine surgeon, Dr. Sokolowki, agreed that she was not a candidate for work. In a series or progress notes beginning March 20, 2020, Dr. Kalina indicated that appellant required pain medication to maintain activities of daily living and to achieve adequate pain relief, which the current medication plan was providing.

In a September 20, 2020 report, Dr. Kalina noted the history of appellant's work-related injury and her medical history. He diagnosed chronic lumbosacral root disorders and chronic other intervertebral disc displacement, lumbar region for which there was no partial or full recovery. Dr. Kalina opined that appellant was off duty to prevent further injury and/or aggravation of her severe spinal stenosis related pain. In an attending physician's report (Form CA-20) he noted that appellant was permanently disabled from work commencing September 24, 2018.

On January 19, 2021 OWCP advised the employing establishment that the weight of the medical evidence rested with Dr. Brecher's opinion that appellant could work with restrictions. It requested that the employing establishment provide a job within those restrictions. The employing establishment did not respond.

On May 10, 2021 OWCP referred appellant to vocational rehabilitation to assist with her return to gainful employment, based on Dr. Brecher's findings.

In a May 18, 2021 report, the vocational rehabilitation counselor reported that she had attempted to schedule an initial vocational rehabilitation interview with appellant on a number of occasions since May 10, 2021. However, on May 17, 2021 appellant advised that she was in the hospital for a few days and anticipated being admitted to a nursing home upon discharge from hospital. She claimed that her current hospitalization was related to her work-related back claim. The counselor noted that one week prior to the hospitalization, appellant told her that she was in the emergency room due to a nonwork-related seizure disorder.

In a June 10, 2021 letter, the vocational rehabilitation counselor requested additional information from appellant to determine whether vocational rehabilitation should continue due to her medical status. She requested that appellant provide a statement from her treating physician indicating a diagnosis, anticipated recovery timeframe, and explanation as to why she is unable to participate in vocational rehabilitation services.

In a June 25, 2021 rehabilitation action report (Form OWCP-44), the vocational rehabilitation counselor indicated that she tried to reach appellant multiple times and left several messages. On June 25, 2021 appellant asserted that her medical records were protected under the Health Insurance Portability and Accountability Act (HIPPA) and that she would refuse to provide any medical information as such information could be obtained through the Department of Labor. The counselor indicated that the medical information was being requested to determine whether she could participate in vocational rehabilitation, but appellant has not responded.

In a June 28, 2021 e-mail, the vocational rehabilitation counselor advised that appellant did not provide supportive medical evidence regarding her inability to participate in vocational rehabilitation services. She related that, one month prior, appellant was in the hospital and was being discharged to a nursing home. Appellant, however, then stopped communicating with her. When she requested that appellant sign a release form so that she could obtain the necessary medical information to determine whether appellant should receive rehabilitation services, appellant responded very defensively that her medical records were "off limits" and that she would not sign a release.

In a June 28, 2021 letter, OWCP advised appellant that the vocational rehabilitation counselor had indicated that she had expressed an unwillingness to participate in a possible rehabilitation effort because she believed that she was disabled from work. However, it noted that

the January 30, 2020 report from Dr. Brecher advised that appellant was able to perform gainful employment. OWCP also noted that appellant stopped communication with her assigned vocational rehabilitation counselor since she had been released from a nursing home due to a nonwork-related medical condition. It noted that the vocational rehabilitation counselor had requested medical evidence of her nonwork-related condition to determine whether she should be in vocational rehabilitation and that she had refused and defensively advised the rehabilitation counselor that her medical records were off limits and she refused to sign a release. OWCP advised that, without such medical records, appellant had not been able to support that her medical condition disabled her from work. It explained that pursuant to 5 U.S.C. § 8113(b), if an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed, and OWCP finds that in the absence of the failure the individual's wage-earning capacity would probably have substantially increased, it may reduce prospectively the compensation based on what probably would have been the individual's wage-earning capacity had they not failed to apply for and undergo vocational rehabilitation. OWCP further advised appellant: "Also, [s]ection 10.519 of Title 20 of the Code of Federal Regulations provides that if an individual without good cause fails or refuses to participate in the essential preparatory efforts as described above, OWCP will assume, in the absence of evidence to the contrary, that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity, and compensation will be reduced accordingly. In effect, this will result in a reduction of compensation to zero." It afforded appellant 30 days to contact the vocational rehabilitation counselor to make a good faith effort to participate in the rehabilitation effort or to provide good reasons for noncompliance.

In a July 23, 2021 letter to appellant, the vocational rehabilitation counselor advised that over the last couple of months she had attempted on several occasions to contact her to discuss her readiness to participate in a vocational rehabilitation interview.

In a July 3, 2021 letter, Dr. Kalina opined that appellant was totally disabled and not capable of any work. He indicated that appellant has severe stenosis and could not work as her symptoms would worsen, requiring surgical correction.

By decision dated August 5, 2021, OWCP reduced appellant's compensation to zero, effective August 5, 2021, based upon its finding that she had failed to cooperate during the early stages of vocational rehabilitation. It noted that while it received medical evidence from Dr. Kalina dated July 3, 2021, indicating that she had severe stenosis and cannot work as her symptoms would worsen requiring surgical correction, the medical evidence was insufficient to support her noncompliance. OWCP also found that appellant had not shown good cause for not complying with the scheduling of an initial vocational interview. It explained that the failure to undergo the essential preparatory effort of vocational rehabilitation did not permit it to determine what would have been appellant's wage-earning capacity had she undergone the testing, training, and rehabilitation effort. OWCP determined that, under the provisions of 20 C.F.R. § 10.519, in the absence of evidence to the contrary, the vocational rehabilitation effort would have resulted in appellant's return to work at the same or higher wages than the position she held when injured. It explained that because she had failed to undergo the early stages of vocational testing, it assumed that she either would have returned to her date-of-injury position or would have earned higher wages. OWCP advised that the reduction in benefits would continue until appellant either underwent vocational rehabilitation or showed good cause for not complying.

## ***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.[4] Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.[5]

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, then 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.[6]

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 --
>
> > (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.
> >
> > (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

[4] *See E.W.*, Docket No. 19-0963 (issued January 2, 2020); *Betty F. Wade*, 37 ECAB 556, 565 (1986).

[5] 5 U.S.C. § 8104(a).

[6] *Id.* at § 8113(b).

remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP."[7]

## ***ANALYSIS***

The Board finds that OWCP improperly reduced appellant's wage-loss compensation to zero, pursuant to 5 U.S.C. § 8113(b), effective August 5, 2021, for failure to cooperate with the early stages of vocational rehabilitation.

In a January 30, 2020 report, Dr. Brecher, OWCP's second opinion physician noted that appellant had multiple medical problems, including permanent aggravation of her degenerative disc disease of her lumbar spine. He opined that appellant was capable of working with restrictions of no lifting greater than 25 pounds and that she may benefit from facet injections and future spine surgery.

On February 20, 2020 OWCP requested that appellant's treating physician, Dr. Kalina review Dr. Brecher's January 30, 2020 report and indicate whether or not he agreed with Dr. Brecher's opinion.

In a March 20, 2020 progress report, Dr. Kalina reviewed Dr. Brecher's report and disagreed that appellant may return to work with restrictions. He indicated that she would not tolerate work and that her condition would worsen. Dr. Kalina also noted that appellant's spine surgeon, Dr. Sokolowki, agreed that she was not a candidate for work. In a September 20, 2020 report, he diagnosed chronic lumbosacral root disorders and chronic other intervertebral disc displacement, lumbar region from which appellant had not achieved partial or full recovery. Dr. Kalina opined that appellant was off duty to prevent further injury and/or aggravation of her severe spinal stenosis related pain. To the extent that he is asserting that working might cause further injury, the Board has held that fear of future injury is not compensable.[8] However, Dr. Kalina also related that appellant had not recovered partially or fully from her accepted injury and that she remained disabled.

On May 10, 2021 OWCP referred appellant to vocational rehabilitation to assist with her return to gainful employment, based on Dr. Brecher's findings.

It is well established that when there are opposing medical reports of virtually equal probative value between an attending physician and a second opinion physician, 5 U.S.C. § 8123(a) requires OWCP refer the case to a referee physician to resolve the conflict.[9] The Board finds that the medical reports of Drs. Brecher and Kalina are in equipoise on the issue of whether appellant was capable of returning to work and are thus in conflict. The Board therefore finds that

[7] 20 C.F.R. § 10.519; *see R.H.*, 58 ECAB 654 (2007).

[8] Appellant's fear of future injury is not compensable. *D.T.*, Docket No. 19-1064 (issued February 20, 2020); *J.O.*, Docket No. 19-1047 (issued November 13, 2019); *Paul A. Clarke*, 43 ECAB 940 (1992). Further, the opinion of a physician that a claimant is unable to work due to a fear of future injury is also not compensable. *P.D.*, Docket No. 18-1461 (issued July 2, 2019). There must be medical evidence showing that a claimant is currently disabled for work due to his or her employment-related condition. *O.L.*, Docket No. 15-1541 (issued January 7, 2016); *William A. Kandel*, 43 ECAB 1011 (1992).

[9] *F.N.*, Docket No. 20-0435 (issued February 26, 2021); *William C. Bush*, 40 ECAB 1064 (1989).

OWCP should have resolved this conflict of medical evidence before referring appellant for vocational rehabilitation.

As there remains an unresolved conflict of medical opinion as to whether appellant is physically capable of participating in any work activities, OWCP has not met its burden of proof to justify termination of her compensation benefits for failure to participate in vocational rehabilitation efforts.

## ***CONCLUSION***

The Board finds that OWCP improperly reduced appellant's wage-loss compensation to zero, pursuant to 5 U.S.C. § 8113(b), effective August 5, 2021, for failure to cooperate with the early stages of vocational rehabilitation.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the August 5, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 17, 2022
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board