

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

D.T., Appellant)	
)	
and)	Docket No. 25-0079
)	Issued: December 26, 2024
U.S. POSTAL SERVICE, LAKE HAVASU POST)	
OFFICE, Lake Havasu City, AZ, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On October 31, 2024 appellant, through counsel, filed a timely appeal from an October 8, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ 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.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly reduced appellant's wage-loss compensation to zero pursuant to 5 U.S.C. § 8113(b), effective April 26, 2024, for failing to cooperate with the early stages of vocational rehabilitation without good cause.

FACTUAL HISTORY

On December 29, 2011 appellant, then a 47-year-old rural letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 28, 2011 the vehicle she was operating was rear-ended when delivering mail while in the performance of duty. She stopped work on the date of the claimed injury. OWCP accepted appellant's claim for concussion; contusions of the face, scalp, and neck (except the eyes); cervical strain; thoracic strain; bilateral leg/knee strains; and bilateral papilledema. It paid her wage-loss compensation for disability from work on the supplemental rolls, effective February 12, 2012, and on the periodic rolls, effective January 13, 2013.

On January 31, 2023 OWCP referred appellant, the medical record, a statement of accepted facts (SOAF), and a series of questions, for a second opinion examination and evaluation with Dr. Torey P. Botti, a Board-certified orthopedic surgeon, to determine her capacity to work.

In a February 28, 2023 report, Dr. Botti discussed appellant's factual and medical history and reported the findings of his physical examination. He diagnosed head contusion and concussion, active; cervical sprain, active; thoracic sprain, resolved; and bilateral leg and knee sprains, active. Dr. Botti opined that appellant could not return to her date-of-injury job and, therefore, work restrictions/limitations were medically warranted. He advised that appellant could perform a sedentary job. Dr. Botti noted that appellant had very low functionality and would be able to function at a desk job with only a limited amount of walking and standing. She could not stoop, climb, kneel, squat, or operate a motor vehicle. Dr. Botti indicated that appellant had an unsteady gait, walked with the cane, and was barely able to perform self-care without assistance.

In a March 15, 2023 letter, OWCP informed appellant that, based on the medical evidence from Dr. Botti, it would be providing vocational rehabilitation services to her, which were designed to return her to work. By letter dated April 21, 2023, it informed her that a vocational rehabilitation counselor had been assigned to assist her with the vocational rehabilitation services.

Appellant's rehabilitation counselor noted in a May 18, 2023 report that his initial interview with appellant took place on April 27, 2023.

On June 19 through 21, 2023, appellant underwent vocational testing to assess her skills, aptitudes, academic achievement, personality traits, manual dexterity, and vocational interests. On July 21, 2023, appellant's vocational rehabilitation counselor identified the positions of receptionist and customer service representative as suitable for appellant based on her job history, medical restrictions, and the labor market survey. He identified the wages for both positions as \$554.00 per week (\$13.85 per hour times 40 hours per week).

On July 21, 2023, appellant's rehabilitation counselor submitted the vocational rehabilitation plan to OWCP.

By letter dated January 11, 2024, OWCP informed appellant that it approved the plan that was developed for her return to work as a customer service representative.³ It advised her that she was expected to cooperate fully and that, after necessary training or other preparation was completed, she would be provided 90 days for placement services so that she might reach the goal of reemployment. OWCP informed appellant that she would have a wage-earning capacity of \$554.00 per week (\$13.85 per hour times 40 hours per week) based on the vocational evaluation and survey of the local labor market. It informed her that if she did not cooperate fully with the present plan, her compensation could be reduced in accordance with 20 C.F.R. § 10.519.

On January 18, 2024, appellant's rehabilitation counselor mailed the rehabilitation plan to appellant and, in the accompanying letter, he directed her to sign the plan and return it promptly.

In a February 12, 2024 report, appellant's rehabilitation counselor stated that on January 25, 2024 appellant informed him that she had not received the letter and rehabilitation plan. He noted that on January 30, 2024 he called and left a voicemail message for appellant. The counselor stated that he also e-mailed appellant to request confirmation of receipt of his letter and rehabilitation plan. He noted that appellant later informed him that the letter and rehabilitation plan were erroneously delivered to her neighbor's home and that they were given to her on January 29, 2024. The counselor indicated that appellant advised him that she signed and mailed the plan on January 30, 2024. He stated that he informed appellant that, once the plan was received, he would upload the documents to OWCP and that training would start once authorization was received from OWCP.

In a February 13, 2024 letter, appellant's rehabilitation counselor informed appellant that he had not received her signature on the rehabilitation plan and noted that he was sending her another copy for her signature. He suggested that she take a photograph of each page with her mobile telephone and e-mail the document to him to ensure receipt of the plan considering there had already been a delay in getting the signed plan documents to OWCP. The counselor informed appellant that she also could mail the documents to him. On February 21, 2024, he stated that appellant informed him that she had not received his letter. The counselor e-mailed appellant on February 27, 2024, to remind her to promptly sign and return the plan documents.

On February 28, 2024, appellant informed her rehabilitation counselor that she had not received the February 13, 2024 letter. On March 1, 2024, the rehabilitation counselor notified OWCP that appellant had not yet returned the signed vocational rehabilitation plan as requested.

In a March 12, 2024 letter, OWCP advised appellant of its determination that she had failed to participate in vocational rehabilitation efforts. It informed her that an individual who refuses or impedes a vocational rehabilitation effort without good cause after testing has been accomplished will have their compensation reduced. OWCP directed appellant to make a good faith effort to

³ OWCP inadvertently mentioned only the customer service representative position, rather than both the receptionist and customer service representative positions, but appellant had otherwise been informed that either position was deemed to be suitable.

participate in the rehabilitation effort within 30 days or, if she believed she had good cause for not participating in the effort, to provide reasons and supporting evidence of such good cause within 30 days. OWCP stated that if these instructions were not followed within 30 days action would be taken to reduce her compensation in accordance with 20 C.F.R. § 10.519.

In an April 8, 2024 statement, appellant discussed the second opinion examination with Dr. Botti, alleging that Dr. Botti “mixed her up” with someone else and asserting that he mainly talked about his own medical issues and did not examine her. She maintained that she was unable to work and did not understand how she is supposed to work when she was unable to take care of herself.

By decision dated April 26, 2024, OWCP reduced appellant’s compensation to zero under 5 U.S.C. § 8113(b), effective the date of the decision, because she had failed to undergo the essential preparatory vocational rehabilitation efforts. It determined that she had failed, without good cause, to undergo vocational rehabilitation as directed.

On May 20, 2024, appellant requested a review of the written record before a representative of OWCP’s Branch of Hearings and Review.

By decision dated October 8, 2024, OWCP’s hearing representative affirmed the April 26, 2024 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.⁴ 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.⁵

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:”

* * *

“(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 the OWCP nurse, interviews,

⁴ *C.H.*, Docket No. 18-1153 (issued January 2, 2019); *Betty F. Wade*, 37 ECAB 556, 565 (1986).

⁵ 5 U.S.C. § 8113(b).

testing, counseling, functional capacity evaluations, 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."⁶

ANALYSIS

The Board finds that OWCP improperly reduced appellant's wage-loss compensation to zero pursuant to 5 U.S.C. § 8113(b), effective April 26, 2024.

Upon receiving medical evidence that appellant could work with restrictions, OWCP properly referred her for vocational rehabilitation services. It advised her of the penalties for failing to cooperate with vocational rehabilitation services without good cause. On July 20, 2023, appellant's vocational rehabilitation counselor identified the positions of receptionist and customer service representative as suitable for appellant based on her job history, medical restrictions, and the labor market survey. He identified the wages for both positions as \$554.00 per week (\$13.85 per hour times 40 hours per week). OWCP informed appellant that it approved the plan that was developed for her return to work as a receptionist or customer service representative. It advised her that she was expected to cooperate fully and that, after necessary training or other preparation was completed, she would be provided 90 days for placement services so that she might reach the goal of employment as a receptionist or customer service representative. OWCP informed appellant that she would have a wage-earning capacity of \$554.00 per week (\$13.85 per hour times 40 hours per week) based on the vocational evaluation and survey of the local labor market. It informed her that if she did not cooperate fully with the present plan, her compensation could be reduced in accordance with 20 C.F.R. § 10.519.

The facts of this case establish that appellant's vocational rehabilitation counselor had identified the positions of receptionist and customer service representative as appellant's vocational goal and had also identified her potential earnings in these positions. 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.⁷

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

⁷ *See C.M.*, Docket No. 23-0565 (issued June 26, 2023); *D.W.*, Docket No. 20-0840 (issued August 19, 2021).

CONCLUSION

The Board finds that OWCP improperly reduced appellant's wage-loss compensation to zero pursuant to 5 U.S.C. § 8113(b), effective April 26, 2024.

ORDER

IT IS HEREBY ORDERED THAT the October 8, 2024 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 26, 2024

Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board