

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

M.D., Appellant	)	
	)	
and	)	Docket No. 23-0377
	)	Issued: June 5, 2023
DEPARTMENT OF THE ARMY, LEXINGTON	)	
BLUEGRASS ARMY DEPOT, Richmond, KY,	)	
Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On January 18, 2023 appellant filed a timely appeal from an October 26, 2022 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 26, 2022 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." 20 C.F.R. § 501.2(c)(1). Evidence not before OWCP will not be considered by the Board 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 October 26, 2022, for failing to cooperate with vocational rehabilitation without good cause.

## FACTUAL HISTORY

This case has previously been before the Board on different issues.<sup>3</sup> The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On February 9, 1994 appellant, then a 42-year-old boiler operator, filed an occupational disease claim (Form CA-2) alleging that he sustained carpal tunnel syndrome causally related to factors of his federal employment. OWCP accepted the claim for bilateral carpal tunnel syndrome. It paid appellant wage-loss compensation for total disability beginning August 31, 1995.<sup>4</sup>

By decisions dated September 12, 2001 and May 7, 2002, OWCP reduced appellant's compensation benefits based on its finding that he had the capacity to work as a telecommunicator.

Appellant appealed to the Board. By decision dated January 29, 2003, the Board reversed OWCP's loss of wage-earning capacity determination after finding that the record contained a conflict in opinion regarding his work capacity.<sup>5</sup>

By decision dated June 4, 2013, OWCP terminated appellant's compensation and entitlement to a schedule award effective that, date as he refused an offer of suitable employment under 5 U.S.C. § 8106(c)(2). By decision dated November 26, 2013, an OWCP hearing representative affirmed the June 4, 2013 decision. By decision dated April 23, 2014, OWCP denied appellant's request for a review of the written record as he had previously had a telephonic hearing. By decisions dated January 14 and February 9, 2015, it denied his reconsideration requests as untimely and insufficient to demonstrate clear evidence of error.

On February 18, 2015 appellant appealed to the Board. By decision dated August 20, 2015, the Board set aside OWCP's January 14 and February 9, 2015 decisions.<sup>6</sup> The Board found that appellant had timely requested reconsideration of the November 26, 2013 decision in correspondence received October 31, 2014. The Board remanded the case for OWCP to apply the standard applicable to timely reconsideration requests.

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<sup>3</sup> Docket No. 19-1500 (issued February 24, 2020); Docket No. 16-0102 (issued March 11, 2016); Docket No. 15-0811 (issued August 20, 2015); Docket No. 02-1754 (issued January 29, 2003).

<sup>4</sup> Appellant underwent a right carpal tunnel release in January 1996 and a left carpal tunnel release in February 1997.

<sup>5</sup> *Supra* note 3.

<sup>6</sup> *Id.*

By decision dated September 30, 2015, OWCP denied modification of its November 26, 2013 decision terminating appellant's compensation for the refusal of suitable work under 5 U.S.C. § 8106(c)(2).

Appellant appealed to the Board. By decision dated March 11, 2016, the Board reversed the September 30, 2015 OWCP decision.<sup>7</sup> The Board found that the medical evidence was insufficient to establish that appellant could work for 10 hours per day for 4 days a week and that, consequently, OWCP had failed to discharge its burden of proof to support termination of his wage-loss compensation under 5 U.S.C. § 8106(c)(2).

Following the Board's decision, OWCP reinstated appellant's wage-loss compensation.<sup>8</sup>

On July 30, 2021 OWCP referred appellant to Dr. Anbu K. Nadar, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a report dated August 20, 2021, Dr. Nadar discussed appellant's history of injury and provided findings on examination. He diagnosed bilateral carpal tunnel syndrome due to the accepted employment injury. Dr. Nadar opined that appellant had continued residuals of his bilateral carpal tunnel syndrome based on his clinical examination. In a work capacity evaluation (OWCP-5c) of even date, he found that appellant could work eight hours per day with restrictions on performing repetitive movements of the wrists and elbows for no more than 2 hours and 40 minutes per day, and pushing, pulling, and lifting up to 10 pounds for 2 hours and 40 minutes per day.

OWCP requested that the employing establishment provide appellant a job offer within the restrictions set forth by Dr. Nadar; however, it responded that it did not have a suitable position within Dr. Nadar's restrictions available.

On March 10, 2022 OWCP referred appellant to a vocational rehabilitation counselor for vocational rehabilitation.

In an April 11, 2022 report, the vocational rehabilitation counselor advised that she had contacted appellant on March 24, 2022 for a vocational interview. She noted that he worked as a boilermaker, had graduated high school, and had no significant computer skills.

On June 15, 2022 OWCP transferred appellant to a different vocational rehabilitation counselor.

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<sup>7</sup> *Id.*

<sup>8</sup> By decision dated February 24, 2020, the Board affirmed a May 17, 2019 OWCP decision finding that appellant received an \$4,794.68 overpayment of compensation from June 1, 2017 through October 13, 2018 because he concurrently received FECA wage-loss compensation and age-related benefits from the Social Security Administration without an appropriate offset, denying waiver of recovery of the overpayment, and requiring recovery of the overpayment by deducting \$200.00 from his continuing compensation payments every 28 days. *Id.*

On June 23, 2022 OWCP requested updated medical evidence from appellant's attending physician addressing his current condition and work limitations.

On July 8, 2022 appellant requested a copy of his case file. He further noted that a new vocational rehabilitation counselor had contacted him for a meeting.

In a vocational rehabilitation report dated July 26, 2022, the vocational rehabilitation counselor discussed appellant's employment and educational background. She indicated that she had scheduled vocational testing.

In an undated letter, the vocational rehabilitation counselor advised appellant that she had scheduled vocational testing for him on August 25, 2022 at 1:00 p.m. at a local library.

In an August 25, 2022 rehabilitation action report (Form OWCP-44), the vocational rehabilitation counselor asserted that appellant had appeared for the scheduled vocational testing, but refused to take the tests.

On September 9, 2022 OWCP notified appellant that the vocational rehabilitation counselor indicated that he had refused to participate in rehabilitation efforts based on his failure to keep an appointment for vocational resting on August 25, 2022. It afforded him 30 days to make a good faith effort to participate with vocational rehabilitation or to submit additional evidence or argument substantiating that he was unable to participate. OWCP informed appellant that if he refused to cooperate without good cause his compensation would be reduced to zero.

In a September 21, 2022 vocational rehabilitation assessment, the vocational rehabilitation counselor set forth appellant's transferrable skills and again noted that he had refused to participate in vocational testing. She related that there was no sedentary work within his restrictions at his "educational level and skill set. Sedentary jobs require computer use at every level." The vocational rehabilitation counselor indicated that appellant had "no interest in retraining in order to obtain a better paying job."

In a vocational rehabilitation report dated September 22, 2022, the rehabilitation counselor noted that she had received an email from the vocational tester advising that appellant appeared for the test, but refused to take it. She attached a copy of the test with his signature across the pages of the test.

On October 11, 2022 OWCP's vocational rehabilitation specialist related that appellant had refused to participate in vocational testing scheduled for September 21, 2022. Appellant instead wrote his name on the test pages.

By decision dated October 26, 2022, OWCP reduced appellant's compensation to zero for failure to participate in vocational rehabilitation. It found that he had failed to participate in the essential preparatory effort of vocational rehabilitation when he failed to cooperate with vocational testing. OWCP thus found that it was unable to determine what appellant's wage-earning capacity would have been had he undergone testing and vocational rehabilitation. It consequently reduced his compensation to zero under 20 C.F.R. § 10.519.

## 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>9</sup> Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.<sup>10</sup>

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 the Secretary.<sup>11</sup>

Where the failure or refusal occurred in the early, but necessary stages of the process, 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).<sup>12</sup>

OWCP procedures provide that specific instances of noncooperation include a failure to appear for the initial interview, counseling sessions, a functional capacity evaluation, other interviews conducted by the 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.<sup>13</sup>

## ANALYSIS

The Board finds that OWCP properly reduced appellant's wage-loss compensation to zero pursuant to 5 U.S.C. § 8113(b), effective October 26, 2022, for failing 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>9</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>10</sup> 5 U.S.C. § 8104(a); *see also A.L.*, Docket No. 22-0316 (issued January 10, 2023); *J.E.*, 59 ECAB 606 (2008).

<sup>11</sup> *Id.* at § 8113(b); *J.S.*, Docket No. 22-0386 (issued October 19, 2022); *S.H.*, Docket No. 16-1827 (issued March 12, 2018); *R.M.*, Docket No. 16-0011 (issued February 11, 2016).

<sup>12</sup> 20 C.F.R. § 10.519(b) and (c).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.17(b) (February 2011); *see E.W.*, Docket No. 19-0963 (issued January 2, 2020); *Sam S. Wright*, 56 ECAB 358 (2005).

whether OWCP properly determined his work restrictions.<sup>14</sup> OWCP referred him to vocational rehabilitation based on the August 20, 2021 report of Dr. Nadar, an OWCP referral physician, who found that appellant had continued residuals of his bilateral carpal tunnel syndrome. Dr. Nadar determined that appellant could work full time performing repetitive movements of the wrists and elbows for no more than 2 hours and 40 minutes per day, and pushing, pulling, and lifting up to 10 pounds for 2 hours and 40 minutes per day. The Board finds that OWCP properly referred appellant for vocational rehabilitation based on Dr. Nadar's report, which established that appellant was no longer totally disabled due to residuals of his employment injury.<sup>15</sup>

In a vocational rehabilitation report dated July 26, 2022, the vocational rehabilitation counselor discussed appellant's employment and educational background. She arranged for him to undergo vocational testing on August 25, 2022. The vocational rehabilitation counselor subsequently advised that appellant had appeared for the scheduled vocational testing, but refused to take the tests. She provided a copy of the test papers with his signature across the pages of the test. OWCP's procedures provide that failure to participate in vocational testing, including the lack of response or inappropriate response to directions in a testing session, constitutes noncooperation with vocational rehabilitation.<sup>16</sup>

OWCP issued a September 9, 2022 letter requesting that appellant either participate in rehabilitation efforts or provide good cause for not participating in vocational rehabilitation efforts. It also notified him of the actions that could be taken under section 8113(b) of FECA if he failed to cooperate with vocational rehabilitation without good cause. Appellant did not, however, either participate in the vocational rehabilitation effort by undergoing testing or provide good cause for not going so within 30 days of OWCP's September 9, 2022 letter.

The Board finds that the evidence of record establishes that appellant failed to participate in vocational rehabilitation without good cause. Appellant's failure to fully participate in preliminary testing constituted a failure to participate in the "early but necessary stages of a vocational rehabilitation effort."<sup>17</sup> OWCP's regulations provide that, in such a case, it cannot be determined what would have been the employee's wage-earning capacity had there been no failure to participate, and it is assumed, 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.<sup>18</sup>

Appellant was given appropriate notification of the sanctions for continuing to refuse to cooperate with the rehabilitation program in the early stages, but failed, without good cause, to comply with these rehabilitation efforts. The Board finds, therefore, that OWCP properly reduced

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<sup>14</sup> See *J.S.*, *supra* note 11; *F.N.*, Docket No. 20-0435 (issued February 26, 2021); *L.C.*, Docket No. 12-972 (issued November 9, 2012).

<sup>15</sup> *R.D.*, Docket No. 19-0752 (issued August 20, 2019); *C.M.*, Docket No. 18-0688 (issued November 15, 2018).

<sup>16</sup> *Supra* note 13.

<sup>17</sup> See 20 C.F.R. § 10.519(b); see also *C.H.*, Docket No. 16-1731 (issued September 5, 2017); *C.P.*, Docket No. 15-0781 (issued April 5, 2016).

<sup>18</sup> *Id.* at § 10.519(c); *A.L.*, *supra* note 10.

his compensation benefits to zero for his failure to cooperate with vocational rehabilitation without good cause. The reduction will remain in effect until such time as appellant acts in good faith to comply with the direction of OWCP.<sup>19</sup>

On appeal appellant disputes that he refused to participate in vocational rehabilitation. As discussed, however, his failure to complete the scheduled vocational testing on August 25, 2022 without good cause constituted a failure to participate in the early and necessary stages of vocational rehabilitation.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that OWCP properly reduced appellant's wage-loss compensation to zero pursuant to 5 U.S.C. § 8113(b), effective October 26, 2022, for failing to cooperate with vocational rehabilitation without good cause.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the October 26, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 5, 2023  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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<sup>19</sup> *Id.* at § 10.519(c); *see B.D.*, Docket No. 21-1301 (issued October 17, 2022); *R.H.*, 58 ECAB 654 (2007).