

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

D.M., Appellant

and

**U.S. POSTAL SERVICE, PECOS POST
OFFICE, Pecos, TX, Employer**

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**Docket No. 23-0912
Issued: March 5, 2024**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 21, 2023 appellant filed a timely appeal from a May 25, 2023 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

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the May 25, 2023 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. 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 May 25, 2023, for failing to cooperate with the early stages of vocational rehabilitation without good cause.

FACTUAL HISTORY

On February 11, 2019 appellant, then a 55-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on February 1, 2019 he injured his left shoulder, left hip, and left ankle when he was struck with a rolling cage while in the performance of duty. OWCP accepted the claim, assigned OWCP File No. xxxxxx296, for unspecified joint derangements of the left shoulder, left hip, and left ankle; breakdown (mechanical) of other internal orthopedic devices, implants and grafts; peroneal tendinitis, left leg; spontaneous rupture of extensor tendons, left ankle and foot; and strain of other muscles and tendons of posterior muscle group at lower left lever, left leg. It paid appellant wage-loss compensation on the supplemental rolls effective January 4, 2020 and on the periodic rolls effective December 5, 2021.³

Between March 10, 2020 and June 1, 2021, appellant underwent a series of injections into the left peroneal tendon sheath by Dr. Ryan P. Shock, a Board-certified podiatrist. Dr. Shock diagnosed left ankle painful hardware and left peroneal tendon tear. On June 18, 2021 he performed a left peroneal tendon repair and hardware removal.⁴

In an October 21, 2021 follow-up report, Dr. Shock noted that appellant related low grade stiffness and minimal pain in the left ankle. He performed a physical examination of the left ankle, which revealed mild effusion and reduced range of motion. Dr. Shock diagnosed joint derangement of the left ankle, spontaneous rupture of the extensor tendons of the left ankle and foot, and peroneal tendinitis of the left lower limb. He recommended a boot for postoperative recovery, fracture healing, reduction of edema, and pain control.

In an October 22, 2021 duty status report (Form CA-17), Dr. Shock indicated that appellant was unable to work in any capacity as it related to his left shoulder, left hip, left ankle, and left foot.

³ Appellant has a prior May 26, 2012 occupational disease claim (Form CA-2) under OWCP File No. xxxxxx319, which OWCP accepted for displacement of lumbar intervertebral disc without myelopathy and thoracic or lumbosacral neuritis or radiculitis. On April 3, 2013 appellant underwent a lumbar microdiscectomy, laminectomy, foraminotomy, and partial facetectomy at L5-S1 on the left. Thereafter, he received a series of transforaminal steroid injections bilaterally at L5 and S1 and a trial spinal cord stimulator for chronic intractable pain was recommended. OWCP has administratively combined OWCP File Nos. xxxxxx296 and xxxxxx319, with the latter serving as the master file. Appellant also has a February 1, 2019 occupational disease claim under OWCP File No. xxxxxx172, which OWCP accepted for cervical disc disorder with myelopathy, cervical radiculopathy, and other derangements of the right and left patellae and right shoulder. OWCP has not administratively combined OWCP File No. xxxxxx172 with OWCP File Nos. xxxxxx296 and xxxxxx319.

⁴ A May 14, 2019 report of magnetic resonance imaging scan of the left ankle revealed a history of a previous fracture fixation involving hardware at the left distal fibula.

On February 25, 2022 OWCP referred appellant, a copy of the case record, and a series of questions to Dr. Varsha R. Gillala, a Board-certified physiatrist, for a second opinion evaluation regarding the status of his employment-related injuries. In a March 21, 2022 report, Dr. Gillala noted his review of the statement of accepted facts and the medical record. He also provided his physical examination findings. Dr. Gillala indicated that appellant had ongoing residuals due to multiple medical problems, including joint derangement of the left shoulder, hip, and ankle and peroneal tendinitis of the left leg under OWCP File No. xxxxxx296; lumbar intervertebral disc displacement without myelopathy and thoracic or lumbosacral neuritis or radiculitis under OWCP File No. xxxxxx310; and cervical disc disorder with myelopathy, cervical radiculopathy, and other derangements of the right and left patellae and right shoulder under OWCP File No. xxxxxx172. He opined that appellant could work eight hours per day in a sedentary capacity with restrictions of intermittent ambulation, standing, and sitting, no reaching above shoulder height on the left, operating a motor vehicle no more than four hours, and no lifting, squatting, kneeling, climbing, or working at heights.

In a March 24, 2022 work capacity evaluation (Form OWCP-5c), Dr. Gillala noted that appellant could work eight hours per day in a sedentary or light-duty capacity with no lifting, squatting, kneeling, or climbing. He further found that he could walk or stand for eight hours with intermittent sitting and could push or pull up to five pounds, eight hours per day.

In March 2022, appellant came under the care of Dr. Kyriakos Tsalamandris, a Board-certified emergency medicine specialist, for the accepted May 26, 2012 and February 1, 2019 employment injuries. In a March 14, 2022 report, Dr. Tsalamandris noted that appellant related complaints of low back pain, which he attributed to the accepted May 26, 2012 employment injury. Physical examination findings included tenderness of the paralumbar muscles, spinous processes at L5-S1, and the iliac crest; painful range of motion; positive flexion, abduction, external rotation (FABER) test, bilaterally; and reduced strength of the left lower extremity compared to the right. Dr. Tsalamandris diagnosed prolapsed lumbar intervertebral disc and lumbosacral radiculopathy. He opined that appellant was totally incapacitated and that his functional status due to the objective examination findings that would not allow for work in any capacity. In a Form CA-17 of even date, Dr. Tsalamandris indicated that appellant was not able to return to work in any capacity due to his lumbosacral spine issues.

In a March 29, 2022 report, Dr. Tsalamandris noted that appellant related complaints of pain in his left shoulder, hip, leg, ankle, and foot that he attributed to the accepted February 1, 2019 employment injury. He indicated that appellant was off from work due to “another work-related injury on another claim.”

On April 27, 2022 OWCP requested clarification from Dr. Gillala regarding appellant’s work capacity.

In a May 24, 2022 supplemental report and Form OWCP-5c of even date, Dr. Gillala opined that appellant was able to work in a sedentary position with restrictions of pushing, pulling, and lifting up to 10 pounds with intermittent rest breaks. He found that appellant could walk for two hours and stand for eight hours alternating with intermittent sitting, and could not reach, twist, bend, or stoop more than one hour, or operate a motor vehicle at work more than four hours.

On June 8, 2022 OWCP referred appellant to vocational rehabilitation to assist with his return to gainful employment, based on Dr. Gillala's findings.

In a July 3, 2022 report, the vocational rehabilitation counselor outlined the results of a June 24, 2022 vocational interview. He noted that appellant worked as a mail carrier and had graduated high school. The vocational rehabilitation counselor did not identify any additional transferrable skills.

In a September 1, 2022 rehabilitation action report (Form OWCP-44), the vocational rehabilitation counselor indicated that he had spoken with a representative of the employing establishment on August 31, 2022 and that there were no modified positions available.

In September 23 and November 7, 2022 reports, Dr. Tsalamandris provided physical examination findings throughout the back and left shoulder, hip, knee, and lower extremity and continued to opine that appellant was not capable of returning to work in any capacity as it related to his lumbar spine.

On November 23, 2022 the vocational rehabilitation specialist recommended that appellant undergo a vocational evaluation to determine his residual skills and abilities.

In OWCP-44 forms dated December 1, 2022 and January 20, 2023, the vocational rehabilitation counselor noted appellant's blatant refusal to schedule the vocational evaluation.

In a January 26, 2023 letter, OWCP advised appellant that the vocational rehabilitation counselor had indicated that he had expressed an unwillingness to participate in a possible rehabilitation effort because he believed that appellant was too severely disabled to work. However, it noted that the May 24, 2022 report from Dr. Gillala, advised that appellant was able to perform gainful employment. 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 so directed, and OWCP finds that, in the absence of the failure the individual's wage-earning capacity would probably have substantially increased, it may reduce prospectively the compensation based on what probably would have been the individual's wage-earning capacity had they not failed to apply for and undergo vocational rehabilitation. It further advised appellant: "Also, [s]ection 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 him 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.

In a February 16, 2023 letter to appellant, the vocational rehabilitation counselor requested that appellant advise by February 26, 2023 if he intended to comply with vocational services.

In a February 28, 2023 report, Dr. Tsalamandris opined that appellant was totally disabled and not capable of any work due to his left shoulder, hip, leg, ankle, and foot injuries. On April 25, 2023 he related that the effects of the work injury had not ceased and that appellant continued to have symptoms and limitations due to his joint derangements of the left shoulder, left hip, left

ankle, and left leg peroneal tendinitis. Dr. Tsalamandris advised that appellant had limitations due to his work injury, including walking, standing, sitting, carrying, lifting, bending, twisting, pulling, and pushing. He related that appellant was “currently removed from work duties at this time.” Dr. Tsalamandris noted that appellant was undergoing injections to the left hip with another provider and utilizing several daily pain patches, pain medications, and anti-inflammatory medications to decrease his pain.

In a March 14, 2023 medical report, Dr. Shock administered an injection to appellant’s left peroneal tendon sheath.

By decision dated May 25, 2023, OWCP reduced appellant’s compensation to zero, effective May 25, 2023, based upon its finding that he had failed to cooperate during the early stages of vocational rehabilitation. It noted that while it received medical evidence from Dr. Tsalamandris dated February 28 and April 25, 2023, indicating that appellant was unable to work, the medical evidence was insufficient to support his noncompliance. OWCP also found that appellant had not shown good cause for not complying with the scheduling of a vocational evaluation. It explained that the failure to undergo the essential preparatory effort of vocational rehabilitation did not permit it to determine what would have been his wage-earning capacity had he undergone the testing, training, and rehabilitation effort. OWCP determined that, under the provisions of 20 C.F.R. § 10.519, in the absence of evidence to the contrary, it was assumed that the vocational rehabilitation effort would have resulted in appellant’s return to work at the same or higher wages than the position he held when injured. It advised that the reduction in benefits would continue until he either underwent vocational rehabilitation or showed good cause for not complying.

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.⁵ Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.⁶

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] wage-earning capacity in the absence of the failure,” until the individual in good faith complies with the direction of OWCP.⁷

⁵ See *S.B.*, Docket No. 19-0781 (issued February 2, 2022); *E.W.*, Docket No. 19-0963 (issued January 2, 2020); *Betty F. Wade*, 37 ECAB 556, 565 (1986).

⁶ 5 U.S.C. § 8104(a); see also *A.L.*, Docket No. 22-0316 (issued January 10, 2023); *J.E.*, 59 ECAB 606 (2008).

⁷ *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'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. 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, 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."⁸

ANALYSIS

The Board finds that OWCP improperly reduced appellant's wage-loss compensation to zero pursuant to 5 U.S.C. § 8113(b), effective May 25, 2023, for failure to cooperate with the early stages of vocational rehabilitation.

In a March 21, 2022 report, Dr. Gillala, OWCP's second opinion physician, opined that appellant had ongoing residuals due to multiple work-related medical problems. In a March 24, 2022 Form OWCP-5c, he found that appellant was able to work eight hours per day in a sedentary or light-duty capacity with no lifting, squatting, kneeling, or climbing, but that he could push or pull up to five pounds.

On April 27, 2022 OWCP requested clarification from Dr. Gillala.

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

By supplemental report and accompanying Form OWCP-5c dated May 24, 2022, Dr. Gillala explained that appellant could work in a sedentary position with restrictions of lifting, pushing, or pulling up to 10 pounds with intermittent rest breaks.

OWCP received reports dated March 14 and 29 and September 23, 2022, wherein Dr. Tsalamandris noted that appellant related ongoing complaints of lower back pain, which appellant attributed to his May 26, 2012 employment injury. He provided physical examination findings, diagnosed a prolapsed lumbar intervertebral disc and lumbosacral radiculopathy, and opined that appellant was totally disabled from all work due to the objective examination findings that would not allow for work in any capacity.

In February 28 and April 25, 2023 medical reports, Dr. Tsalamandris opined that appellant was incapable of any work due to his left shoulder, hip, leg, ankle, and foot injuries. He noted that appellant was undergoing injections to the left hip with another provider and was utilizing several daily pain patches, pain medications, and anti-inflammatory medications to decrease his pain.

On June 8, 2022 OWCP referred appellant to vocational rehabilitation to assist with his return to gainful employment, based on Dr. Gillala's findings.

It is well established that when there are opposing medical reports of virtually equal probative value between an attending physician and a second opinion physician, 5 U.S.C. § 8123(a) requires OWCP refer the case to a referee physician to resolve the conflict.⁹ The Board finds that the medical reports of Drs. Gillala and Tsalamandris are in equipoise on the issue of whether appellant was capable of returning to work and are thus in conflict. The Board therefore finds that OWCP should have resolved this conflict of medical evidence before referring appellant for vocational rehabilitation.¹⁰

As there remains an unresolved conflict of medical opinion as to whether appellant is physically capable of participating in any work activities, OWCP has not met its burden of proof.

CONCLUSION

The Board finds that OWCP improperly reduced appellant's wage-loss compensation to zero, pursuant to 5 U.S.C. § 8113(b), effective May 25, 2023, for failure to cooperate with the early stages of vocational rehabilitation without good cause.

⁹ *F.N.*, Docket No. 20-0435 (issued February 26, 2021); *William C. Bush*, 40 ECAB 1064 (1989); *James P. Roberts*, 31 ECAB 1010 (1980).

¹⁰ *See B.D.*, Docket No. 21-1301 (issued October 17, 2022); *F.N. id.*

ORDER

IT IS HEREBY ORDERED THAT the May 25, 2023 decision of the Office of Workers' Compensation Programs is reversed.¹¹

Issued: March 5, 2024
Washington, DC

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

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

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

¹¹ Upon return of the case record, OWCP should consider administratively combining OWCP File No. xxxxxx172 with OWCP File Nos. xxxxxx296 and xxxxxx319.