

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

L.D., Appellant

and

**U.S. POSTAL SERVICE, CUSTOMER CARE
CENTER, Detroit, MI, Employer**

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**Docket No. 18-0205
Issued: July 23, 2018**

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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 27, 2017 appellant filed a timely appeal from an October 12, 2016 merit decision and a November 18, 2016 nonmerit 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 to consider the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$66,806.68 for the period August 21, 2014 to June 25, 2016 as she continued to receive compensation after her wage-loss compensation was reduced to zero; (2) whether OWCP properly found that appellant was at fault in creation of the overpayment and therefore not subject to waiver of recovery of the overpayment; and (3) whether OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 17, 2009 appellant, then a 45-year-old call center agent (modified), filed a recurrence (Form CA-2a) claiming a recurrence of disability commencing July 13, 2009.² OWCP developed the claim as a new injury because appellant described new work factors such as repetitive reaching and use of her hands which allegedly caused her disability. On December 2, 2013 OWCP accepted the claim for bilateral carpal tunnel syndrome and left ulnar nerve lesion. It paid appellant wage-loss compensation benefits beginning July 13, 2009, and paid benefits on the periodic rolls, effective July 27, 2014.³

On May 27, 2014 OWCP referred appellant for vocational rehabilitation services based on the October 29, 2013 findings of Dr. Gary J. La Tourette, a second opinion Board-certified orthopedic surgeon. Dr. La Tourette reported that it was doubtful that appellant could perform the duties of a modified call center agent due to the repetitive wrist and elbow movements required by that position. However, he opined that appellant was capable of performing sedentary work including up to six hours of pushing and pulling up to 20 pounds, and up to six hours of lifting up to 10 pounds.

On June 18, 2014 OWCP authorized a functional capacity evaluation (FCE) to obtain clarification of appellant's work capabilities/restrictions.

On June 27, 2014 an FCE was conducted by Doug Ellis, a physical therapist. Mr. Ellis determined that appellant had completed the FCE; however, the FCE was invalid/unreliable due to inconsistencies in appellant's performance such as self-limiting pain behaviors and probable less than maximum effort. He also related that appellant's permanent work restrictions should therefore be based upon objective findings only. Mr. Ellis reported numerous tests results and related that a variety of results indicated "probable" less than maximum effort. He concluded that appellant's results from his assessment, may for a variety of factors, be less than what was required for a safe return to work.

In a July 3, 2014 letter, OWCP advised appellant that the June 27, 2014 FCE results were considered invalid due to inconsistencies in her performance and self-limiting pain behavior during the testing. It noted 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 she not failed to apply for and undergo vocational rehabilitation. OWCP further stated:

"Also, [s]ection 10.519 of Title 20 of the Code of Federal Regulations provide 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

² The present claim was assigned OWCP File No. xxxxxx900. Appellant had previously filed an occupational disease claim (Form CA-2), assigned OWCP File No. xxxxxx994, which was accepted on July 12, 2005 for aggravation of cervical degenerative disc disease and brachial neuritis/radiculitis. On May 16, 2014 OWCP administratively combined File Nos. xxxxxx994 and xxxxxx900, with the latter file designated as the master file.

³ Appellant was approved by OPM for disability retirement by letter dated September 10, 2010.

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 appellant 30 days to contact the vocational rehabilitation counselor to make a good effort to participate in the rehabilitation effort or to provide good reasons for noncompliance.

On July 17, 2014 Mr. Ellis conducted a repeat FCE. Once again, he found the results unreliable and invalid due to continuing self-limiting pain behavior and probability of less than maximum effort. Mr. Ellis noted that appellant related continued symptoms and that she had increased symptoms for three days following the initial FCE evaluation. He related that prior to the start of the second evaluation he reviewed the prior testing and discussed specific examples of inconsistencies. Mr. Ellis related that appellant was encouraged to participate to the best of her ability. He again concluded that “the results identified in today’s assessment may, for a variety of factors, be less than which is a safe return to work level for this client.”

On a July 21, 2014 Rehabilitation Action Report (Form OWCP-44), the rehabilitation counselor advised that the July 17, 2014 FCE was determined to be invalid/unreliable as there were inconsistencies in appellant’s performance.

Based on appellant’s performance on the June 27 and July 17, 2014 FCEs, OWCP suspended its vocational rehabilitation efforts on August 19, 2014.

By decision dated August 21, 2014, OWCP finalized the reduction of compensation to zero, effective that date under 5 U.S.C. § 8113(b) on the basis that appellant did not fully cooperate with the FCEs performed on June 27 and on July 17, 2014.

OWCP, by letter dated July 19, 2016, notified appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$66,806.68 as her compensation has been reduced to zero on August 21, 2014, but she continued to receive wage-loss compensation until June 25, 2016. It further advised her of its preliminary determination that she was at fault in the creation of the overpayment because she accepted a payment that she knew or reasonably should have known was incorrect. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documentation. Additionally, it notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

On August 23, 2016 appellant requested reconsideration of OWCP’s August 21, 2014 decision.

By decision dated October 12, 2016, OWCP finalized its preliminary overpayment determination finding that appellant received an overpayment of compensation in the amount of \$66,806.68 for the period August 21, 2014 to June 25, 2016, because she continued to receive wage-loss compensation after her compensation had been reduced to zero for failure to cooperate with the early stages of vocational rehabilitation. It found that she was at fault in the creation of the overpayment as she knew or reasonably should have known that she was not entitled to wage-loss compensation. OWCP further noted that appellant had elected to receive compensation benefits from OPM retroactively to August 21, 2014.

By decision dated November 18, 2016, OWCP determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error with respect to the August 21, 2014 decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's 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

Section 10.519 of OWCP's regulations provides that if an employee without good cause fails or refused 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, meeting with OWCP's nurses, 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.”⁶

OWCP procedures provide that specific instances of noncooperation during the plan development stage include: failure to appear for the initial interview; failure to attend meetings with the rehabilitation counselor; failure to undergo an FCE, including failure to put forth optimum effort during the FCE; failure to undergo vocational testing and other work evaluations, including lack of response or inappropriate response to directions during testing; and failure to respond to the rehabilitation counselor's telephone calls or written notices.⁷

⁴ See *R.D.*, Docket No. 16-0936 (issued April 20, 2017); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁵ 5 U.S.C. § 8113(b).

⁶ 20 C.F.R. § 10.519.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.17(b) (February 2011); see *Sam S. Wright*, 56 ECAB 358 (2005).

ANALYSIS -- ISSUE 1

The overpayment of compensation in this case was based on OWCP's August 21, 2014 decision reducing appellant's compensation to zero based on her failure to undergo the essential preparatory effort of vocational testing. The Board must review the underlying decision to determine whether an overpayment was established.⁸

The Board finds that OWCP improperly reduced appellant's compensation to zero for failing, without good cause, to participate in the vocational rehabilitation efforts.

OWCP accepted that appellant had employment-related conditions of aggravation of cervical degenerative disc disease, brachial neuritis/radiculitis, bilateral carpal tunnel syndrome and left ulnar nerve lesion. It paid appellant wage-loss compensation beginning July 13, 2009, and placed her on the periodic rolls, effective July 27, 2014.

The record reflects that, on May 27, 2014, OWCP referred appellant for vocational rehabilitation services to assist her in returning to gainful employment within her medical limitations. As part of the vocational rehabilitation process, appellant was directed to attend and fully participate in an FCE on June 27, 2014. Although she attended the examination, physical therapist Mr. Ellis' report reflected that she provided inconsistent responses and failed to demonstrate maximum effort. He concluded that the evaluation was unreliable and invalid.

Appellant was notified that her failure to cooperate without good cause was reason to reduce her compensation benefits. She was directed to attend and fully participate in a second FCE scheduled for July 17, 2014. The second FCE was scheduled with the same physical therapist, Mr. Ellis, who had found her effort was less than maximum. Appellant again attended and completed the evaluation, but using substantially similar language from the first FCE, Mr. Ellis again reported that he was unable to accurately assess her full work capacity due to inconsistencies in her test responses and less than maximum effort.

The Board finds that the second FCE is virtually identical to the first one in both format and results. It is therefore of diminished reliability. To avoid the appearance of a predisposition for any result, and to obtain a fair and impartial reporting, given the facts of this case the second FCE should have been scheduled with an independent physical therapist or other medical professional not already affiliated with the case to perform the second FCE.⁹

As such, the Board finds that OWCP improperly reduced appellant's compensation benefits to zero, for failure to cooperate in vocational rehabilitation, based on the June 27, 2014 FCE report. OWCP based the fact of overpayment on the reduction of appellant's compensation to zero for failing to cooperate in vocational rehabilitation. The Board finds that as OWCP improperly reduced appellant's compensation to zero, the fact of overpayment has not been established. In view of the Board's finding, the remaining two issues are moot.

⁸ See *C.P.*, Docket No. 14-1316 (issued November 6, 2014); *Russell E. Wageneck*, 46 ECAB 653 (1995).

⁹ See *R.D.*, Docket No. 16-0936 (issued April 20, 2017); see also *Y.C.*, Docket No. 15-1442 (issued October 3, 2016).

CONCLUSION

Fact of overpayment has not been established in this case as OWCP improperly reduced appellant's compensation to zero for failing to cooperate in vocational rehabilitation.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 18 and October 12, 2016 are reversed.

Issued: July 23, 2018
Washington, DC

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

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

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