

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

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L.C., Appellant)	
)	
and)	Docket No. 23-0145
)	Issued: September 12, 2023
U.S. POSTAL SERVICE, CASTLE ROCK POST)	
OFFICE, Castle Rock, WA, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On November 9, 2022 appellant filed a timely appeal from a June 15, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective February 17, 2022, pursuant to 5 U.S.C. § 8113(b), for failure to cooperate with vocational rehabilitation without good cause.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. 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.*

FACTUAL HISTORY

On January 10, 2005 appellant, then a 42-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on January 8, 2005 she sustained injuries in a motor vehicle accident while in the performance of duty. She stopped work on January 10, 2005. OWCP accepted appellant's claim for lumbosacral sprain/strain, neck sprain/strain, forehead contusion, and acute contusion of abdominal wall. It subsequently expanded the acceptance of the claim to include displacement of cervical intervertebral disc without myelopathy. OWCP accepted a recurrence of disability on January 8, 2010 and paid appellant appropriate wage-loss compensation on its supplemental rolls from January 8 through August 20, 2010.³ Appellant stopped work completely on October 17, 2012, and has not returned.⁴ Effective July 28, 2013, OWCP paid her wage-loss compensation on its periodic rolls.

On September 8, 2020 OWCP referred appellant, along with a statement of accepted facts (SOAF), the case record, and a series of questions to Dr. Carolyn Yang, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the nature and extent of her employment injury and work capacity. In an October 9, 2020 report, Dr. Yang indicated that she reviewed appellant's records and noted the accepted conditions in the claim. She reported appellant's complaints and presented physical examination findings. In response to OWCP's questions, Dr. Yang indicated that objective findings supported that appellant had residuals from her work-related injuries, which included left-sided cervical radiculopathy with persistent numbness in the C7-T1 distribution and weakness of her left upper extremity and decreased range of motion of the cervical spine. She opined that it would be unsafe for appellant to return to her position as a rural carrier as she was not able to turn her neck safely for driving, she had restrictions relating to driving a motor vehicle due to narcotic medications, and she had some weight bearing restrictions due to cervical pain. Dr. Yang opined that appellant did not require any further medical treatment and could return to sedentary or light work. She reviewed job classification descriptions for information clerk, receptionist, and customer service representative positions and indicated that those were the kinds of jobs that were within appellant's work restrictions. In an October 9, 2020 work capacity evaluation (Form OWCP-5c), Dr. Yang indicated that appellant was able to work eight hours a day in a permanent sedentary- or light-duty position.

On November 4, 2020 OWCP referred appellant to a vocational rehabilitation counselor. It noted that appellant's work restrictions were based on Dr. Yang's October 9, 2020 second opinion report and Form OWCP-5c.

Appellant subsequently underwent vocational evaluation. Vocational testing was completed on January 26, 2021, and a transferable skill analysis was conducted on March 8, 2021. In a May 17, 2021 letter, the vocational rehabilitation counselor recommended that appellant undergo short-term training to learn Microsoft office systems. She documented a short training plan proposal for computer training at a local college. On June 24, 2021 the rehabilitation counselor completed updated labor market surveys for the positions of customer service

³ OWCP paid reduced wage-loss compensation from July 3 through August 20, 2010 following a appellant's return to part-time work.

⁴ On March 9, 2010 appellant underwent anterior cervical discectomy, partial corpectomy, foraminotomy and neural decompression followed by instrumental interbody fusion at C4-5 and C5-6. On June 4, 2013 she underwent left C5-8 and C6-7 foraminotomies on June 4, 2013.

representative, Department of Labor, *Dictionary of Occupational Titles (DOT)* No. 239.362-014; information clerk, DOT No. 237.367-022; and receptionist, DOT No. 237.367-038, which she noted Dr. Yang had approved as viable employment options for appellant. In her reports, she documented that appellant did not believe she could participate in vocational rehabilitation and was working with her medical providers to provide such documentation.

On July 26, 2021 the vocational rehabilitation counselor recommended a rehabilitation plan for appellant to undergo online training which included the purchase of a laptop computer and software. On August 1, 2021 appellant signed the rehabilitation plan and award form.

In a letter dated August 17, 2021, OWCP informed appellant that it had approved the training plan developed by her vocational rehabilitation counselor for her return to work as a receptionist, customer service representative, or an information clerk, and its determination that those job duties were within her medical restrictions. It authorized up to \$500.00 for a laptop and up to \$150.00 for Microsoft office software. OWCP also authorized 90 days of placement services after the necessary training was completed. It advised appellant that she was expected to cooperate fully so that she may return to work in the specified job or one similar to it. OWCP informed appellant that, if she failed to cooperate fully, it would assume that the vocational services would have resulted in a wage-earning capacity and, therefore, would reduce her compensation, pursuant to 5 U.S.C. § 8113 and 20 C.F.R. § 10.519.

In a September 27, 2021 report, the vocational rehabilitation counselor reported that appellant had been resistant to vocational services during the past month. Appellant was slow to enroll in the required training. The rehabilitation counselor related that appellant saw her orthopedist who reportedly told her that she was 65 percent disabled.

OWCP subsequently received a September 14, 2021 report, wherein Dr. Travis C. Philipp, an orthopedic surgeon, noted appellant's history of injury and medical treatment. He indicated that she had not worked since 2012 and was considering retraining for desk-type work. Dr. Philipp rated appellant's neck disability index score at 62 percent. He noted her physical examination findings and opined that, in the absence of radiculopathy, myelopathy or spinal instability, she was not currently a surgical candidate. Dr. Philipp opined that appellant should maintain her current multidisciplinary regimen, including physical therapy and pharmacologic management, as she was overall able to manage her symptoms.

In an undated statement, received on October 19, 2021, appellant asserted that she was never reimbursed for the new computer and Microsoft program that she bought for her training class. She contended that, with her neck condition, it was very difficult to sit and work on a computer as her neck seized up and she developed massive headaches, which sometimes lasted for days. Appellant also related that she could not safely drive a car due to her neck condition.

In a November 11, 2021 rehabilitation action report (Form OWCP-44), the vocational rehabilitation counselor noted that appellant began her training classes as planned and initially appeared to actively participate in her program. However, on October 5, 2021, appellant related that her father was gravely ill and she had fallen behind on course work, but was working to catch up. The vocational rehabilitation counselor indicated that, as of November 2, 2021, appellant was missing several assignments, she did not pass her course, and she did not answer telephone calls or respond to e-mails. She checked again on November 11, 2021 and appellant still had a failing grade and was still missing several assignments. The vocational rehabilitation counselor further

noted that the term would end on December 2, 2021 and while appellant may still be able to turn the work in and pass her course, she had stopped communicating and was not participating in her training program. A copy of appellant's grades and assignments were attached. The vocational rehabilitation counselor continued to report on appellant's lack of participation in the approved training plan.

On December 15, 2021 OWCP interrupted vocational rehabilitation services, pending appellant's compliance. On December 22, 2021 the vocational rehabilitation counselor reported that appellant had not completed her training program.

By notice dated December 29, 2021, OWCP proposed to reduce appellant's wage-loss compensation because she did not fully cooperate with vocational rehabilitation training. It noted that she had not undertaken the training because of her father's health problems and non-reimbursement of a laptop. OWCP noted that the results of the tests and evaluations performed by the rehabilitation counselor as well as medical evidence from Dr. Yang demonstrated that she had the ability to successfully complete the training program which would provide her with the knowledge and skills necessary for placement effort in the fields of clerk, customer service representative, and/or receptionist. It again directed appellant to undergo the approved training program and provided her 30 days to either make necessary arrangements to participate in the training program or submit additional evidence to support good cause if she disagreed with the proposed reduction of compensation. No response was received.

By decision dated February 17, 2022, OWCP finalized the December 29, 2021 proposed reduction of appellant's wage-loss compensation, pursuant to 5 U.S.C. §§ 8104 and 8113(b), because she failed, without good cause, to undergo vocational rehabilitation as directed. It included the DOT No. 239.362-014, position description and physical requirements for a customer service representative, which it noted to be sedentary strength level. OWCP further noted that the physical requirements of the customer service representative position did not exceed appellant's current work restrictions as provided by Dr. Yang on October 9, 2020 and was, therefore, medically suitable. It indicated that had appellant successfully completed the approved vocational rehabilitation program, she would have been capable of securing reemployment as a customer service representative, which had an entry-level wage of \$768.65 per week. OWCP applied the *Shadrick* formula,⁵ finding that she had 80 percent wage-earning capacity. It reduced appellant's wage-loss compensation, effective that date.

On March 3, 2022 appellant requested a review of the written record by a representative of OWCP's Branch of Hearing and Review. In a March 1, 2022 statement, she contended that Dr. Yang supported that her work-related conditions were still present and her decreased/lack of range of motion in the cervical spine/neck were issues that affected her work on a computer and no treatment would improve her ability to do the tasks required. She provided a copy of a November 21, 2021 e-mail she sent to her vocational rehabilitation counselor, which stated that she could not physically do the computer work as it caused her horrible pain and anxiety, as well as a copy of the vocational rehabilitation counselor's November 21, 2021 response. Appellant also resubmitted Dr. Philipp's September 14, 2021 report.

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

By decision dated June 15, 2022, OWCP's hearing representative affirmed the February 17, 2022 decision.

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.⁶ Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.⁷

Section 8113(b) of FECA⁸ 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.”⁹

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.”¹⁰

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

⁶ *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).

⁷ *Supra* note 1 at § 8104(a).

⁸ *Supra* note 1.

⁹ *Id.* at § 8113(b).

¹⁰ 20 C.F.R. § 10.519(a).

inappropriate response to directions in a testing session, as well as failure to attend an approved training program.¹¹

ANALYSIS

The Board finds that OWCP met its burden of proof to reduce appellant's wage-loss compensation, effective February 17, 2022, for failure to cooperate with vocational rehabilitation without good cause.

When determining whether OWCP properly reduced appellant's wage-loss compensation benefits based on her failure to participate in vocational rehabilitation, the Board must first analyze whether OWCP properly determined appellant's work restrictions and ability to work.¹² OWCP referred appellant to vocational rehabilitation based on the October 9, 2020 report of Dr. Yang, an OWCP second opinion examiner, who conducted an examination and opined that appellant continued to suffer residuals of her accepted work-related injuries. Dr. Yang indicated that appellant could not work at her date-of-injury position but could work full time in a permanent sedentary or light category position, such as that of an information clerk, receptionist, or customer service representative, positions for which she had reviewed job classification descriptions. As Dr. Yang's report was sufficiently rationalized and based on the objective findings of record, the Board finds that OWCP properly determined that Dr. Yang's opinion represents the weight of the medical evidence and, accordingly, that appellant had the physical capacity to perform the duties of a customer service representative.¹³ The position was classified as sedentary, which the Board finds falls within the sedentary work requirements set forth by Dr. Yang.

Based on Dr. Yang's findings, OWCP referred appellant for vocational rehabilitation. The vocational rehabilitation counselor indicated that appellant had the vocational capacity to perform the positions of an information clerk, receptionist, or customer service representative, as identified by Dr. Yang, and provided a rehabilitation plan, including online computer training, which OWCP approved. On November 11, 2021 she informed OWCP that while appellant had initially appeared to actively participate in her classes at a local college as planned, on October 5, 2021 she related that her father was gravely ill and she had fallen behind on course work. While appellant indicated she was working to catch up, the rehabilitation counselor documented on November 2 and 11, 2021 that appellant had not completed several assignments, she had failing grades, and she did not answer her telephone or respond to her e-mails. She concluded that the semester term would end on December 2, 2021 and that appellant had stopped communicating with her and was not participating in her training program. The vocational rehabilitation counselor thereafter continued to report on appellant's lack of participation in the approved training plan. 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

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Vocational Rehabilitation Services, *Non-Cooperation and Sanction Decisions*, Chapter 2.813.17 (February 2011).

¹² See *J.S.*, Docket No. 22-0386 (issued October 19, 2022); *F.N.*, Docket No. 20-0435 (issued February 26, 2021); *L.C.*, Docket No. 12-972 (issued November 9, 2012).

¹³ See *S.C.*, *supra* note 6; see also *M.P.*, Docket No. 19-1364 (issued February 4, 2020).

undergo training after a training program had been approved.¹⁴ The Board finds that the evidence of record establishes that appellant failed to continue in vocational rehabilitation without good cause.

Appellant has alleged that she was unable to continue vocational rehabilitation as she could not physically sit and complete the required computer tasks due to her neck condition. While she correctly noted that Dr. Philipp, in his September 14, 2021 report, rated her disability score at 62 percent, Dr. Philipp failed to offer any opinion regarding her ability to participate in the vocational rehabilitation training plan or perform sedentary work as a customer service representative. An appellant cannot self-certify her own medical condition or physical limitations.¹⁵ While appellant also alleged that Dr. Yang supported that she continued to suffer residuals of her work-related conditions and she still was under medical treatment, Dr. Yang specially supported that the targeted positions were within appellant's medical limitations. She submitted no medical evidence which established that her work-related conditions prevented her from participating in the online training or which explained why she could not return to work as a customer service representative. Thus, there is no evidence that appellant had good cause for her failure to continue vocational rehabilitation.

Accordingly, the Board finds that OWCP properly determined that appellant had, without good cause, failed to continue vocational rehabilitation.¹⁶ 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 her wage-earning capacity had she undergone vocational rehabilitation. The vocational rehabilitation counselor identified the position of customer service representative, DOT No. 239.362-014, with wages of \$768.65 per week. This represents the amount, which would likely have been appellant's wage-earning capacity had she completed vocational rehabilitation. OWCP followed its procedures and advised her that, if she did not continue vocational rehabilitation, her compensation would be reduced. It properly applied the *Shadrick* formula, as codified in section 10.403 of its regulations,¹⁷ in determining appellant's wage-earning capacity and reducing her compensation. The Board, thus, finds that appellant had, without good cause, failed to continue participation in vocational rehabilitation.

CONCLUSION

The Board finds that OWCP has met its burden of proof to reduce appellant's compensation, effective February 17, 2022, for failure to cooperate with vocational rehabilitation without good cause.

¹⁴ *Supra* note 12.

¹⁵ *See B.M.*, Docket No. 19-1075 (issued February 10, 2021); *R.A.*, Docket No. 19-1752 (issued March 25, 2020); *A.W.*, Docket No. 18-0589 (issued May 14, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁶ *J.S.*, *supra* note 12; *D.T.*, Docket No. 16-1590 (issued January 17, 2018); *M.K.*, Docket No. 16-1676 (issued February 16, 2017).

¹⁷ 20 C.F.R. § 10.403.

ORDER

IT IS HEREBY ORDERED THAT the June 15, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 12, 2023
Washington, DC

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

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

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