

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

E.O., Appellant	)	
	)	
and	)	Docket No. 24-0925
	)	Issued: December 5, 2024
U.S. POSTAL SERVICE, JAMES A. FARLEY	)	
POST OFFICE, New York, NY, Employer	)	
	)	

*Appearances:*  
Paul Kalker, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On September 13, 2024 appellant, through counsel, filed a timely appeal from an August 27, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective January 22, 2024, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, for failure to cooperate with the early stages of vocational rehabilitation, without good cause.

## FACTUAL HISTORY

On July 10, 2001 appellant, then a 37-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on June 27, 2001 she sustained a left knee injury from constant lifting and bending while in the performance of duty. She stopped work on June 28, 2001. OWCP accepted the claim for tear of the meniscus of the left knee, and subsequently expanded the acceptance of appellant's claim to include bilateral chondromalacia patellae, tear of lateral meniscus of left knee, and tear of medial meniscus of left knee. OWCP paid appellant wage-loss compensation, and she subsequently returned to light-duty work on July 15, 2002. Appellant stopped work again on March 7, 2003 and, on February 20, 2004, OWCP accepted her claim for a recurrence of disability, effective March 7, 2003.

In a September 12, 2023 report, Dr. Laxmidhar Diwan, a Board-certified orthopedic surgeon, noted appellant's continued complaints of bilateral knee pain and discussed his findings on physical examination. His physical examination revealed tenderness along the medial and lateral joint line, and he noted positive McMurray, Lachman, and patellofemoral grinding tests as well as swelling. Dr. Diwan observed that appellant had difficulty bending, kneeling, and squatting, and that she had difficulty rising from a chair. He diagnosed left knee medial meniscus tear, left knee lateral meniscus tear, left knee internal derangement, left knee status post arthroscopy three times, right knee medial meniscus tear, right knee lateral meniscus tear, right knee internal derangement, and right knee status post arthroscopy two times. Dr. Diwan opined that appellant was totally disabled and noted that she was not currently working.

On September 18, 2023 OWCP referred appellant, the medical record, a statement of accepted facts (SOAF), and a series of questions to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion evaluation and determination regarding whether she had any disability or residuals causally related to the accepted June 27, 2001 employment injury.

On October 30, 2023 Dr. Sultan evaluated appellant for the purpose of the second opinion evaluation. In his report, he documented her physical examination findings, discussed her history of injury, and summarized her various diagnostic studies. Dr. Sultan opined that appellant sustained acute trauma to the left knee following the occurrence of the June 27, 2001 employment injury resulting in left knee aggravation of preexisting low grade left knee osteoarthritis, which had not yet resolved and remained active causing objective orthopedic examination findings. He explained that due to the aging process and her underlying left knee osteoarthritis, he did not anticipate that her left knee condition would improve, which was progressive and had not yet reached a fixed and stable state. Dr. Sultan reported that appellant's left knee prognosis was guarded-to-poor and if her left knee condition continued to deteriorate, she would eventually require left knee arthroplasty. He opined that her present level of disability was directly related to the accepted work-related condition and recommended strict sedentary work activity, noting that she was to avoid prolonged standing and walking and was also to avoid bending, squatting,

stooping, and crawling. Dr. Sultan completed a work capacity evaluation (Form OWCP-5c), which indicated that appellant could work eight hours per day at the sedentary level with restrictions on bending, stooping, pushing, pulling, lifting, squatting, kneeling, and climbing.

On November 6, 2023 OWCP began the vocational rehabilitation process to identify positions within her work limitations based on Dr. Sultan's October 30, 2023 second opinion report and Form OWCP-5c.

On November 9, 2023 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.

In a December 20, 2023 letter, OWCP advised appellant that the vocational rehabilitation counselor had indicated that she failed to participate in vocational rehabilitation after she failed to respond to the rehabilitation counselor on December 13 and 15, 2023, and also refused to schedule testing after being contacted by the testing evaluator on December 18, 2023. It explained that her failure to undergo the essential preparatory effort of vocational testing did not permit OWCP to determine what would have been her wage-earning capacity had she undergone the testing and rehabilitation effort. OWCP further 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, it may prospectively reduce the compensation based on what likely would have been the individual's wage-earning capacity had they not failed to apply for and undergo vocational rehabilitation. It advised appellant that:

“Section 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 appellant 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. No response was received.

By decision dated January 22, 2024, OWCP reduced appellant's compensation to zero, effective that date, based upon her failure to cooperate with vocational rehabilitation. 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 (20 C.F.R. § 10.519), and 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 she held when

injured. It advised appellant that the reduction in benefits would continue until she either underwent vocational rehabilitation or showed good cause for not complying.

Following the January 22, 2024 decision, appellant submitted medical evidence in support of her claim including May 9, 2024 x-rays of the knees and a May 9, 2024 report from Dr. Diwan.

In a May 9, 2024 report, Dr. Diwan continued to opine that appellant was totally disabled, as the employment-related injury had not resolved.

On August 6, 2024 appellant, through counsel, requested reconsideration.

By decision dated August 27, 2024, OWCP denied modification of the January 22, 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.<sup>3</sup> Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.<sup>4</sup>

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.<sup>5</sup>

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

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<sup>3</sup> 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).

<sup>4</sup> 5 U.S.C. § 8104(a); see also *A.L.*, Docket No. 22-0316 (issued January 10, 2023); *J.E.*, 59 ECAB 606 (2008).

<sup>5</sup> *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).

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."<sup>6</sup>

### ANALYSIS

The Board finds that OWCP improperly reduced appellant's wage-loss compensation to zero, effective January 22, 2024, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, for failure to cooperate with the early stages of vocational rehabilitation.

In an October 30, 2023 report, Dr. Sultan, OWCP's second opinion physician, opined that appellant had continuing residuals of her June 27, 2001 employment-related left knee injury. In a Form OWCP-5c of even date, he opined that appellant was able to work eight hours per day in a sedentary-duty capacity with additional restrictions provided for bending, stooping, lifting, squatting, kneeling, and climbing. Dr. Sultan further reported that appellant's prognosis looked poor, and her condition would continue to worsen.

In a September 12, 2023 report, Dr. Laxmidhar Diwan, a Board-certified orthopedic surgeon, noted appellant's continued complaints of bilateral knee pain and discussed his findings on physical examination. His physical examination revealed tenderness along the medial and lateral joint line, and he noted positive McMurray, Lachman, and patellofemoral grinding tests as well as swelling. Dr. Diwan observed that appellant had difficulty bending, kneeling, and squatting, and that she had difficulty rising from a chair. He diagnosed left knee medial meniscus tear, left knee lateral meniscus tear, left knee internal derangement, left knee status post arthroscopy three times, right knee medial meniscus tear, right knee lateral meniscus tear, right knee internal derangement, and right knee status post arthroscopy two times. Dr. Diwan opined that appellant was totally disabled and noted that she was not currently working. In his May 9, 2024 report, he reiterated his opinion that appellant was totally disabled.

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<sup>6</sup> 20 C.F.R. § 10.519; *see D.W.*, Docket No. 20-0840 (issued August 19, 2021); *R.H.*, 58 ECAB 654 (2007).

On November 6, 2023 OWCP referred appellant to vocational rehabilitation to assist with her return to gainful employment, based on Dr. Sultan's findings. In reaching its conclusion with regard to appellant's ability to work, OWCP must initially determine the employee's medical condition and work restrictions.<sup>7</sup>

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 to refer the case to a referee physician to resolve the conflict.<sup>8</sup> The Board finds that the medical reports of Drs. Sultan and Diwan are in equipoise on the issue of whether appellant was capable of returning to work and are thus in conflict.<sup>9</sup> The Board therefore finds that OWCP should have resolved this conflict of medical evidence before referring appellant for vocational rehabilitation.<sup>10</sup>

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 January 22, 2024, for failure to cooperate with the early stages of vocational rehabilitation without good cause.

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<sup>7</sup> *F.N.*, Docket No. 20-0435 (issued February 26, 2021); *L.C.*, Docket No. 12-972 (issued November 9, 2012).

<sup>8</sup> *F.N.*, *id.*; *William C. Bush*, 40 ECAB 1064 (1989); *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>9</sup> *D.M.*, Docket No. 23-0912 (issued March 5, 2024).

<sup>10</sup> *See B.D.*, Docket No. 21-1301 (issued October 17, 2022); *F.N.*, *supra* note 7.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 27, 2024 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 5, 2024  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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