

FACTUAL HISTORY

On September 10, 2003 appellant, then a 40-year-old telephone operator, filed an occupational disease claim (Form CA-2) alleging that she suffered stress as a result of being stalked by another employee while in the performance of duty. She first realized her condition and its relation to her employment on February 20, 2003. Appellant stopped work on July 28, 2003 and has not returned. OWCP accepted the claim for aggravation of preexisting depression. It paid wage-loss compensation on its supplemental rolls as of August 21, 2003, and on the periodic compensation rolls commencing March 20, 2005.

In a May 20, 2020 letter, OWCP requested that Dr. David R. Hawkins, a psychiatrist, provide updated medical documentation on appellant's work-related condition. In a May 27, 2020 letter, Dr. Hawkins indicated that he last treated appellant on August 17, 2017.

On January 20, 2021 OWCP referred appellant, along with a statement of accepted facts (SOAF) and list of questions, for a second opinion evaluation with Dr. Manuel Saint Martin, a Board-certified psychiatrist. In a February 11, 2021 report, Dr. Saint Martin opined that appellant still had symptoms of major depression and that she had reached maximum medical improvement. He also opined that she should have ongoing treatment to maintain her current level of functioning. Dr. Saint Martin indicated that appellant was not capable of returning to her date-of-injury job as a telephone operator in the same location or under the same circumstances. He also noted that appellant was spending about four hours a day on activities related to selling merchandise online, which she hoped to perform as a business. In a February 10, 2021 work capacity evaluation for psychiatric/psychological conditions (Form OWCP-5a), Dr. Saint Martin opined that appellant was capable of working no more than four hours per day as anxiety would affect her ability to concentrate on work tasks. He noted that there were no medical factors, including medications taken, that needed to be considered in finding employment.

In a February 16, 2021 letter, OWCP informed appellant that the weight of the medical evidence rested with the second opinion report of Dr. Saint Martin, who opined that she was capable of resuming gainful employment up to four hours per day within imposed restrictions. It advised her of the purpose of vocational rehabilitation services. OWCP also noted that her case was referred for appropriate vocational rehabilitation services and that a vocational rehabilitation counselor would contact her to set up an initial interview and her employment plan.

In separate letters also dated February 16, 2021, OWCP informed both Dr. Hawkins and the employing establishment that appellant would be referred to vocational rehabilitation services as Dr. Saint Martin had indicated that she was employable for four hours a day.

In a February 26, 2021 letter, OWCP notified appellant that Gerald Balut, a vocational rehabilitation counselor, had been assigned to assist her in returning to suitable employment. It advised her that participation in its vocational rehabilitation program was mandatory and, pursuant to section 8113(b) of FECA (5 U.S.C. § 8113(b)), if an employee without good cause failed to undergo vocational rehabilitation when so directed, OWCP may reduce compensation prospectively based on what would have been the employee's wage-earning capacity had she not failed to undergo vocational rehabilitation.

In a letter dated April 13, 2021, OWCP requested that appellant have her treating physician provide updated medical documentation to substantiate her disability and its relation to her federal employment.

In a March 31, 2021 rehabilitation action report (Form OWCP-44), the vocational rehabilitation counselor related that rehabilitation plan development status began on February 26, 2021 and that he had tried to contact appellant at two telephone numbers, but was not able to converse with her. He also noted that appellant never responded to his March 16, 2021 correspondence, which was sent to appellant's address, which requested that she contact him as soon as possible for the initial vocational assessment which was scheduled for March 25, 2021 at 10:00 a.m. The vocational rehabilitation counselor also indicated that he tried without success to contact appellant several more times. A March 31, 2021 vocational rehabilitation executive summary indicated that the counselor spoke with someone who answered appellant's telephone. The counselor was apprised that appellant went by three names and that she may have moved to Hicksville, New York. The counselor was able to obtain a new telephone number for appellant, however, her voice mail box was full on March 10 and 24, 2021. In a May 7, 2021 vocational rehabilitation executive summary, the vocational rehabilitation counselor reported that appellant contacted him on April 6, 2021 but, due to severe static on the telephone line, he told her that he would immediately call her back. Appellant responded "yes" as he verified appellant's telephone number. However, when he immediately called back, appellant did not pick up the telephone and his attempts to reach her over the course of several hours either went to voice mail or to her mailbox which was full. The rehabilitation counselor indicated that he also called appellant on April 7, 14, 15, and 22, 2021. When he was able to leave a voice mail message, he provided both his cell number and office number, which had also been provided on the informational form he previously sent the prior month, however, appellant never responded. The rehabilitation counselor recommended that the case be closed due to appellant's noncooperation.

In a May 31, 2021 vocational rehabilitation report, the vocational rehabilitation counselor noted that he had been trying to reach appellant since March 9, 2021 with little success despite multiple attempts, except on April 6, 2021. He indicated that he left her detailed messages on May 5, 19, and 26, 2021, but she did not respond.

In a June 30, 2021 Form OWCP-44 and vocational rehabilitation report, the vocational rehabilitation counselor listed his attempts of trying to call appellant with no success. This included June 14, 21, and 29, 2021 when he left messages for appellant, but received no response. He again requested that the case be closed because of noncooperation.

In subsequent vocational rehabilitation reports dated July 31, August 31, September 30, and October 30, 2021, the vocational rehabilitation counselor reiterated that he had been trying to reach appellant since March 9, 2021, that she had two different telephone numbers, and that she never responded to correspondence sent to her New York address for the initial interview set for March 25, 2021 at 10:0 a.m. He noted that appellant had not replied to any of his contacts in the past four months and that she still had not contacted him to begin rehabilitation activities. The rehabilitation counselor documented his attempts to contact appellant again on August 25, September 7, and October 19, 2021, noting that he had left detailed messages regarding rehabilitation process and had included his contact numbers, but she did not respond.

In a November 5, 2021 letter, OWCP advised appellant that the vocational rehabilitation counselor had attempted to contact her on March 9, 10, April 6, 7, 14, 15, and 22, May 5, 19 and 26, June 14, 21, and 29, 2021 either by telephone or in written correspondence requesting that she contact OWCP regarding possible rehabilitation services. It explained the purpose of vocational rehabilitation and advised, pursuant to 5 U.S.C. § 8113(b), if an individual without good cause fails to 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 he or she not failed to 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." This reduction would continue until appellant in good faith complies with OWCP's directions concerning vocational rehabilitation. It afforded appellant 30 days to contact OWCP and the vocational rehabilitation counselor and participate in the rehabilitation effort or to provide good reasons for noncompliance.

In a November 9, 2021 memorandum of telephone call (Form CA-110), appellant denied noncooperation and advised OWCP that she wanted to cooperate with vocational rehabilitation services. She verified her cell phone number and New York address. OWCP further advised appellant that she needed to obtain a current medical report from her physician.

In an undated letter, which OWCP received on November 29, 2021, appellant advised, in pertinent part, that she "have always and will continue to participate in any vocational therapy, given the opportunity."

In a November 30, 2021 Form OWCP-44 and vocational rehabilitation report, the vocational rehabilitation counselor indicated that he left appellant detailed messages on November 10 and 22, 2021, but received no response. He noted that a noncompliance letter had been sent to appellant and that she had until December 10, 2021 to respond. In December 31, 2021 and January 31, 2022 vocational rehabilitation reports, the rehabilitation counselor documented leaving detailed messages regarding participation in vocational rehabilitation activities on December 10, 15 and 31, 2021 and January 10, 26, 31, 2022, but appellant had not responded. He advised that appellant had not replied to any of his contacts in the past six/seven months.

In his February 28, 2022 vocational rehabilitation report, the rehabilitation counselor indicated that appellant did not respond to his messages left on February 10 and 17, 2022; however, she had called him on February 19, 2022. During that conversation, appellant stated that she had tried to call him in December 2021 and January 2022, but both times there was no voice mail available for her to leave a message. The rehabilitation counselor indicated that they arranged that he would call appellant at 9:30 a.m. on Monday, February 21, 2022 to go over the case file. On February 21, 2022 the counselor called appellant as scheduled and left a detailed message, but appellant never responded. He left additional messages for appellant on March 10, 30, April 11, 25, May 9, 18, 25, 2022, but she did not respond.

In letters dated May 2 and June 28, 2022, OWCP requested that appellant have her treating physician provide updated medical documentation to substantiate her disability and its relation to her federal employment pursuant to its requirement to support payment of continuing compensation.

On June 15, 2022 appellant advised OWCP of her new address in Greenville, North Carolina, effective June 7, 2022.

In June 30 and July 8, 2022 Forms OWCP-44, the rehabilitation counselor related that for the past four and a half months, he had given appellant every opportunity to cooperate in the rehabilitation process, but she has failed to respond to any of his contacts. He recommended that the case be closed for noncooperation. In a June 30, 2022 executive summary, the vocational rehabilitation counselor reported leaving messages for appellant on June 7 and 21, 2022, but she did not respond to his calls. Based on appellant's background, he indicated that she had the ability to be gainfully employed on a part-time basis, but suitable gainful employment was not able to be provided because of her noncooperation.

By decision dated July 12, 2022, OWCP reduced appellant's wage-loss compensation to zero pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, effective July 12, 2022, due to her failure to cooperate with vocational rehabilitation without good cause. It found that her failure to undergo the essential preparatory effort of vocational testing did not permit OWCP to determine what would have been her wage-earning capacity had she undergone the testing and rehabilitation effort.

On August 9, 2022 appellant requested for reconsideration. In an August 1, 2022 statement, she noted the background of her claim and indicated that she was traumatized every time her telephone rings. Appellant noted that she listened to her voice mails when she upgraded her telephone in early 2022. She alleged that she had trouble getting in touch with the "very unprofessional" vocational rehabilitation counselor. Appellant noted that one message in late December from a "Jerry," which wished her a Happy New Year, had frightened her as she did not realize that "Jerry" was Gerald, the rehabilitation counselor, as he did not leave his full name or his company. She related that "not once in any of his messages did he say what he wanted or who he was." Appellant noted that she had called him, but he did not have an answering machine. She also questioned how the rehabilitation process was supposed to work as "Jerry" was in Massachusetts and she had lived in New York at the time. Appellant noted that she had numerous problems with OWCP's New York office and that no doctor had released her to work.

By decision dated August 17, 2022, OWCP denied modification of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

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.² Section 8104(a) of FECA

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

provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.³

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.⁴

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, functional capacity evaluations [(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.”

OWCP’s procedures state that specific instances of noncooperation include a failure to appear for the initial interview, counseling sessions, an FCE, other interviews conducted by the

³ 5 U.S.C. § 8104(a).

⁴ *Id.* at § 8113(b).

rehabilitation counselor, vocational testing sessions, and work evaluations, as well as lack of response or inappropriate response to directions in a testing session after several attempts at instruction.⁵

ANALYSIS -- ISSUE 1

The Board finds that 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 July 12, 2022, due to her failure to cooperate with vocational rehabilitation without good cause.

If the individual fails or refuses to continue to participate in a vocational rehabilitation effort after a suitable position has been identified, future monetary compensation will be reduced based on the potential earnings of the identified position, as this would likely have been the individual's wage-earning capacity had he or she undergone vocational rehabilitation.⁶ But if the failure or refusal to participate occurred prior to the identification of a suitable job -- during the so-called early, but necessary stages of a vocational rehabilitation effort, OWCP is not in a position to determine what would have been the individual's wage-earning capacity.⁷ Under this latter scenario, OWCP will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity, and therefore, the individual's prospective monetary compensation is reduced to zero.

Upon receiving Dr. Saint Martin's February 11, 2021 report that appellant was not totally disabled from all work and was capable of performing up to four hours of work with restrictions, OWCP properly referred appellant to vocational rehabilitation services in February 2021. Despite OWCP's letters dated April 13, 2021 and May 2 and June 28, 2022 which informed appellant of the need for updated medical documentation from her treating physician, no new medical evidence was received. Thus, the most recent medical documentation of record remains the February 11, 2021 second opinion examination report from Dr. Saint Martin which opined that appellant was capable of working no more than four hours per day with restrictions.

The facts of this case establish that the vocational rehabilitation specialist was unable to successfully contact appellant to begin rehabilitation services. Since March 9, 2021 he had attempted to reach appellant through voice mail messages and since March 16, 2021 through written correspondence. Appellant did not respond to the scheduled March 25, 2021 initial interview and thereafter to the vocational specialist's numerous documented messages over a period of several months, with the exception of April 6, 2021 and February 19, 2022. On April 6, 2021 the rehabilitation specialist related that he spoke to appellant and she verified her contact information, however, due to static on the line he informed her that he would call back immediately. He did call appellant back immediately, but she did not pick up the telephone at that time, or during multiple attempts that day. On February 19, 2022 the vocational rehabilitation specialist indicated that they arranged to go over appellant's case file on Monday, February 21,

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.17(b) (February 2011).

⁶ 5 U.S.C. § 8113(b).

⁷ *Id.*

2022 at 9:30 a.m., but, when he called her at the stated time and date, she never picked up the telephone or responded to his messages.

On November 5, 2021 OWCP preliminarily explained in a letter to appellant that, pursuant to 5 U.S.C. § 8113(b), if an individual without good cause fails to 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 he not failed to undergo vocational rehabilitation.

The facts of this case thus establish that appellant failed to make good faith efforts to cooperate in vocational rehabilitation since March 2021. Though appellant indicated that she would cooperate with vocational rehabilitation, the vocational rehabilitation counselor's reports indicate that she continued her pattern of noncooperation even when contact was briefly made. As such, the vocational rehabilitation counselor was unable to identify suitable positions within appellant's restrictions and vocational goals. Therefore, the Board finds that that 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(a).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right.⁸ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁹ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.¹⁰ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹¹ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹²

⁸ This section provides in pertinent part: [t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.607.

¹⁰ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

¹¹ 20 C.F.R. § 10.606(b)(3).

¹² *Id.* at § 10.608(a), (b).

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for further reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

With the reconsideration request received on August 9, 2022, appellant did not show that OWCP erroneously applied or interpreted a specific point of law and she did not advance a new and relevant legal argument not previously considered. She did not present a valid argument supporting a finding that she did participate in vocational rehabilitation efforts in good faith. Consequently, appellant was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹³

Appellant also did not submit evidence in support of her reconsideration request. As she did not submit any relevant and pertinent new evidence not previously considered by OWCP, appellant is not entitled to a review of the merits of her claim based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹⁴

Accordingly, the Board finds that appellant has not met any of the requirements enumerated under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied her request for reconsideration without reopening the case for review on the merits.¹⁵

CONCLUSION

The Board finds that 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 July 12, 2022, due to her failure to cooperate with vocational rehabilitation without good cause. The Board also finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

¹³ *Id.* at § 10.606(b)(3); *L.D.*, Docket No. 18-1468 (issued February 11, 2019).

¹⁴ *Id.* at § 10.606(b)(3)(iii).

¹⁵ *See S.K.*, Docket No. 22-0248 (issued June 27, 2022); *D.R.*, Docket No. 18-0357 (issued July 2, 2018); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

ORDER

IT IS HEREBY ORDERED THAT the July 12 and August 17, 2022 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 6, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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