



## ISSUE

The issue is whether OWCP has met its burden of proof to reduce appellant's compensation to zero, effective November 10, 2019, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, for failure to cooperate with vocational rehabilitation without good cause.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>4</sup> The facts and circumstances as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On August 29, 2005 appellant, then a 38-year-old postal supervisor, filed a traumatic injury claim (Form CA-1) alleging that on July 9, 2005 she sustained anxiety, mental anguish, and stress as a result of a confrontation with an employee during which the employee placed her hands on appellant's face, threw objects at appellant, and made threats of violence to appellant, while in the performance of duty. OWCP accepted the claim for post-traumatic stress disorder (PTSD). Appellant stopped work on July 30, 2005 and did not return. OWCP paid her wage-loss compensation on the supplemental rolls from March 18, 2006 through August 4, 2007 and on the periodic rolls from August 5, 2007 through October 12, 2019.

By decision dated September 10, 2008, OWCP terminated appellant's entitlement to wage-loss compensation and schedule award benefits effective that date, on the grounds that she had refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2). Appellant requested reconsideration, and by decision dated February 9, 2009, OWCP denied modification of the September 10, 2008 decision. On March 17, 2009 appellant, through counsel, filed a timely appeal of OWCP's termination decision to the Board. By decision dated December 15, 2009, the Board found that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and schedule award benefits effective September 10, 2008 on the grounds that she refused an offer of suitable work.<sup>5</sup> The Board determined that the medical evidence of record did not establish that she was capable of performing the modified supervisor position offered by the employing establishment.

On February 6, 2019 OWCP referred appellant for a second opinion examination regarding her work capacity. In a report dated February 27, 2019, Dr. Tara Brass, a Board-certified psychiatrist serving as second opinion physician, reviewed appellant's history of injury and conducted a psychiatric/mental status examination. She observed psychomotor agitation during examination and an anxious affect. Dr. Brass diagnosed PTSD, noting that appellant was at maximum medical improvement. She opined that based on the examination and review of medical records, appellant had a permanent moderate partial psychiatric disability, and was able to return to work on a part-time basis at four hours per day, five days per week to minimize stress. Dr. Brass noted that appellant should avoid work with the employing establishment.

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<sup>4</sup> Docket No. 09-1095 (issued December 15, 2009).

<sup>5</sup> *Id.*

On March 4, 2019 OWCP referred appellant to a vocational rehabilitation counselor based on Dr. Brass' work restrictions.

By letter dated March 5, 2019, Dr. Robert Conciatori, a Board-certified psychiatrist, stated that appellant was under his care for severe chronic PTSD, causally related to the incident of July 9, 2005. He noted objective findings on mental status examination of depression, anxiety, fear of further assault, nightmares, flashbacks, avoidant behavior, and hypervigilance. Dr. Conciatori opined that appellant was psychiatrically totally disabled from being able to work in any employing establishment in any position, as she was paralyzed by a fear she could be attacked again. He stated that no accommodations, retraining, or reassignment could remedy her condition, and that she was totally disabled from work.

On March 12, 2019 the rehabilitation counselor informed appellant regarding her rights and responsibilities regarding return to work. The counselor noted that, if appellant felt she was unable to return to work, or had medical documentation indicating why she could not return to work at that time, she should submit it for review. Appellant told the rehabilitation counselor that she would cooperate with vocational rehabilitation services so as not to jeopardize her benefits.

In a transferable skills analysis dated March 18, 2019, the rehabilitation counselor reviewed appellant's history of employment and rendered a list of occupations suitable to her skill set, including cashier, retail sales clerk, customer service clerk, and retail stock clerk.

In an initial evaluation report dated April 5, 2019, the rehabilitation counselor noted that she had spoken to appellant's husband on the telephone on March 8, 2019. Appellant was present during the call and her husband explained that she was not able to talk with the counselor due to symptoms of her PTSD. On May 22, 2019 she called the rehabilitation counselor on the telephone and they discussed job goals and possible computer training.

By letter dated July 11, 2019, the rehabilitation counselor sent appellant a rehabilitation placement plan and job search plan and agreement for her review, signature, and return.

On July 11, 2019 the rehabilitation counselor obtained wage and labor market trend data for the positions of information clerk, cashier-wrapper, and general merchandise salesperson. She left a voice message for appellant.

By letter dated August 6, 2019, counsel noted that he was in receipt of the individual rehabilitation placement plan and job search plan and agreement dated July 11, 2019. He related that the plan would be forwarded to appellant's treating physician for determination as to whether appellant was medically capable of committing to, and fulfilling, the plan's obligations and responsibilities.

In an action report dated September 10, 2019, the rehabilitation counselor noted that appellant had not responded regarding her individual rehabilitation placement plan and job search plan and agreement and was not complying with rehabilitation services.

In a rehabilitation counselor progress report dated September 13, 2019, the counselor noted that while counsel had previously stated that appellant's treating physician would review her

individual rehabilitation placement plan and job search plan and agreement, no additional information had been provided in that regard and no response had been received.

OWCP, in a letter dated September 17, 2019, notified appellant of the penalties under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 for failing to cooperate with vocational rehabilitation without good cause. It noted that while counsel had indicated appellant's treating physician would opine as to her individual rehabilitation placement plan and job search plan and agreement, no additional information had been received. It stated that the fact that OWCP had not received appellant's concurrence with respect to the plan constituted a refusal to comply with the vocational rehabilitation effort. OWCP noted that it had determined the weight of the medical evidence rested with Dr. Brass' February 19, 2019 report, who advised that appellant was partially disabled and able to perform gainful employment. It further advised her that, if she failed or refused to participate in vocational rehabilitation without good cause, her compensation benefits would be reduced to zero and that this reduction would continue until she complied with OWCP's directions concerning rehabilitation. OWCP afforded her 30 days to contact OWCP and her rehabilitation counselor to make a good faith effort to participate in the rehabilitation effort designed to return her to gainful employment. It informed appellant that, if she believed that she had a good reason for not participating in the rehabilitation effort, she should respond within 30 days, with reasons for noncompliance, and submit evidence in support of his position. OWCP noted that, if she did not comply with the instructions contained in the letter within 30 days, the rehabilitation effort would be terminated and action would be taken to reduce her compensation under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.

By letter dated September 30, 2019, Dr. Conciatori related that appellant had been under his care since 2013 and that she had been diagnosed with PTSD, causally related to being assaulted and threatened with death while working as an employing establishment supervisor in 2005. He opined that she was totally disabled from work and had extreme fear of returning to her job due to her psychiatric condition. Regarding the referral to vocational training, Dr. Conciatori indicated that appellant was "a shaking leaf, with extreme fear of being attacked again." He explained that appellant lived "a very circumscribed existence, not venturing forth and then only with family members with her." Dr. Conciatori opined that appellant "could not survive in a public setting such as vocational training" and that she "would be overwhelmed by fear by being placed in any type of work atmosphere." He further opined that appellant was not a candidate for vocational retraining or employment.

By decision dated November 6, 2019, OWCP reduced appellant's compensation to zero, effective November 10, 2019, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, for her failure to cooperate with vocational rehabilitation without good cause. It found that the opinion expressed by Dr. Conciatori was largely based on fear of future injury and thus did not show good cause for not complying with vocational rehabilitation.

## 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>6</sup> Section 8104(a) of FECA provides that OWCP may direct a permanently disabled employee to undergo vocational rehabilitation.<sup>7</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, 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>8</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--

(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.”<sup>9</sup>

OWCP’s procedures state that specific instances of noncooperation include a failure to appear for the initial interview, counseling sessions, a functional capacity evaluation, other interviews conducted by the rehabilitation counselor, vocational testing sessions, and work

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<sup>6</sup> *E.W.*, Docket No. 19-0963 (issued January 2, 2020); *Betty F. Wade*, 37 ECAB 556, 565 (1986).

<sup>7</sup> 5 U.S.C. § 8104(a).

<sup>8</sup> *Id.* at § 8113(b).

<sup>9</sup> 20 C.F.R. § 10.519.

evaluations, as well as lack of response or inappropriate response to directions in a testing session after several attempts at instruction.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

### ANALYSIS

The Board finds that OWCP did not meet its burden of proof to reduce appellant's compensation to zero, effective November 10, 2019, for failure to cooperate with vocational rehabilitation without good cause.

Once OWCP has made a determination that an employee is totally disabled as a result of an employment injury and pays compensation, it has the burden of justifying a subsequent reduction of benefits.<sup>13</sup> It reduced appellant compensation based on her failure to participate in vocational rehabilitation.

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>14</sup> When it referred her to vocational rehabilitation, it determined that the weight of the evidence was represented by the opinion of Dr. Brass. On February 27, 2019 Dr. Brass opined that based on the psychiatric examination and review of medical records, appellant had a permanent moderate partial psychiatric disability, and was able to return to work on a part-time basis at four hours per day, five days per week to minimize stress. He noted that she should avoid work with the employing establishment.

Subsequently, OWCP received two reports from appellant's treating physician, Dr. Conciatori, who opined that appellant was not capable of participating in vocational rehabilitation or returning to work. Dr. Conciatori related that she was permanently disabled due to her PTSD. In his March 5, 2019 report, he noted appellant's continued objective findings of PTSD on mental status examination of depression, anxiety, nightmares, flashbacks, avoidant behavior, and hypervigilance. Dr. Conciatori explained that she lived a very circumscribed existence, not venturing out and then only with family members with her. He further related that appellant could not survive in a public setting such as vocational training and she would be overwhelmed by fear by being placed in any type of work atmosphere. Dr. Conciatori concluded

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<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.17(b) (February 2011).

<sup>11</sup> 5 U.S.C. § 8123(a); *L.S.*, Docket No. 19-1730 (issued August 26, 2020); *M.S.*, 58 ECAB 328 (2007).

<sup>12</sup> 20 C.F.R. § 10.321; *P.B.*, Docket No. 20-0984 (issued November 25, 2020); *R.C.*, 58 ECAB 238 (2006).

<sup>13</sup> *D.E.*, Docket No. 15-0712 (issued June 23, 2016).

<sup>14</sup> *Id.*; *L.C.*, Docket No. 12-972 (issued November 9, 2012).

that her symptoms related to her PTSD diagnosis prevented her from participating in vocational rehabilitation or work in a public setting.

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.<sup>15</sup> The Board finds that the medical reports of Drs. Brass and Conciatori are in equipoise on the issue of whether appellant is capable of returning to work and are thus in conflict.

OWCP assigned the weight of the medical evidence to Dr. Brass' February 27, 2019 report and found that Dr. Conciatori's medical opinion was based on "fear of future injury" and thus not compensable. The Board has long held that fear of future injury is not a compensable factor of employment.<sup>16</sup> The Board notes that in this case, Dr. Conciatori did not state that appellant was disabled from work due to fear that returning to work would aggravate her underlying PTSD, but instead, he stated that her paralyzing fear of being in a public setting was a symptom of her accepted condition of PTSD that disabled her from work.<sup>17</sup> Fear as a symptom of PTSD is different from general fear of future injury: the former involves a description of a symptom of the accepted condition, whereas generally, fear of future injury is not a symptom of the accepted condition, but rather speculation that another injury could occur.<sup>18</sup>

Dr. Conciatori opined that appellant's disability from work was due to symptoms of her accepted condition, not speculation as to the aggravating effect returning to work might have on her accepted PTSD. He is Board-certified in psychiatry, provided long-standing medical care for the accepted conditions in this claim, and set forth his medical opinion on the relevant issue with equal rationale and clarity as the opinion of the second opinion physician, Dr. Brass. As the opposing medical reports are of virtually equal weight and rationale, the Board finds that there is an unresolved conflict between Drs. Brass and Conciatori with regard to appellant's 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 not met its burden of proof to justify termination of her compensation benefits for failure to participate in vocational rehabilitation efforts.<sup>19</sup>

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<sup>15</sup> *D.E.*, *supra* note 13; *William C. Bush*, 40 ECAB 1064 (1989).

<sup>16</sup> *Matthew J. Rieder*, Docket No. 03-2125 (issued April 21, 2004); *Manuel Gill*, 52 ECAB 282 (2001).

<sup>17</sup> *See id.*

<sup>18</sup> *See generally Lether M. Wright*, Docket No. 99-1894 (issued July 9, 2001). *See also Order Remanding Case, C.W.*, Docket Nos. 18-1764 & 19-0709 (issued August 27, 2020).

<sup>19</sup> *Supra* note 13.

**CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to reduce appellant's compensation to zero, effective November 10, 2019, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, for failure to cooperate with vocational rehabilitation without good cause.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 6, 2016 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 26, 2021  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

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