

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

C.M., Appellant	)	
	)	
and	)	
	)	<b>Docket No. 23-0565</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	<b>Issued: June 26, 2023</b>
<b>TRANSPORTATION SECURITY</b>	)	
<b>ADMINISTRATION, East Elmhurst, NY,</b>	)	
<b>Employer</b>	)	
	)	

*Appearances:*  
Paul Kalker, Esq., for the appellant<sup>1</sup>  
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 March 3, 2023 appellant, through counsel, filed a timely appeal from a September 26, 2022 merit decision of the Office of Workers’ Compensation Programs (OWCP).<sup>2</sup> Pursuant to the

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<sup>1</sup> 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 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.

<sup>2</sup> The record also contains a September 16, 2022 OWCP decision denying authorization for physical therapy. Appellant has not appealed this decision and thus it is not before the Board at this time. 20 C.F.R. § 501.3.

Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>4</sup>

### **ISSUE**

The issue is whether OWCP properly reduced appellant's wage-loss compensation to zero pursuant to 5 U.S.C. § 8113(b), effective September 26, 2022, for failing to cooperate with the early stages of vocational rehabilitation without good cause.

### **FACTUAL HISTORY**

On February 27, 2019 appellant, then a 49-year-old airport security officer, filed a traumatic injury claim (Form CA-1) alleging that on February 20, 2019 she injured her left ankle, right knee, right shoulder, and back when she slipped and fell on ice in a parking lot walking to her vehicle to drive to a training session while in the performance of duty.<sup>5</sup> OWCP accepted the claim for a right knee contusion and sprains of the cervical spine, lumbar spine, left ankle, and right rotator cuff. It paid appellant wage-loss compensation on the supplemental rolls effective April 8, 2019 and on the periodic rolls effective March 27, 2022.

In a report dated November 6, 2020, Dr. Orsuville Cabatu, a physiatrist, specializing in physical medicine, diagnosed post-traumatic cervical strain/sprain with left radiculitis, disc bulges at C3 through C7 with foraminal stenosis, left C5 radiculopathy, post-traumatic lumbar strain/sprain with left radiculitis, a disc bulge at L4-5 with bilateral foraminal stenosis, left L5 radiculopathy, post-traumatic tension headaches, and right knee strain/sprain. He provided work restrictions.

In a progress report dated January 20, 2021, Dr. Monet A. France, who specializes in orthopedic surgery, evaluated appellant for continued right knee pain. She diagnosed tri-compartment osteoarthritis of the right knee and a work-related injury.

On May 21, 2021 OWCP referred appellant to Dr. Frank J. Corrigan, a Board-certified orthopedic surgeon, for a second opinion examination.

In a report dated June 16, 2021, Dr. Corrigan discussed appellant's history of a February 20, 2019 employment injury, and her current complaints of neck pain radiating into the left arm, back pain radiating into the right leg, occasional right shoulder pain, constant right knee pain, and occasional pain in the left ankle. He provided his review of the medical evidence and detailed findings on examination. Dr. Corrigan opined that appellant had recovered from her

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> The Board notes that, following the September 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.*

<sup>5</sup> The employing establishment indicated on a CA-1 form that appellant was in the performance of duty at the time of the incident.

cervical strain, lumbar strain, left ankle sprain, right knee contusion, and right rotator cuff strain. He noted that several of appellant's diagnostic studies showed degenerative findings unrelated to trauma and attributed her continued symptoms to "pre-existing chronic and degenerative pathology and unrelated to the incident on February 20, 2019." Dr. Corrigan advised that appellant could return to work with restrictions due to her preexisting chronic and degenerative conditions unrelated to her accepted employment injury. In a work capacity evaluation (OWCP-5c) of even date, he advised that she could perform full-time sedentary work pushing, pulling, and lifting up to 10 pounds for 8 hours per day.

In a report dated July 5, 2021, Dr. Cabatu diagnosed cervical strain/sprain with left radiculitis, left C5 and L5 radiculopathy, and lumbar strain/sprain with right radiculitis. He noted that appellant was not working. Dr. Cabatu advised that her complaints and the objective findings were consistent with her history of injury.<sup>6</sup>

On July 29, 2021 OWCP referred appellant to a vocational rehabilitation counselor for vocational rehabilitation services.

On August 27, 2021 the vocational rehabilitation counselor advised OWCP that he had attempted to reach appellant by telephone and letters beginning August 5, 2021.

In an initial vocational rehabilitation report dated September 23, 2021, the vocational rehabilitation counselor noted that he had made "a protracted effort to connect" with appellant for the meeting, and that she had "been less than cooperative...." He questioned why she seemed to be available at only limited times and noted that he had sent her five letters and left numerous telephone messages. The vocational rehabilitation counselor expressed "deep concern about the claimant's lack of cooperation...."

On October 19, 2021 OWCP notified appellant that the vocational rehabilitation counselor indicated that she had not responded to his letters. It afforded her 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 she refused to cooperate without good cause her compensation would be reduced to zero unless evidence showed that a return to work would not result in no loss of wage-earning capacity.

In an October 20, 2021 vocational rehabilitation report, the rehabilitation counselor noted that he had finally met with appellant. He noted that she had worked in security for one year at a college following her graduation from high school, in security at a hospital for 18 years, and in security at the employing establishment from 2006 to 2019. The vocational rehabilitation counselor advised that the employing establishment did not have a position available for appellant, and noted that she had retired on disability. He requested a status change to plan development.

On October 21, 2021 OWCP approved the status change to plan development and requested that the vocational rehabilitation counselor submit a plan for approval.

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<sup>6</sup> Dr. Cabatu provided similar progress reports in September and November 2021.

In a report dated November 1, 2021, Dr. Syed Hosain, a Board-certified anesthesiologist, administered an epidural injection.

In a December 30, 2021 vocational rehabilitation progress report, the vocational rehabilitation counselor identified the positions of security guard and surveillance system monitor as target occupations based on appellant's job history, medical restrictions, and a labor market survey. He noted that she had over 30 years of experience in the field of security.

The vocational rehabilitation counselor completed job classifications (Form CA-66) for the positions of surveillance system monitor and security guard dated December 30, 2021. He advised that appellant met the specific vocational preparation for the positions through her over 30 years of experience in security work. The vocational rehabilitation counselor indicated that labor market data indicated that she could earn weekly wages of \$679.00 at the bottom 10 percent of salary range. In a vocational rehabilitation plan of even date, he indicated that given appellant's work history, she could likely earn around \$750.00 to \$800.00 weekly.

In vocational rehabilitation progress reports dated February 8 and March 19, 2022, the vocational rehabilitation counselor requested approval to move into direct placement status.

On June 1, 2022 OWCP advised appellant that it had approved 90 days of job placement assistance for the selected positions of security guard and surveillance system monitor. It informed her that it would likely reduce her compensation based on her ability to earn wages of \$679.00 per week at the end of the 90-day period, and that it was thus important for her to cooperate with vocational rehabilitation. OWCP further notified appellant of the provisions of 5 U.S.C. § 8115, and that it would terminate her placement assistance and reduce her compensation prior to 90 days if she failed to cooperate with vocational rehabilitation services.

In a vocational rehabilitation report dated July 15, 2022, the vocational rehabilitation counselor advised that he had spoken with appellant by telephone, and that she expressed concerns about finding a job within her restrictions, but had agreed to cooperate seeking positions.

In a letter dated August 17, 2022, the vocational rehabilitation counselor advised appellant that he had tried to reach her by telephone, and noted that he had repeatedly asked her to provide her email address. He requested that she mail or email him an updated log of the jobs to which she had applied from the job leads that he had sent.

In a rehabilitation action report (Form OWCP-44) dated August 24, 2022, the vocational rehabilitation counselor informed OWCP that appellant had failed to fully cooperate with vocational rehabilitation services. He related that she had not provided her email address despite repeated requests or provided a job activity log. In a vocational rehabilitation progress report of even date, the vocational rehabilitation counselor listed the job openings set to appellant in letters dated July and August 2022.

On August 25, 2022 OWCP approved a 30-day extension for job placement services.

In letters dated August 30 and September 6, 2022, the vocational rehabilitation counselor again asked appellant to provide him with an email address and updated job log. He provided links to job openings.

In an OWCP-44 form dated September 13, 2022, the vocational rehabilitation counselor advised that appellant had not provided either an email address or job activity log. He indicated that she was not cooperating with vocational rehabilitation, and recommended not extending job placement services.

In a letter dated September 13, 2022, the vocational rehabilitation counselor again requested a job log from appellant. He noted that she had advised that she did not have internet access.

On September 9, 2022 Dr. Preston Bare, a chiropractor, related that he was treating appellant for pain in her neck, low back, right shoulder, and left ankle. He recommends massage therapy to reduce pain and stress.

By decision dated September 16, 2022, OWCP denied appellant's request for authorization for physical therapy.<sup>7</sup>

On September 26, 2022 OWCP reduced appellant's compensation to zero for failure to participate in vocational rehabilitation. It determined that she had failed to participate in the essential preparatory effort of vocational rehabilitation. OWCP thus found that it was unable to determine what appellant's wage-earning capacity would have been had she undergone testing and vocational rehabilitation. It consequently reduced her 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>8</sup> Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.<sup>9</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 wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary.<sup>10</sup>

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<sup>7</sup> On September 26, 2022 OWCP notified appellant that it was in the process of scheduling her for a second opinion evaluation.

<sup>8</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>9</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>10</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).

OWCP 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 remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.”<sup>11</sup>

### ANALYSIS

The Board finds that OWCP improperly reduced appellant’s wage-loss compensation to zero pursuant to 5 U.S.C. § 8113(b), effective September 26, 2022, for failing to cooperate with the early stages of 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.<sup>12</sup> 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

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<sup>11</sup> 20 C.F.R. § 10.519; *see D.W.*, Docket No. 20-0840 (issued August 19, 2021); *R.H.*, 58 ECAB 654 (2007).

<sup>12</sup> *Id.*

to determine what would have been the individual's wage-earning capacity.<sup>13</sup> 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 medical evidence that appellant could work with restrictions, OWCP properly referred her for vocational rehabilitation services on July 29, 2021. It advised her on October 19, 2021 of the penalties for failing to cooperate with vocational rehabilitation services without good cause. On December 30, 2021 the vocational rehabilitation counselor identified the positions of security guard and surveillance system monitor as suitable for appellant based on her job history, medical restrictions, and the labor market survey. On June 1, 2022 OWCP notified her that it had approved 90 days of job placement services for the selected positions of surveillance system monitor and security guard. OWCP informed appellant that it would likely reduce her compensation based on her ability to earn wages of \$679.00 per week at the end of the 90-day period and that it was thus important for her to cooperate with vocational rehabilitation. It further advised her of the provisions of section 8115 and that it would terminate her placement assistance, and reduce her compensation prior to 90 days if she failed to cooperate with vocational rehabilitation services.

The facts of this case establish that the vocational rehabilitation counselor had identified the position of surveillance system monitor and security guard as appellant's vocational goal, and had also identified her potential earnings in this position. OWCP had confirmed and relayed this information to appellant. Therefore, pursuant to 20 C.F.R. § 10.519(a), OWCP should have reduced her future monetary compensation based on the amount which would likely have been her wage-earning capacity had she undergone vocational rehabilitation. However, it improperly reduced appellant's wage-loss compensation to zero.<sup>14</sup>

### CONCLUSION

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

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<sup>13</sup> 20 C.F.R. § 10.519(b); *see also* *S.V.*, Docket No. 20-0906 (issued February 11, 2021); *C.S.*, Docket No. 06-1612 (issued February 27, 2007).

<sup>14</sup> *See S.V., id.; D.W., supra* note 11.

**ORDER**

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

Issued: June 26, 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