

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

L.C., Appellant)	
)	
and)	Docket No. 24-0696
)	Issued: September 20, 2024
DEPARTMENT OF THE NAVY, MILITARY)	
SEALIFT COMMAND, Norfolk, VA, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On June 7, 2024 appellant filed a timely appeal from a May 15, 2024 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

ISSUE

The issue is whether OWCP properly reduced appellant's compensation, effective May 15, 2024, 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.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the May 15, 2024 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.*

FACTUAL HISTORY

On October 30, 2014 appellant, then a 61-year-old radio electronics technician, filed an occupational disease claim (Form CA-2) alleging that he sustained right carpal tunnel syndrome causally related to factors of his federal employment including heavy lifting, chipping paint, sanding, sandblasting, pulling, hauling, and pushing heavy items. He noted that he first became aware of his condition and realized its relationship to his federal employment on April 26, 2014.³ Appellant stopped work on May 26, 2014. OWCP accepted his claim for right carpal tunnel syndrome, right lateral epicondylitis, lesion of the right ulnar nerve, right radial styloid tenosynovitis, bilateral wrist sprain, and right trigger finger. It paid appellant wage-loss compensation on the supplemental rolls, effective September 5, 2014, and on the periodic rolls, effective November 15, 2015.

On September 23, 2022 OWCP referred appellant, along with a statement of accepted facts (SOAF), the case record, and a series of questions to Dr. J. Hearst Welborn, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the extent of his employment injury and work capacity. In a January 24, 2023 report, Dr. Welborn noted appellant's physical examination findings, observing subjective bilateral hand pain and objective left small finger proximal interphalangeal joint arthritis due to a giant cell tumor of the tendon sheath. He opined that all accepted work-related conditions had resolved and recommended that appellant could return to work with restrictions of lifting no more than 10 pounds due to hip replacement and bilateral wrist arthritis. Dr. Welborn further noted that appellant may participate in vocational rehabilitation. He also completed a work capacity evaluation (Form OWCP-5c), wherein he diagnosed bilateral wrist sprain, and related that appellant could return to work with a 10-pound pushing, pulling, lifting restriction.

In a supplemental report dated February 13, 2023, Dr. Welborn clarified that appellant's current disability was not work related, but instead was due to the natural aging process, bilateral wrist arthritis, and his status post hip replacement.

On February 21, 2023 OWCP issued a notice proposing to terminate appellant's wage-loss compensation, as the medical evidence of record established that he no longer had employment-related disability from work due to his accepted employment injury. It afforded him 30 days to submit additional evidence or argument, in writing, if he disagreed with the proposed termination of wage-loss compensation.

In a letter dated March 13, 2023, Dr. Michael Kulick, a Board-certified plastic surgeon, reviewed the January 24, 2023 report from Dr. Welborn. He stated that Dr. Welborn had provided his opinion as to appellant's disability without full knowledge of appellant's medical records and

³ OWCP assigned the present claim OWCP File No. xxxxxx367. Under OWCP File No. xxxxxx802, OWCP accepted appellant's February 24, 2003 traumatic injury claim (Form CA-1) for closed fracture of the left phalanx or phalanges, contusion of the left small finger, crushing injury of the left finger(s), left interphalangeal wrist sprain, left hand arthropathy, left symptomatic inflammatory myopathy, closed dislocation of the finger, giant cell tumor of the left tendon sheath, and left carpal tunnel syndrome. Under OWCP File No. xxxxxx442, OWCP accepted appellant's March 26, 2003 occupational disease claim for left carpal tunnel syndrome, bilateral wrist sprain, right ulnar nerve lesion, bilateral radial styloid tenosynovitis, metacarpophalangeal sprain of the left hand, and giant cell tumor of the left tendon sheath. OWCP has administratively combined OWCP File Nos. xxxxxx802, xxxxxx442, and xxxxxx367, with the latter serving as the master file.

history of work-related injuries to the upper extremities. Dr. Kulick noted that appellant had accepted injuries to the upper extremities under separate OWCP file numbers. He further noted inaccuracies within Dr. Welborn's January 24, 2023 report as well as inaccuracies within the SOAF reviewed by Dr. Welborn.

On March 23, 2023 OWCP informed appellant that the proposed termination of February 21, 2023 was issued in error and stated that it would revise the SOAF, to be followed by a request to Dr. Welborn for a supplemental report based on the corrected SOAF and responsive to the discrepancies noted by Dr. Kulick.

OWCP provided Dr. Welborn with a corrected SOAF and the full medical record and requested a supplemental opinion.

In a report dated April 12, 2023, Dr. Welborn reviewed the corrected SOAF and appellant's complete medical record. He opined that appellant's accepted conditions had not resolved and were still causing objective symptoms such as work-related arthritis of the left small finger and giant cell tumor. Dr. Welborn also opined that appellant's accepted employment conditions did not cause his current disability. As to appellant's loss of motion of the right small finger, he attributed the symptom to a motor vehicle incident that occurred in 2018 and opined that appellant would have bilateral wrist arthritis even in the absence of his federal employment. Dr. Welborn recommended work restrictions of no lifting more than 10 pounds due to bilateral wrist arthritis and status post hip replacement.

On May 17, 2023 OWCP referred appellant to vocational rehabilitation services in order to assist with his return to gainful employment, based on Dr. Welborn's findings.

In a May 31, 2023 rehabilitation action report (Form OWCP-44), the vocational rehabilitation counselor indicated that while she was able to contact appellant, appellant declined to complete the initial evaluation with the rehabilitation counselor.

In a Form OWCP-44 dated June 14, 2023, the vocational rehabilitation counselor indicated that she had contacted appellant on June 9, 2023, but that he had refused to cooperate with vocational rehabilitation services. The vocational rehabilitation counselor notified appellant that these services were mandatory and that he would need to contact her again by June 12, 2023. On June 13, 2023 appellant notified the rehabilitation counselor that he had sent a letter to OWCP advising it of his compliance with vocational rehabilitations services. The rehabilitation counselor then attempted to complete an initial evaluation over the telephone with appellant on June 13, 2023, but was unable to complete the evaluation.

In a July 12, 2023 letter to appellant, OWCP advised him that he had impeded the efforts of the vocational rehabilitation counselor and that the evidence of record showed that he failed to keep his scheduled appointments, indicating his unwillingness to participate in vocational rehabilitation services. It noted that the medical evidence of record from Dr. Welborn constituted the weight of the medical evidence and supported that appellant was capable of modified-duty work. 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.

On July 27, 2023 the employing establishment advised that no light-duty work within appellant's provided restrictions was available.

In a letter dated July 27, 2023, counsel for appellant argued that OWCP's proposed reduction of appellant's compensation due to failure without good cause to comply with vocational rehabilitation services was not based on a complete evaluation of appellant's medical conditions and noted that Dr. Welborn had only assigned work restrictions based on appellant's hand conditions. With the letter, counsel enclosed an unsigned medical report dated June 28, 2023.

In a June 22, 2023 letter, Dr. Alix Magliore, an internist, stated that appellant was involved in an accident and was not fit for rehabilitation due to multiple progressive medical conditions. He opined that appellant was not fit to return to the workplace or to be trained for another assignment.

In an August 15, 2023 letter, OWCP again advised appellant that he had impeded the efforts of the vocational rehabilitation counselor and that the evidence of record showed that he failed to keep his scheduled appointments, indicating his unwillingness to participate in vocational rehabilitation services. It advised that the medical evidence of record, including Dr. Welborn's reports that represented the weight of the medical evidence and indicated that he was not totally disabled. 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.

In a Form OWCP-44 dated August 23, 2023, the rehabilitation counselor indicated that appellant contacted her on August 22, 2023 to advise that he was now prepared to participate in vocational rehabilitation services.

In a September 5, 2023 letter, the rehabilitation counselor notified appellant of a September 19, 2023 appointment for vocational rehabilitation testing. Appellant attended the appointment and completed the testing. The vocational testing report, dated September 20, 2023, was received by OWCP on September 25, 2023. The rehabilitation counselor submitted a vocational rehabilitation plan justification and plan on October 11 and 17, 2023, identifying positions of customer complaint clerk, Department of Labor, *Dictionary of Occupational Titles* (DOT) No. 241.367-014 and receptionist, DOT No. 237.367-038, as sufficiently available within appellant's local labor market and within appellant's medical work restrictions, earning \$830.00 per week as a customer complaint clerk and \$800.00 per week as a receptionist. The duties of the positions of receptionist and customer complaint clerk were described, and the rehabilitation counselor noted that the positions were classified as sedentary work involving no lifting over 10 pounds.

On October 23, 2023 OWCP advised appellant that the vocational rehabilitation plan had been approved and that it had determined that the duties of the positions indicated were within his medical limitations. It informed appellant that he was expected to cooperate fully so that he may return to work in the specified jobs or similar positions. OWCP further notified appellant that it would provide 90 days of placement services in order to reach this goal. It stated that regulations provided that if he did not cooperate fully with the approved plan, it may assume that vocational rehabilitation services would have resulted in wage-earning capacity, and that it may reduce his compensation in accordance with 20 C.F.R. § 10.519.

On October 24, 2023 the rehabilitation counselor notified appellant that OWCP had approved a training plan for return to work. The counselor enclosed the vocational rehabilitation plan form and a form delineating the responsibilities for himself and the rehabilitation counselor for appellant to sign, indicating that they should be returned by November 15, 2023.

In a Form OWCP-44 dated November 21, 2023, the rehabilitation counselor noted that a computer training plan had been approved and the approved plan had been sent to appellant for signature. The rehabilitation counselor attempted to contact appellant regarding approval of the plan. Appellant did not return the counselor's telephone calls or respond to e-mails sent to him regarding approval of the vocational rehabilitation plan. In a letter dated November 12, 2023, he stated that he would not participate in the vocational rehabilitation plan.

In a February 14, 2024 letter, OWCP advised appellant that the vocational rehabilitation counselor had indicated that he had discontinued cooperation with the rehabilitation program because he did not enroll or start a computer training program, he did not return the signed plan documents, and that he had stopped communicating with the counselor. It noted that although appellant had expressed an unwillingness to participate in rehabilitation efforts because he believed he was totally disabled, the medical evidence of record showed that he was not totally disabled. OWCP stated that the results of Dr. Welborn's reports showed that he had the ability to obtain employment as a customer complaint clerk earning wages of \$830.00 per week. 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 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 letter dated March 8, 2024, appellant contended that he was not fit for duty and that he had provided good cause for noncompliance with vocational rehabilitation.

On April 8, 2024 appellant signed and returned the rehabilitation placement plan, but did not date his signature and wrote, "Job description requested per doctor's orders."

By decision dated May 15, 2024, OWCP reduced appellant's wage-loss compensation and finalized its proposed reduction of appellant's compensation, effective on that date, based upon its finding that he had failed, without good cause, to undergo vocational rehabilitation as directed. It included the position description for receptionist with physical requirements, noting that these requirements were classified as sedentary work involving no lifting over 10 pounds. OWCP noted that while it received medical evidence from Dr. Kulick dated March 13, 2023, critiquing Dr. Welborn's January 24, 2023 report, it had subsequently issued a corrected SOAF that was reviewed by Dr. Welborn in an April 12, 2023 report. In this report, Dr. Welborn stated that

appellant was partially disabled and could work with permanent restrictions for nonwork-related arthritis and status post hip replacement. OWCP found that the evidence submitted was not sufficient to alter the reduction of appellant's compensation because he did not cooperate with the approved vocational rehabilitation services. Applying the *Shadrick* formula,⁴ it reduced his compensation based upon his capacity to earn \$800.00 per week as a receptionist, finding that he had 62 percent wage-earning capacity, effective on May 15, 2024.

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.⁵

Section 8113(b) of FECA 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.”⁶

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.”

OWCP's procedures state that specific instances of noncooperation include a failure to appear for the initial interview, counseling sessions or other interviews conducted by the rehabilitation counselor, vocational testing sessions, and work evaluations, lack of response

⁴ *Albert C. Shadrick*, 5 ECAB 376 (1953); codified at 20 C.F.R. § 10.403.

⁵ 5 U.S.C. § 8104(a).

⁶ *Id.* at § 8113(b).

or inappropriate response to directions in a testing session, as well as failure to attend an approved training program.⁷

ANALYSIS

The Board finds that OWCP properly reduced appellant's wage-loss compensation pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, effective May 15, 2024, for his failure to cooperate with vocational rehabilitation without good cause.

When determining whether OWCP properly reduced appellant's wage-loss compensation benefits based on his failure to participate in vocational rehabilitation, the Board must first analyze whether OWCP properly determined appellant's work restrictions and ability to work.⁸ OWCP referred appellant to vocational rehabilitation based on the April 12, 2023 report of Dr. Welborn, an OWCP second opinion examiner, who conducted an examination and opined that appellant continued to suffer partial disability as a result of accepted conditions. Dr. Welborn indicated that appellant could work with restrictions of no lifting more than 10 pounds due to bilateral wrist arthritis and status post hip replacement. As Dr. Welborn's report was sufficiently rationalized and based on the objective findings of record, the Board finds that OWCP properly determined that Dr. Welborn's opinion represented the weight of the medical evidence and, accordingly, that appellant had the physical capacity to perform the duties of a customer complaint clerk or receptionist.⁹ The duties of the positions of receptionist and customer complaint clerk were described, and the rehabilitation counselor noted that the positions were classified as sedentary work involving no lifting over 10 pounds, in accordance with Dr. Welborn's recommendations.

OWCP received reports dated March 13, 2023 from Dr. Kulick and a letter dated June 22, 2023 from Dr. Magliore, who disputed Dr. Welborn's findings regarding appellant's ability to participate in vocational rehabilitation. However, neither Dr. Kulick or Dr. Magliore offered objective findings or a rationalized medical opinion substantiating work restrictions which would preclude appellant from participation in vocational rehabilitation.¹⁰

Based on Dr. Welborn's findings, OWCP referred appellant for vocational rehabilitation. The vocational rehabilitation counselor indicated that appellant had the vocational capacity to perform the positions of customer complaint clerk and receptionist, and provided a rehabilitation plan, including training and placement, which OWCP approved. The rehabilitation counselor attempted to contact appellant and to secure cooperation with the vocational rehabilitation plan over the period May 17 through November 21, 2023. Appellant at times indicated that he was prepared to cooperate with the vocational rehabilitation plan and at times indicated that he refused to cooperate. The vocational rehabilitation counselor noted that appellant's responsiveness to telephone calls and e-mails was sporadic and unreliable, and that he had failed to sign and return

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

⁸ See *L.C.*, Docket No. 23-0145 (issued September 12, 2023); *J.S.*, Docket No. 22-0386 (issued October 19, 2022); *F.N.*, Docket No. 20-0435 (issued February 26, 2021); *L.C.*, Docket No. 12-972 (issued November 9, 2012).

⁹ See *M.P.*, Docket No. 19-1364 (issued February 4, 2020).

¹⁰ See *D.S.*, Docket No. 17-1972 (issued July 24, 2018).

the vocational rehabilitation plan and related documents in a timely manner. The counselor continued to report appellant's lack of participation in the approved training plan. OWCP's procedures state that specific instances of noncooperation include lack of response or inappropriate response to directions in a testing session, as well as failure to attend an approved training program; failure to attend classes; failure to apply appropriate effort to succeed in such classes; and failure to undergo training after a training program had been approved.¹¹ The Board finds that the evidence of record establishes that appellant failed to continue in vocational rehabilitation without good cause.

Accordingly, the Board finds that OWCP properly determined that appellant had, without good cause, failed to continue vocational rehabilitation.¹² Pursuant to 5 U.S.C. § 8113(b) and the implementing regulations, OWCP may reduce appellant's compensation based on the amount which would likely have been his wage-earning capacity had he undergone vocational rehabilitation. The vocational rehabilitation counselor identified the position of receptionist, DOT No. 237.367-038, with wages of \$800.00 per week. This represents the amount that would have likely been appellant's wage-earning capacity had he completed vocational rehabilitation. OWCP followed its procedures and advised him that, if he did not continue vocational rehabilitation, his compensation would be reduced. It properly applied the *Shadrick* formula, as codified in section 10.403 of its regulations,¹³ in determining appellant's wage-earning capacity and reducing his compensation. The Board, thus, finds that appellant had, without good cause, failed to continue participation in vocational rehabilitation, and his compensation was properly reduced to reflect a wage-earning capacity as a receptionist.

CONCLUSION

The Board finds that OWCP properly reduced appellant's wage-loss compensation, effective May 15, 2024, 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.

¹¹ *Supra* note 7.

¹² *See D.T.*, Docket No. 16-1590 (issued January 17, 2018); *M.K.*, Docket No. 16-1676 (issued February 16, 2017).

¹³ 20 C.F.R. § 10.403.

ORDER

IT IS HEREBY ORDERED THAT the May 15, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 20, 2024
Washington, DC

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

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

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