

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

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| K.C., Appellant |) | |
| |) | |
| and |) | Docket No. 22-0278 |
| |) | Issued: May 5, 2023 |
| FEDERAL JUDICIARY, U.S. DISTRICT |) | |
| COURT, Los Angeles, CA, Employer |) | |
| |) | |

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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 12, 2021 appellant filed a timely appeal from an October 13, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

¹ The Board notes that, following the October 13, 2021 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.*

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) and 20 C.F.R. § 10.519, effective October 13, 2021, for failure to cooperate with vocational rehabilitation without good cause.

FACTUAL HISTORY

On March 18, 2019 appellant, then a 51-year-old generalist clerk, filed a traumatic injury claim (Form CA-1) alleging that on March 8, 2019 she injured her back when she tripped over a box while in the performance of duty. She stopped work on March 11, 2019. OWCP accepted the claim for compression fracture of a lumbar vertebra. It accepted the additional conditions of sacroiliitis and lumbar radiculopathy on March 10, 2020. OWCP paid appellant wage-loss compensation on the supplemental rolls beginning June 24, 2019 and on the periodic rolls beginning March 29, 2020.

In notes dated May 2 through October 23, 2019, appellant's attending physician, Dr. Lawrence R. Miller, a Board-certified internist, found that she was totally disabled beginning March 8, 2019 due to her employment-related post-traumatic left sacroiliitis. He diagnosed left lateral recess stenosis at L3-4 and preexisting steroid-dependent rheumatoid arthritis. Beginning December 4, 2019 through July 9, 2020, Dr. Miller diagnosed left lumbar radiculopathy, left sacroiliitis, and rheumatoid arthritis.

On October 1, 2020 OWCP referred appellant, a statement of accepted facts (SOAF), and the medical record to Dr. Ghol B. Ha'Eri, a Board-certified orthopedic surgeon, for a second opinion examination.

In an October 21, 2020 report, Dr. Ha'Eri reviewed the SOAF and appellant's medical treatment. He performed a physical examination and diagnosed left paracentral disc protrusion at L3-4 resulting in lower back pain and radicular pain in the left lower extremity, left sacroiliitis, mild compression fracture of T12, L1, L2, and L4, and preexisting rheumatoid arthritis. Dr. Ha'Eri found that appellant was capable of sedentary work beginning June 1, 2019. He provided a work capacity evaluation (Form OWCP-5c), noted sedentary work, but did not provide any additional specific restrictions.

On March 24, 2021 OWCP referred appellant to vocational rehabilitation to assist with her return to gainful employment based on Dr. Ha'Eri's report, which it found was entitled to the weight of the medical evidence.

In a letter dated April 1, 2021, appellant's vocational rehabilitation counselor informed her that he had attempted to reach her by telephone through voice messages with no response. He requested that she schedule a telephone appointment as soon as possible.

On April 6, 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.

On April 10, 2021 Dr. Miller completed an attending physician's report (Form CA-20) and opined that appellant was totally disabled from work through that date due to lumbar radiculopathy, disc problems, and sacroiliitis.

In a report dated April 16, 2021, the vocational rehabilitation counselor indicated that appellant had not responded to calls and messages left from March 30 through April 15, 2021.

On May 4, 2021 appellant contacted the vocational rehabilitation counselor and scheduled an initial interview for May 7, 2021. She did not appear for this scheduled interview or respond to repeated calls on May 7, 2021.

In a May 10, 2021 letter, the vocational rehabilitation counselor informed appellant that she had been referred for vocational rehabilitation services by OWCP. He requested that she contact him and provided his telephone numbers.

In a July 8, 2021 note, Dr. Miller reported that appellant remained symptomatic with ongoing lower back pain and radicular symptoms in the left lower extremity. He found that she was totally disabled.

OWCP informed the employing establishment on August 16, 2021 that appellant could return to sedentary work which entailed exerting 10 pounds of force occasionally to lift, carry, push, pull, or otherwise move objects, sitting most of the time, and walking or standing occasionally for up to 2 hours 40 minutes in an 8-hour workday.

On August 26 and 30, 2021 the employing establishment offered appellant her date-of-injury position as a full-time generalist clerk with accommodations for limited walking and standing.

In an August 30, 2021 letter, OWCP advised appellant that the vocational rehabilitation counselor had indicated that she was unwilling or unable to participate in vocational rehabilitation and training, as she had failed to respond to the vocational rehabilitation counselor during the period March 30 through May 7, 2021. It 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. OWCP 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." It afforded her 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.

On August 25, 2021 Dr. Miller diagnosed left lumbar radiculopathy, left sacroiliitis, and rheumatoid arthritis and found that appellant was totally disabled. He noted that she remained symptomatic with ongoing pain in her lower back and radicular symptoms into the left lower extremity.

The vocational rehabilitation counselor completed reports on September 18 and October 2, 2021 and noted that appellant had not responded to numerous attempts to contact her and that she had not scheduled an initial interview.

In an October 1, 2021 memorandum of telephone call (Form CA-110), appellant contended that she could not participate in vocational rehabilitation counseling because her attending physician found that she was totally disabled from work.

By decision dated October 13, 2021, OWCP reduced appellant's compensation to zero, effective that date, based upon its finding that she had failed to cooperate during the early stages of vocational rehabilitation. It noted that she had not shown good cause for not complying. OWCP noted that appellant had not responded to its August 30, 2021 letter. It 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. OWCP determined that, under the provisions of 5 U.S.C. 8113(b) of FECA and section 10.519 of its regulations, 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. It advised that the reduction in benefits would continue until she 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.³ Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.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, 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.⁵

³ See *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).

⁴ 5 U.S.C. § 8104(a).

⁵ *Id.* at § 8113(b).

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. [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.’”⁶

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.⁷

Section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, OWCP shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.

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

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

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to reduce appellant's wage-loss compensation to zero, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, effective October 13, 2021.

Once OWCP has made a determination that an employee is totally disabled from work as a result of an employment injury and pays compensation, it has the burden of justifying a subsequent reduction of benefits.⁸ It reduced appellant's compensation based on her failure to participate in the early stages of vocational rehabilitation without good cause.

In reaching its conclusion with regard to the ability to work, OWCP must initially determine the employee's medical condition and work restrictions.⁹ When it referred appellant to vocational rehabilitation, it determined that the weight of the evidence was represented by the opinion of Dr. Ha'Eri. Dr. Ha'Eri found that she could return to sedentary work.

However, appellant's attending physician, Dr. Miller, in his August 25, 2021 report, found that she was totally disabled from work due to symptoms of her accepted employment injuries and could not return to work.

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. The Board finds that the medical reports of Drs. Miller and Ha'Eri are in equipoise on the issue of whether appellant is capable of returning to work and are thus in conflict. As the opposing medical reports are of virtually equal weight and rationale, the Board finds that there is an unresolved conflict with regard to her ability to return to work and participate in vocational rehabilitation efforts.

As there remains an unresolved conflict of medical opinion as to whether appellant is physically capable of participating in vocational rehabilitation, OWCP has failed to meet its burden of proof to justify reduction of her compensation benefits to zero for failure to participate in vocational rehabilitation efforts.

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to reduce appellant's wage-loss compensation to zero, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, effective October 13, 2021.

⁸ *F.N.*, Docket No. 20-0435 (issued February 26, 2021); *D.E.*, Docket No. 15-0712 (issued June 23, 2016).

⁹ *Id.*; *L.C.*, Docket No. 12-972 (issued November 9, 2012).

ORDER

IT IS HEREBY ORDERED THAT the October 13, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 5, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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