

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

R.R., Appellant	)	
	)	
and	)	Docket No. 23-0540
	)	Issued: August 15, 2023
U.S. POSTAL SERVICE, OZONE PARK	)	
CARRIER ANNEX, Brooklyn, NY, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On March 6, 2023 appellant filed a timely appeal from a February 14, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP has met its burden of proof to reduce appellant's compensation, effective February 14, 2023, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 for his failure to cooperate with vocational rehabilitation, without good cause.

**FACTUAL HISTORY**

On December 23, 2013 appellant, then a 60-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1) alleging that on December 18, 2013 he sustained a left arm

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

injury when he slipped and fell while exiting a truck in the performance of duty. He stopped work on December 19, 2013. OWCP accepted appellant's claim for back contusion and left shoulder strain. It paid him wage-loss compensation on the supplemental rolls, effective February 15, 2014, and on the periodic rolls, effective May 4, 2014.

On January 28, 2022 OWCP referred appellant, along with a statement of accepted facts, the case record, and a series of questions to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the extent of appellant's employment injury and work capacity. In a March 14, 2022 report, Dr. Sultan indicated that he reviewed appellant's records and noted that his claim was accepted for back contusion and left shoulder strain. On examination of the left shoulder, he noted reduced range of motion on abduction, forward elevation, and posterior extension. On examination of the thoracolumbar area, Dr. Sultan noted reduced range of motion on forward flexion, lumbar extension, trunk rotation, and trunk tilting. He noted that appellant's work-related conditions had not resolved, and that appellant was at maximum medical improvement. Dr. Sultan stated that appellant was unable to return to his date-of-injury position as a motor vehicle operator. In an attached work capacity evaluation (Form OWCP-5c), he recommended sedentary work restrictions with up to 10 pounds lifting, pushing, and pulling, with only desk work recommended.

On August 5, 2022 OWCP referred appellant to Claudine Bruley, a vocational rehabilitation counselor for vocational rehabilitation services. It noted that his work restrictions were based on Dr. Sultan's January 28, 2022 Form OWCP-5c.

In an August 10, 2022 report, Ms. Bruley indicated that she had conducted an initial interview with appellant.

A rehabilitation action report (Form OWCP-44) dated August 18, 2022 indicated that no modified work was available with appellant's previous employer.

On September 12, 2022 appellant's vocational rehabilitation file was reassigned to vocational rehabilitation counselor Steven Sachs, PhD.

A September 29, 2022 letter from the employing establishment indicated that no modified work was currently available at the employing establishment. However, the employing establishment was still attempting to locate modified work within a 50-mile radius.

In a letter dated September 26, 2022, vocational rehabilitation counselor, Dr. Sachs, contacted appellant and noted that he had attempted to reach appellant by telephone, but was unable to leave a message. He requested that appellant contact him as soon as the letter was received to provide further instructions regarding vocational rehabilitation. No response was received. A second letter dated October 6, 2022, from Dr. Sachs, was sent to appellant regarding referral for vocational rehabilitation services. This letter again noted that he had attempted to reach appellant by telephone, but was unable to leave a message. Appellant was requested to call as soon as possible to discuss his medical history, educational, and vocational backgrounds.

On October 11, 2022 Dr. Sachs contacted appellant. Appellant advised Dr. Sachs that he was unable to walk and that he was retired. He also indicated that he had a 10<sup>th</sup> grade education and did not have a General Educational Development (GED) certification. Dr. Sachs

recommended completion of a transferable skills analysis and labor market survey with formal vocational testing.

In a letter dated October 28, 2022 to appellant, vocational rehabilitation counselor Dr. Sachs noted that formal vocational testing had been authorized. He also noted that a vocational tester had attempted to speak with appellant, but that appellant had abruptly ended a telephone conversation with her. Dr. Sachs requested that appellant complete vocational testing documents being mailed to him, and that appellant return them per instructions.

In a Form OWCP-44 dated November 17, 2022, Dr. Sachs noted that the vocational evaluator had attempted to reach appellant in a follow-up attempt on November 9, 2022. Follow-up attempts to reach appellant on November 12 and 16, 2022 were unsuccessful. Dr. Sachs stated that appellant was “obstructing his vocational program. Vocational testing is necessary to proceed with plan development.”

In a letter to appellant dated December 19, 2022, OWCP advised that he had not responded to letters dated September 26 and October 28, 2022 regarding possible rehabilitation services. It informed him that, if he failed to cooperate fully, it would assume that the vocational services would have resulted in no loss of wage-earning capacity. OWCP further informed appellant that if he did not provide a good reason for failing to participate, or if he did not submit evidence showing that vocational rehabilitation efforts “would not result in a return to work with no loss of wage-earning capacity,” such efforts “will be terminated and action will be taken to reduce your compensation” pursuant to 5 U.S.C. § 8113 and 20 C.F.R. § 10.519. It held his case open for 30 days to afford him the opportunity to respond.

In a Form OWCP-44 dated January 7, 2023, vocational rehabilitation counselor Dr. Sachs, noted that appellant had not made any effort to contact him or the vocational evaluator. He related that vocational testing was necessary to proceed with plan development, but that appellant continued to obstruct the vocational rehabilitation program. On January 26, 2023 Dr. Sachs informed OWCP by e-mail that no further contact had been made with appellant.

On February 7, 2023 an OWCP claims examiner recommended that rehabilitation services be closed due to nonparticipation. Appellant’s vocational rehabilitation services were closed as of February 8, 2023. On February 10, 2023 OWCP informed appellant that it had closed his case for vocational rehabilitation services.

By decision dated February 14, 2023, OWCP finalized the December 19, 2022 proposed reduction of appellant’s wage-loss compensation to zero, pursuant to 5 U.S.C. §§ 8104 and 8113(b), because he failed without good cause to undergo vocational rehabilitation as directed. It concluded that he had failed to participate in essential preparatory vocational testing and, therefore, his wage-earning capacity could not be determined. OWCP noted that the reduction would remain in effect until appellant either underwent the directed vocational testing in good faith or showed good cause for not complying.

## 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. Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.<sup>2</sup>

Section 8113(b) of FECA<sup>3</sup> 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 or her wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary.”<sup>4</sup>

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 provides, in pertinent part:

“(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 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.

“(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

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<sup>2</sup> *Id.* at § 8104(a).

<sup>3</sup> *Supra* note 1.

<sup>4</sup> *Id.* at § 8113(b).

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.”<sup>5</sup>

### ANALYSIS

The Board finds that OWCP met its burden of proof to reduce appellant’s compensation to zero, effective February 14, 2023, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 for his failure to cooperate with vocational rehabilitation, without good cause.

Upon receiving medical evidence from Dr. Sultan that appellant was not totally disabled for all work, but was capable of performing sedentary work with permanent restrictions, OWCP properly referred appellant to vocational rehabilitation services in August 2022.

Appellant’s rehabilitation services file was reassigned to vocational rehabilitation counselor Dr. Sachs in September 2022. In a letter dated September 26, 2022, vocational rehabilitation counselor, Dr. Sachs, contacted appellant and noted that he had attempted to reach appellant by telephone, but was unable to leave a message. He requested that appellant contact him as soon as he received the letter. No response was received. On October 6, 2022 Dr. Sachs sent a second letter to appellant regarding referral for vocational rehabilitation services. This letter again noted that he had attempted to reach appellant by telephone, but was unable to leave a message. Dr. Sachs requested that appellant call as soon as possible to discuss his medical history, educational, and vocational backgrounds. On October 11, 2022 he was able to speak with appellant. At that time appellant told Dr. Sachs that he was unable to walk and that he was retired. He also indicated that he had a 10<sup>th</sup> grade education and did not have a GED. Dr. Sachs recommended completion of a transferable skills analysis and labor market survey with formal vocational testing. In a letter dated October 28, 2022 to appellant, Dr. Sachs noted that a vocational tester had attempted to speak with appellant, but that appellant had abruptly ended a telephone conversation with her. He requested that appellant complete vocational testing documents being mailed to appellant and that he return them per instructions. In a Form OWCP-44 dated November 17, 2022, Dr. Sachs noted that the vocational evaluator had attempted to reach appellant in a follow-up attempt on November 9, 2022. Another follow-up attempt on November 16, 2022 was unsuccessful. Dr. Sachs stated that appellant was obstructing the vocational rehabilitation program.

In a letter dated December 19, 2022, OWCP stated that appellant had not responded to letters dated September 26 and October 28, 2022 regarding possible rehabilitation services. It informed him that, if he failed to cooperate fully, it would assume that the vocational services would have resulted in no loss of wage-earning capacity and, therefore, may reduce his compensation to zero pursuant to 5 U.S.C. § 8113 and 20 C.F.R. § 10.519. OWCP held appellant’s case open for 30 days to afford him the opportunity to respond. No response was received.

Appellant’s failure without good cause to complete vocational testing documents constitutes a failure to participate in the early, but necessary, stages of a vocational rehabilitation

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<sup>5</sup> 20 C.F.R. § 10.519.

effort.<sup>6</sup> OWCP's regulations provide that, in such a case, it cannot be determined what would have been the employee's wage-earning capacity had there been no failure to participate, and it is assumed 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.<sup>7</sup> Appellant did not submit evidence to refute such an assumption, and OWCP had a proper basis upon which to reduce his disability compensation to zero.

Appellant was given appropriate notification of the sanctions for continuing to refuse to cooperate with the vocational rehabilitation program in the early stages, but failed, without good cause, to comply with these vocational rehabilitation efforts. The Board finds, therefore, that OWCP properly reduced his compensation benefits to zero for his failure to cooperate with vocational rehabilitation, without good cause.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### CONCLUSION

The Board finds that OWCP has met its burden of proof to reduce appellant's compensation, effective February 14, 2023, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 for his failure to cooperate with vocational rehabilitation, without good cause.

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<sup>6</sup> *Id.* at § 10.519(b). *See also E.W.*, Docket No. 19-0963 (issued January 2, 2020); *R.M.*, Docket No. 16-0011 (issued February 11, 2016); *Conard Hightower*, 54 ECAB 796 (2003).

<sup>7</sup> *Id.* at § 10.519(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 14, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 15, 2023  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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