

<sup>2</sup> The Board notes that, following the April 14, 2023 decision, OWCP received additional evidence. However, the Board's *Rules of Procedures* 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) and 20 C.F.R. § 10.519, effective June 9, 2021, for failure to cooperate with vocational rehabilitation without good cause.

## **FACTUAL HISTORY**

On October 20, 2006 appellant, then a 52-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on October 13, 2006 she injured her lower back when she lifted luggage while in the performance of duty. OWCP accepted the claim for lumbar strain, resolved. On March 18, 2009 it expanded the acceptance of the claim to include aggravation of spondylolisthesis and aggravation of lumbar degeneration. OWCP paid appellant wage-loss compensation on the supplemental rolls commencing November 28, 2006 and on the periodic rolls commencing February 5, 2017.

On November 3, 2020 OWCP referred appellant, along with a statement of accepted facts (SOAF), the case record, and a series of questions to Dr. Allan Brecher, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the extent of her employment-related conditions and work capacity.

In a December 16, 2020 report, Dr. Brecher noted that appellant's claim was accepted for sprain of back, lumbar region, and subsequently expanded to include acquired spondylolisthesis and degeneration of lumbosacral intervertebral disc. He also noted that she stopped work on October 13, 2006. In response to OWCP's questions, Dr. Brecher diagnosed lumbar spondylolisthesis with tenderness and decreased motion that limited appellant's ability to work beyond the sedentary level. He opined that she had occult spondylolisthesis that was aggravated at work, had progressed from grade 1 to grade 2, and was now permanent. Dr. Brecher noted that conservative care had not worked, and that appellant might need surgery in the future. In response to whether there were any work factors that, may have aggravated her medical condition, he advised "only the initial injury." Dr. Brecher opined that appellant was capable of sedentary work based upon the functional capacity evaluation and her examination. He completed a work capacity evaluation (Form OWCP-5c) which indicated that she could work eight hours per day with sedentary restrictions of no more than one hour of walking, no more than one hour of standing, and pushing, pulling and lifting of no more than 10 pounds.

On February 16, 2021 OWCP reopened appellant's vocational rehabilitation file to identify positions within her work limitations based on Dr. Brecher's December 16, 2020 second opinion report and Form OWCP-5c.

On February 16, 2021 OWCP informed appellant that it had assigned a vocational rehabilitation counselor to assist her in returning to suitable employment. It noted that participation in vocational rehabilitation was mandatory and that sections 8113(b) and 8115 of FECA allowed it to prospectively reduce or suspend compensation in accordance with an injured workers' wage-earning capacity, if he or she refused to undergo vocational rehabilitation without good cause.

In a rehabilitation action report received on February 26, 2021, the vocational rehabilitation counselor noted that she attempted to contact appellant *via* telephone on February 16, 17, and 23, 2021 and sent a letter on February 19, 2021 requesting that appellant contact her; however, appellant neither returned the telephone calls nor responded to the letter.

In a February 24, 2021 letter to OWCP, appellant requested a copy of the SOAF, the list of questions sent to the second opinion physician, and the second opinion physician's qualifications. In a February 25, 2021 letter to OWCP, she requested a copy of the second opinion report.

In a March 23, 2021 email, the vocational rehabilitation counselor confirmed that appellant had not contacted her.

In a March 24, 2021 letter, OWCP advised appellant that the vocational rehabilitation counselor reported that appellant failed to respond to the vocational rehabilitation counselor's calls and letter. It explained 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. OWCP 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 directed, it may prospectively reduce the compensation based on what likely would have been the individual's wage-earning capacity had they not failed to apply for and undergo vocational rehabilitation. It further advised appellant that, "Section 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." OWCP 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.

The vocational rehabilitation counselor completed reports on March 7 and April 7, 2021 indicating that appellant had not responded to numerous attempts to contact her, and that she had not scheduled an initial interview.

In a letter dated April 13, 2021, appellant argued that she had good cause for not participating in vocational rehabilitation due to the COVID-19 pandemic. She further alleged that she had been involved in a vocational rehabilitation effort in 2018 to 2019 and had been terminated from the program, and that she had called OWCP on February 23 and 26, 2021 but did not receive a return call.

In response to an April 29, 2021 inquiry from OWCP, the vocational rehabilitation counselor confirmed that appellant had not contacted her.

In a February 12, 2021 report, Dr. Thomas Dahlberg, a hospice and palliative medicine specialist, diagnosed spinal stenosis of the lumbar region and bilateral lumbar radiculopathy.

By decision dated June 9, 2021, OWCP reduced appellant's compensation to zero, effective that date, based upon her failure to cooperate with vocational rehabilitation. It found that

her April 13, 2021 letter did not show good cause for not participating, and noted that she was directed to contact the counselor, not OWCP. OWCP explained that the failure to undergo the essential preparatory effort of vocational rehabilitation did not permit it to determine what would have been her wage-earning capacity had she undergone the testing, training, and rehabilitation effort. It determined that, under the provisions of 5 U.S.C. § 8113(b) of FECA and section 10.519 of its regulations, and 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. OWCP advised appellant that the reduction in benefits would continue until she either underwent vocational rehabilitation or showed good cause for not complying.

On May 31, 2022 appellant requested reconsideration. She reiterated that she had undergone vocational rehabilitation in 2018. Appellant also alleged that the employing establishment indicated that she was not eligible for vocational rehabilitation unless she could lift at least 10 pounds. She further argued that she was totally disabled from work.

OWCP received a copy of appellant's April 13, 2021 letter.

OWCP received continuing progress notes from Dr. Dahlberg and nurses dated June 15, 2021 through November 2022. Dr. Dahlberg continued to diagnose bilateral lumbar radiculopathy and lumbar spinal stenosis.

OWCP received July 9, 2018 work restrictions from Dr. Theodore Suchy, Board-certified in orthopedic surgery, and an August 24, 2017 report from Dr. David Sack, Board-certified in occupational medicine, who recommended that appellant be referred for vocational rehabilitation as soon as possible.

By decision dated April 14, 2023, OWCP denied modification of the June 9, 2021 decision.

### **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.<sup>3</sup> Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.<sup>4</sup>

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]

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<sup>3</sup> See *K.C.*, Docket No. 22-0278 (issued May 5, 2023); *D.W.*, Docket No. 20-0840 (issued August 19, 2021); *E.W.*, Docket No. 19-0963 (issued January 2, 2020); *Betty F. Wade*, 37 ECAB 556, 565 (1986).

<sup>4</sup> 5 U.S.C. § 8104(a).

wage-earning capacity in the absence of the failure,” until the individual in good faith complies with the direction of OWCP.<sup>5</sup>

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. [It] will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with 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.”<sup>6</sup>

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 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>7</sup>

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<sup>5</sup> *Id.* at § 8113(b).

<sup>6</sup> 20 C.F.R. § 10.519; *see R.H.*, 58 ECAB 654 (2007).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.17b (February 2011).

## ANALYSIS

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 June 9, 2021, for failure to cooperate with vocational rehabilitation without good cause.

Upon receiving medical evidence that appellant was not totally disabled from all work, but was capable of performing sedentary work with permanent restrictions, OWCP properly referred her to vocational rehabilitation services on February 16, 2021. The rehabilitation counselor provided a February 26, 2021 report, which indicated that she attempted to contact appellant *via* telephone on February 16, 17, and 23, 2021 and by letter dated February 19, 2021, and that appellant did not return the telephone calls or respond to the letter.

The vocational rehabilitation counselor completed additional reports on March 7 and April 7, 2021, confirming that appellant had not responded to numerous attempts to contact her on multiple occasions and that she had not scheduled an initial interview.

Appellant responded by letter dated April 13, 2021, and argued that she had good cause for not participating in vocational rehabilitation due to the COVID-19 pandemic, that she had participated in vocational rehabilitation in 2018 to 2019, and had been terminated from the program, and that she had called OWCP on February 23 and 26, 2021 but did not receive a reply.

On April 29, 2021 the vocational rehabilitation counselor confirmed that appellant had not contacted her.

Dr. Brecher opined that appellant was capable of sedentary work, and completed an FCE which indicated that she could work eight hours per day with sedentary restrictions of no more than one hour of walking, no more than one hour of standing, and pushing, pulling, and lifting of no more than 10 pounds. Based on the second opinion physician report and FCE, OWCP properly referred appellant for vocational rehabilitation and appellant failed to cooperate without good cause.

Appellant's failure without good cause to return her rehabilitation counselor's calls and letter constitutes a failure to participate in the early, but necessary, stages of a vocational rehabilitation effort.<sup>8</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>9</sup> Appellant did not submit evidence to refute such an assumption, and OWCP had a proper basis upon which to reduce her disability compensation to zero.

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<sup>8</sup> 20 C.F.R. § 10.519(b). *See A.I.*, Docket No. 22-0316 (issued January 10, 2023); *see also E.W.*, Docket No. 19-0963 (issued January 2, 2020); *R.M.*, Docket No. 16-0011 (issued February 11, 2016); *Conard Hightower*, 54 ECAB 796 (2003).

<sup>9</sup> *Id.* at § 10.519(c).

On March 24, 2021 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 her compensation benefits to zero for her failure to cooperate with vocational rehabilitation without good cause. Accordingly, the reduction will remain in effect until such time as appellant acts in good faith to comply with the direction of OWCP.<sup>10</sup>

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) and 20 C.F.R. § 10.519, effective June 9, 2021, for failure to cooperate with vocational rehabilitation without good cause.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the April 14, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 7, 2023  
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

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<sup>10</sup> 5 U.S.C. § 8101 *et seq.*