

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

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J.S., Appellant )  
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 )  
and ) **Docket No. 22-0386**  
 ) **Issued: October 19, 2022**  
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DEPARTMENT OF THE NAVY, NAVAL )  
DISTRICT WASHINGTON SECURITY )  
POLICE, Washington, DC, Employer )  

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*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  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On January 5, 2022 appellant filed a timely appeal from an October 1, 2021 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 this case.<sup>2</sup>

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

<sup>2</sup> The Board notes that, following the October 1, 2021 decision, a appellant submitted additional evidence to OWCP. 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 has met its burden of proof to reduce appellant's compensation, effective October 1, 2021, pursuant to § 8113(b), for failure to cooperate with vocational rehabilitation without good cause.

## FACTUAL HISTORY

On August 21, 1988 appellant, then a 39-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained injuries when he was involved in a motor vehicle accident while in the performance of duty. He stopped work. OWCP accepted appellant's claim for cervical sprain. It paid him wage-loss compensation on the supplemental rolls, effective October 6, 1988, and on the periodic rolls, effective February 27, 1990.

On May 14, 2020 OWCP expanded the acceptance of appellant's claim to include lumbar sprain and lumbosacral spondylosis without myelopathy.

On July 6, 2020 OWCP referred appellant, along with a statement of accepted facts (SOAF), the case record, and a series of questions to Dr. Robert Moore, a Board-certified orthopedic surgeon, for a second-opinion evaluation to determine the extent of his employment injury and work capacity. In an August 3, 2020 report, Dr. Moore indicated that he reviewed appellant's records and noted that his claim was accepted for neck strain, lumbar strain, and lumbosacral spondylolisthesis. He reported appellant's complaints of lower back pain. Upon examination of appellant's cervical spine, Dr. Moore observed full range of motion and no tenderness in the cervical region. Examination of appellant's lumbar spine revealed mild tenderness in the lumbar midline and paravertebral muscles. Straight leg raise testing was negative. Dr. Moore diagnosed lumbar degenerative disc disease, status post lumbar fusion for spondylolisthesis, and cervical strain, resolved.

In response to OWCP's questions, Dr. Moore opined that appellant's neck sprain had resolved, but that he continued to suffer residuals of his accepted lumbar strain and lumbosacral spondylolisthesis. He reported that appellant was unable to return to his date-of-injury job as a police officer, but could work with restrictions. Dr. Moore further opined that appellant could participate in vocational rehabilitation. In an August 3, 2020 work capacity evaluation (Form OWCP-5c), he indicated that appellant could work full time with restrictions of no bending/stooping, no stair climbing, and pushing, pulling, and lifting up to 12 pounds for 3 hours.

In September 2020, OWCP referred appellant to Rachel Boling, a vocational rehabilitation counselor. It noted that appellant's work restrictions should be based on Dr. Moore's August 3, 2010 report and Form OWCP-5c.

Appellant subsequently underwent vocational evaluation. In a September 28, 2020 report, Ms. Boling reported appellant's educational history and noted his employment history. She indicated that she had conducted an initial interview with appellant on September 24, 2020 and that appellant advised her that he was not capable of working due to various medical conditions, including chronic obstructive pulmonary disease (COPD), prediabetes, and hypertension.

On October 5 and 19, 2020 appellant asserted that he could not work and requested another second-opinion evaluation.

In a work and educational history form signed by appellant on October 5, 2020, he reported no employment history, job-related training, or computer skills.

On October 6, 2020 Ms. Boling completed a transferable skills analysis and forwarded her report to OWCP. She noted that appellant had an Associate Degree in Business Administration and listed Dr. Moore's work restrictions. Ms. Boling identified the positions of order clerk, Department of Labor, Dictionary of Occupational Titles (DOT) No. 249.362-026, and information clerk, DOT No. 237.367-022, as viable employment options for appellant. Both order and information clerks were considered to be in the sedentary demand level.<sup>3</sup> On October 26 and November 2, 2020 Ms. Boling completed labor market surveys for the positions of order clerk and information clerk. She noted that these jobs were reasonably available within a 55-mile commuting distance of appellant's residence. Ms. Boling also recommended that appellant undergo online computer training.

In a November 5, 2020 note, Ya H. Taylor, a certified nurse practitioner, indicated that appellant was "disabled due to multiple comorbidities preventing him from performing tasks required by most employment (sanding, bending, heavy lifting)." She noted that appellant was morbidly obese and had a history of spinal fusion and moderate COPD.

On January 22, 2021 Ms. Boling recommended, and OWCP approved, a rehabilitation plan for appellant to undergo free online computer courses through nonprofit organization. The plan requested 60 days of job placement services.

In a letter dated January 27, 2021, OWCP informed appellant of the rehabilitation plan developed by Ms. Boling for his return to work as an order clerk or information clerk and its determination that those jobs duties were within his medical limitations. Appellant was advised that he was expected to cooperate fully so that he may return to work in the specified job or one similar to it. He was informed that, if he failed to cooperate fully, OWCP would assume that the vocational services would have resulted in a wage-earning capacity and, therefore, may reduce his compensation pursuant to 5 U.S.C. § 8113 and 20 C.F.R. § 10.519.

In a February 2, 2021 note, Ms. Taylor reported that appellant was disabled for more than 10 years and was unable to return to work due to his comorbidities.

In a letter dated February 19, 2021, Ms. Taylor indicated that she had reviewed notes from appellant's cardiologist and pulmonologist. She explained that shortness of breath due to morbid obesity and COPD had limited appellant from being able to ambulate a short distance. Ms. Taylor reported that appellant had chronic heart failure, which required medication, and a history of spinal

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<sup>3</sup> A sedentary demand level required exerting up to 10 pounds occasionally and/or a negligible amount of force frequently to lift, carry, push, pull, or otherwise move objects. Sedentary work also involved sitting most of the time, but may involve walking or standing for brief periods of time.

fusion, which limited his physical mobility. She opined that appellant's "labored work of breathing from his COPD and his severe back pain limits him from participating in physical work."

OWCP received a letter dated March 4, 2021 signed by Dr. John R. Greene, an emergency medicine physician, which was identical to Ms. Taylor's February 19, 2021 letter.

In an email dated March 28, 2021, Ms. Boling informed OWCP of the dates that job search meetings took place with appellant. She also indicated that appellant did not apply with any of the positions provided to him, had not retaken tutorial quizzes through the nonprofit organization to achieve an eighty percent score, and did not submit independent employer contacts.

In an attending physician's report (Form CA-20) dated April 12, 2021, Dr. Greene noted the September 21, 1988 employment injury and reported specific findings of fusion of lumbar spine. He indicated that appellant was permanently disabled from work.

In a report dated April 27, 2021, Dr. Greene indicated that appellant had been permanently disabled from work for the past 20 years. He noted that appellant would be off work indefinitely.

On May 26, 2021 appellant alleged that he was still disabled and unable to work. He disagreed with the second-opinion physician and again requested a second-opinion examination.

In a rehabilitation report dated May 26, 2021, Ms. Boling indicated that appellant had reported that he was unable to do anything according to his doctor. She indicated that appellant had not applied for the job leads provided, nor worked on online tutorials, nor made any independent employer contacts.

On June 25, 2021 vocational rehabilitation services were terminated because of appellant's lack of compliance. The closure report noted that appellant was able to check his email and apply for jobs with the rehabilitation counselor's assistance, but he would not complete the tasks on his own, alleging that he was too busy attending medical appointments. It also indicated that appellant submitted only 9 of 29 assigned contacts, citing that he was busy with medical appointments. The rehabilitation counselor also determined that the position remained vocationally suitable and that such position was reasonably available in his commuting area.

In a memorandum dated July 19, 2021, the rehabilitation counselor indicated that, during the placement assistance period, appellant did not fully cooperate with the reemployment effort because he felt that he was unable to work. She noted that appellant had informed her that he could not follow up on job leads or complete computer skill refresher courses because he was busy attending to medical issues. The rehabilitation counselor reported that the positions of order clerk and information clerk remained vocationally suitable and that such positions were reasonably available in his commuting area.

In a report dated July 22, 2021, Dr. Greene indicated that appellant had low back pain for years after he sustained a low back injury at work. He noted that appellant underwent lumbar fusion surgery in 1988 and had a nerve stimulator placed in his lower back. Dr. Greene indicated that appellant complained of severe low back pain radiating down the right lower extremity. He opined that appellant was "clearly disabled from performing jobs requiring stamina in walking,

bending, lifting, carrying, etc....” Dr. Greene also noted that, after 30 years of unemployment and 70 years of age, it would be unreasonable to expect appellant to enter the work force.

By notice dated August 4, 2021, OWCP proposed to reduce appellant’s wage-loss compensation because he did not fully cooperate with vocational rehabilitation training. It noted that the August 3, 2020 report by Dr. Moore demonstrated that he was capable of working with restrictions and that the physical requirements of the information clerk position did not exceed these medical restrictions. OWCP provided appellant 30 days to submit additional evidence if he disagreed with the proposed reduction of compensation.

Appellant submitted additional medical reports, including eye examination reports dated August 18 through 27, 2021 and hospital records and diagnostic reports dated August 15 through 18, 2021 regarding treatment for sudden loss of vision in his right eye.

On September 20, 2021 appellant again requested a second-opinion examination and indicated that he did not want his compensation reduced.

By decision dated October 1, 2021, OWCP finalized the August 4, 2021 proposed reduction of appellant’s wage-loss compensation, pursuant to 5 U.S.C. §§ 8104 and 8113(b), because he failed without good cause to undergo vocational rehabilitation as directed. It included the DOT #237.367-022 and the position description for an information clerk. OWCP indicated that the information clerk position had a sedentary strength level with restrictions of exerting up to 10 pounds of force occasionally (up to 1/3 of the time) and/or a negligible amount of force frequently (from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body and walking or standing for brief periods of time. It further noted that the physical requirements of the information clerk position did not exceed appellant’s current work restrictions as provided by Dr. Moore on August 3, 2020 and was, therefore, medically suitable. OWCP indicated that had appellant successfully completed the approved vocational rehabilitation program, he would have been capable of securing reemployment as an information clerk, which had an entry-level wage of \$423.60 per week. It applied the *Shadrick* formula,<sup>4</sup> finding that he had 51 percent wage-earning capacity. OWCP reduced appellant’s wage-loss compensation, effective that day.

### **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.<sup>5</sup> Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.<sup>6</sup>

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<sup>4</sup> *Albert C. Shadrick*, 5 ECAB 376(1953); codified at 20 C.F.R. § 10.403.

<sup>5</sup> *S.B.*, Docket No. 19-0781 (issued February 2, 2022); *S.C.*, Docket No. 19-1680 (issued May 27, 2020); *Betty F. Wade*, 37 ECAB 556 (1986).

<sup>6</sup> 5 U.S.C. § 8104(a).

Section 8113(b) of FECA<sup>7</sup> provides:

“If an individual without good cause fails to apply for and 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.”<sup>8</sup>

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.”<sup>9</sup>

OWCP’s procedures state that specific instances of noncooperation include a failure to appear for the initial interview, counseling sessions or other interviews conducted by the rehabilitation counselor, vocational testing sessions, and work evaluations, lack of response or inappropriate response to directions in a testing session, as well as failure to attend an approved training program.<sup>10</sup>

### ANALYSIS

The Board finds that OWCP has met its burden of proof to reduce appellant’s compensation, effective October 1, 2021, for failure to cooperate with vocational rehabilitation without good cause.

When determining whether OWCP properly reduced appellant’s wage-loss compensation benefits based on his failure to participate in vocational rehabilitation, the Board must first analyze

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<sup>7</sup> *Supra* note 1.

<sup>8</sup> 5 U.S.C. § 8113(b).

<sup>9</sup> 20 C.F.R. § 10.519(a).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Vocational Rehabilitation Services, *Non-Cooperation and Sanction Decisions*, Chapter 2.813.17 (February 2011).

whether OWCP properly determined appellant's work restrictions and ability to work.<sup>11</sup> OWCP initially referred appellant to vocational rehabilitation based on the August 3, 2020 report of Dr. Moore, an OWCP second opinion examiner, who conducted an examination and opined that appellant still suffered residuals of his accepted lumbar spine injury. Dr. Moore indicated that appellant could work full time with restrictions of no bending/stooping, no stair climbing, and pushing, pulling, and lifting up to 12 pounds for three hours. He also noted that appellant was able to participate in vocational rehabilitation.

As Dr. Moore's report was sufficiently rationalized and based on examination findings, the Board finds that OWCP properly determined that Dr. Moore's opinion represents the weight of the medical evidence and, accordingly, that appellant had the physical capacity to perform the duties of an information clerk.<sup>12</sup> The position was classified as sedentary and required no bending, stooping, or climbing and lifting, pushing, and pulling up to 10 pounds. The Board finds that the restrictions of Dr. Moore fall within these sedentary work requirements.

Based on Dr. Moore's findings, OWCP referred appellant for vocational rehabilitation. The vocational rehabilitation counselor identified the position of order clerk and information clerk as the best employment options for appellant and provided a rehabilitation plan, which OWCP approved. On March 28 and May 26, 2021 the counselor informed OWCP that appellant did not apply to any of the positions provided to him, take any of the online tutorials or tutorial quizzes, or make any independent employer contacts. OWCP's procedures state that specific instances of noncooperation include lack of response or inappropriate response to directions in a testing session, as well as failure to attend an approved training program; failure to attend classes; failure to apply appropriate effort to succeed in such classes; and failure to undergo training after a training program had been approved.<sup>13</sup> The Board finds that the evidence of record establishes that appellant failed to continue in vocational rehabilitation without good cause.

Appellant has alleged that he was unable to continue vocational rehabilitation and return to work because of various medical conditions. He submitted reports and a Form CA-20 dated March 4, April 12, and July 22, 2021 by Dr. Greene who noted appellant's history of a work-related back injury. Dr. Greene indicated that appellant complained of severe low back pain radiating down the right lower extremity. He noted that appellant was permanently disabled. Although he opined that appellant was permanently disabled, Dr. Greene did not provide sufficient medical reasoning to support his opinion on disability nor did he refer to any physical examination findings or objective evidence to support his opinion. The Board has found that findings on examination are generally needed to support a physician's opinion that an employee is disabled from work.<sup>14</sup> Dr. Greene's reports, therefore, are insufficient to establish that appellant was unable to work a modified duty schedule. In addition, the reports by Ms. Taylor are also insufficient to establish appellant's disability from work because medical reports signed solely by a nurse

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<sup>11</sup> See *F.N.*, Docket No. 20-0435 (issued February 26, 2021); *L.C.*, Docket No. 12-972 (issued November 9, 2012).

<sup>12</sup> See *S.C.*, Docket No. 19-1680 (issued May 27, 2020); see also *M.P.*, Docket No. 19-1364 (issued February 4, 2020).

<sup>13</sup> *Supra* note 10.

<sup>14</sup> *R.C.*, Docket No. 17-0748 (issued July 20, 2018); *Dean E. Pierce*, 40 ECAB 1249 (1989).

practitioner are of no probative value.<sup>15</sup> As these reports were not countersigned by a qualified physician, they are of no probative value to establish appellant's claim.<sup>16</sup>

Accordingly, the Board finds that OWCP properly determined that appellant had, without good cause, failed to continue vocational rehabilitation.<sup>17</sup> 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 his wage-earning capacity had he undergone vocational rehabilitation. The rehabilitation counselor identified the position of information clerk, DOT No. 237.367-022, with wages of \$423.60 per week. This represents the amount, which would likely have been appellant's wage-earning capacity had he completed vocational rehabilitation. OWCP followed its procedures and advised him that, if he did not continue vocational rehabilitation, his compensation would be reduced. It properly applied the *Shadrick* formula, as codified in section 10.403 of its regulations,<sup>18</sup> in determining appellant's LWEC and reducing his compensation. The Board, thus, finds that appellant had, without good cause, failed to continue participation in vocational rehabilitation, and his compensation was properly reduced to reflect a wage-earning capacity as an information clerk.

### CONCLUSION

The Board finds that OWCP has met its burden of proof to reduce appellant's compensation, effective October 1, 2021, for failure to cooperate with vocational rehabilitation without good cause.

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<sup>15</sup> 5 U.S.C. § 8102(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 20 C.F.R. § 10.5(t). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); *W.Z.*, Docket No. 20-0191 (issued July 31, 2020) (medical reports signed solely by nurse practitioners or physical therapists are of no probative value as such healthcare providers are not considered "physician[s]" as defined under FECA and are, therefore, not competent to provide medical opinions).

<sup>16</sup> *K.C.*, Docket No. 18-1330 (issued March 11, 2019); *see K.W.*, 59 ECAB 271, 279 (2007); FECA Procedure Manual, *supra* note 10, Chapter 2.805.3a(1).

<sup>17</sup> *See D.T.*, Docket No. 16-1590 (issued January 17, 2018); *M.K.*, Docket No. 16-1676 (issued February 16, 2017).

<sup>18</sup> 20 C.F.R. § 10.403.



**ORDER**

**IT IS HEREBY ORDERED THAT** the October 1, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 19, 2022  
Washington, DC

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

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board