United States Department of Labor
Employees' Compensation Appeals Board

NETTIE L. FROST, Appellant	)	
and	)	**Docket No. 04-416**
	)	**Issued: August 27, 2004**
DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Fresno, CA, Employer	)	

Appearances:
Nettie L. Frost, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On December 4, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated November 13, 2003, denying reconsideration, August 26, 2003, denying an oral hearing and July 18, 2003, reducing appellant's compensation. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly reduced appellant's compensation benefits on the grounds that she refused to cooperate with vocational rehabilitation efforts; (2) whether the Office properly denied her request for an oral hearing on her claim by an Office hearing representative; and (3) whether the Office abused its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

Appellant, a 57-year-old senior case technician, filed a Form CA-2 claim for benefits on December 12, 2002, alleging that she developed a bilateral shoulder impingement condition and bilateral rotator cuff tear causally related to factors of her employment. By decision dated April 10, 2003, the Office denied appellant's claim on the grounds that the claimed conditions were not causally related to factors or incidents of employment. By letter dated April 24, 2003, the Office vacated its previous decision and accepted the claim for right shoulder rotator cuff tear and right shoulder arthroscopic surgery on August 16, 2002. The claim was expanded to bilateral rotator cuff tears and bilateral rotator cuff repair. Appellant returned to modified, light duty on November 18, 2002. The Office paid appellant appropriate compensation.

By letter dated April 25, 2003, the Office advised appellant that she had been assigned a case management nurse. The Office informed appellant that the nurse was empowered to assist her in coordinating the medical aspects of her care and facilitating the flow of information between appellant, her physicians, the employing establishment and the Office.

In her initial evaluation report dated May 24, 2003, the intervention nurse, Terrie Moffa, reviewed appellant's medical history and outlined her future course of treatment. She indicated that she had contacted appellant and conducted her initial evaluation of appellant at her home on May 6, 2003. Ms. Moffa further stated that she had contacted Dr. Sanagaram Shantharam, appellant's attending physician and a specialist in orthopedic surgery, on May 14, 2003 and had scheduled a follow-up examination of appellant for May 27, 2003; she also telephoned appellant on May 14, 2003 and informed her of the May 27, 2003 appointment. Ms. Moffa stated in conclusion that she would appear at the May 27, 2003 examination with appellant and Dr. Shantharam to assess appellant's status and progress, address current work restrictions to determine if an increase in activity would be medically appropriate and obtain further treatment plan recommendations. Following the examination, Ms. Moffa was to meet with the Office claims examiner to apprise him of appellant's progress.

By letter to appellant, dated June 4, 2003, the Office stated that appellant had refused without good cause to meet with her nurse and assist her in efforts toward reemployment such as work evaluations, coordination of medical efforts and facilitation of reemployment efforts with the employing establishment. The Office noted that appellant had demonstrated a refusal to communicate with her field nurse, Ms. Moffa, by not informing her of an appointment she had made to undergo a magnetic resonance imaging (MRI) scan and an appointment with Dr. Shantharam, the attending physician. The Office advised appellant that she was required to cooperate with the assigned nurse until completion of the rehabilitation process and that her continued refusal to cooperate would result in her compensation being reduced to zero. The Office allowed appellant 30 days to either cooperate with rehabilitation efforts, which she should manifest by immediately telephoning Ms. Moffa, or submit in writing her reasons for failing to cooperate, supported by evidence and argument.

By telephone call dated June 19, 2003, Ms. Moffa informed the Office that appellant had not contacted her since the June 4, 2003 Office letter, warning her that compensation would be terminated if she refused to cooperate with her assigned nurse. By letter dated June 7, 2003, appellant stated that Ms. Moffa had lied to her by claiming that the MRI scan technician was

refusing to accept any of Dr. Shantharam's patients. Appellant also alleged that Ms. Moffa had given one of her coworkers preferential treatment. In an evaluation report dated June 24, 2003, Ms. Moffa confirmed that she had experienced problems scheduling an MRI scan appointment for appellant because the imaging firm, Advanced Medical Imaging (AMI), would not accept Dr. Shantharam's patients from the branch office where appellant had been examined and treated. Ms. Moffa stated that she contacted another imaging firm, Fresno Imaging Center (FIC), to whom she had provided patient and insurance information and had informed appellant of this communication.

Ms. Moffa stated, however, that appellant declined to accept Ms. Moffa's offer to arrange an appointment with FIC. Appellant had also refused her attempts to refer her to a transportation service which would take her to the appointment, for which she would be reimbursed. Ms. Moffa attempted to reinitiate contacts with AMI and eventually Dr. Shantharam's office was able to schedule another MRI scan appointment for June 10, 2003, which Ms. Moffa authorized. Ms. Moffa further related that Dr. Shantharam's office had called her on June 4, 2003 and advised her that appellant had requested that she not be allowed to go into the examination room. Finally, Ms. Moffa stated that she telephoned AMI on June 19, 2003 to reschedule her MRI scan for July 7, 2003 and then notified the Office of the rescheduled date. Ms. Moffa also stated that she told the Office that she had not received a telephone call from appellant. Ms. Moffa stated in conclusion that she would contact the Office to determine further direction regarding appellant's noncompliance and would keep the Office apprised of her progress. In telephone calls dated July 15, 22 and 24, 2003, Ms. Moffa informed the Office that appellant was still noncompliant. The Office telephoned Ms. Moffa on July 24, 2003 and advised her that it was going to sanction appellant due to her noncompliance. The Office instructed her to close the case.

By decision dated July 18, 2003, the Office reduced appellant's compensation benefits to zero, finding that she failed to cooperate with rehabilitation efforts.

By letter to the Branch of Hearings and Review dated September 13, 2003, appellant requested help with her claim. The letter was construed by the Branch of Hearings and Review as a request for an oral hearing, which it denied by decision dated September 23, 2003. By letter dated September 29, 2003, appellant requested reconsideration of the Office's July 18, 2003 termination decision. Appellant stated that she had complied with the nurse intervention program and requested that the Office assign her a new nurse.

By decision dated November 13, 2003, the Office denied appellant's application for review on the ground that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act, in 5 U.S.C. § 8113(b) states:

> "If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of this title, the [Office], 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 wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the [Office].[1]"

Section 10.519(b) and (c) of the Office's regulation provides that, if a suitable position is not identified because of the failure or refusals to cooperate in the early but necessary stages of a vocational rehabilitation effort, *i.e.*, meeting with nurse, interviews, testing, counseling, functional capacity evaluations or work evaluations, then the Office will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity and will reduce compensation to zero. This reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of the Office.[2]

Section 8104(a) of the Act[3] pertains to vocational rehabilitation and provides: "The Secretary of Labor may direct a permanently disabled individual whose disability is compensable under this subchapter to undergo vocational rehabilitation. The Secretary shall provide for furnishing the vocational rehabilitation services…." Under this section of the Act, the Office has developed procedures by which, an emphasis is placed on returning partially disabled employees to suitable employment and/or determining their wage-earning capacity.[4] If it is determined that the injured employee is prevented from returning to the date-of-injury job, vocational rehabilitation services may be provided to assist returning the employee to suitable employment.[5] Such efforts will be initially directed at returning the partially disabled employee to work with the employing establishment.[6] Where reemployment at the employing establishment is not possible, the Office will assist the claimant to find work with a new employer and sponsor necessary vocational training.[7]

The Act further provides: "If an individual without good cause fails to apply for and undergo vocational rehabilitation, when so directed under section 8104" the Office, 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

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[1] 5 U.S.C. § 8113(b).

[2] 20 C.F.R. § 10.519(b) and (c).

[3] 5 U.S.C. § 8104(a).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.2 (December 1993).

[5] *Id*. The Office's regulation provides: "In determining what constitutes 'suitable work' for a particular disabled employee, [the Office] considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors." 20 C.F.R. § 10.500(b).

[6] *See supra* note 4 at Chapter 2.813.3. The Office's regulation provide: "The term 'return to work' as used in this subpart is not limited to returning to work at the employee's normal worksite or usual position, but may include returning to work at other locations and in other positions. In general, the employer should make all reasonable efforts to place the employee in his or her former or an equivalent position, in accordance with 5 U.S.C. § 8151(b)(2)." 20 C.F.R. § 10.505.

[7] *See supra* note 4 at Chapter 2.813.3.

individual in accordance with what would probably have been [her] wage-earning capacity in the absence of the failure, until the individual in good faith complies" with the direction of the Office.[8] Under this section of the Act, an employee's failure to willingly cooperate with vocational rehabilitation may form the basis for termination of the rehabilitation program and the reduction of monetary compensation.[9] In this regard, the Office's implementing federal regulation states:

> "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, [the Office] will act as follows:
>
> > (a) Where a suitable job has been identified, [the Office] 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. [The Office] will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with the [Office] 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 [the Office].
> >
> > (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 the [Office] nurse, interviews, testing, counseling, functional capacity evaluations and work evaluations), [the Office] 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, [the Office] will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity and [the Office] 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 directions of [the Office]."[10]

ANALYSIS -- ISSUE 1

Appellant returned to light duty on November 18, 2002. By letter dated April 25, 2003, the Office advised appellant that she had been assigned a case management nurse. Appellant was initially referred to Ms. Moffa, the intervention nurse, who was assigned to monitor

[8] 5 U.S.C. § 8113(b).

[9] *See Wayne E. Boyd*, 49 ECAB 202 (1997) (the employee failed to cooperate with the early and necessary stage of developing a training program).

[10] 20 C.F.R. § 10.519.

appellant's medical status and progress and develop a medical management plan appropriate to the case. The Office's July 18, 2003 decision reduced appellant's compensation to zero on the grounds that she refused to cooperate with field nurse services, which constituted a refusal to undergo vocational rehabilitation without good cause.

The Board finds that appellant's refusal to cooperate with the nurse intervention program and medical management plan of the nurse did not constitute a refusal to undergo vocational rehabilitation without good cause such that the Office could then reduce her compensation under section 8113(b) of the Act. The Office found that appellant's refusal to cooperate in the medical management plan constituted a refusal to undergo vocational rehabilitation, justifying suspension of her monetary compensation under section 10.519(c) of the Office's regulation.[11] The Board notes, however, that refusal to cooperate in the medical management plan did not constitute a failure or refusal with the early or necessary stages of vocational rehabilitation under section 8113 of the Act or the implementing regulation.[12] The Office's application of section 8113 to reduce appellant's monetary compensation to zero was therefore in error.

The Office's decision is premised on the April 25, 2003 referral for nurse intervention to work with appellant's treating physician on a medical management plan in order to return to work. The Office decision finds that the nurse services constituted a vocational rehabilitation effort. The Board finds, however, that the record does not demonstrate that the Office field nurse was involved in a vocational rehabilitation effort.[13]

The primary role of the Office field nurse, as described in the Office's procedures, is to attempt to identify light or limited duty for the claimant at the employing establishment, with the goal of reemployment in the previous position.[14] This preliminary reemployment effort often occurs prior to the Office's determination of permanent disability, which would then allow for formal vocational rehabilitation. Such an effort does not provide the disabled worker any additional skills or training needed to reenter the labor market in a new position. The Office's procedures recognize this lack of vocational rehabilitation by stating that if the Office field nurse's attempts to return the disabled worker to limited duty at the employing establishment fail, the claimant may then be referred to a vocational rehabilitation counselor for services such as vocational testing including medical rehabilitation, work evaluations, vocational training, counseling, placement and follow-up services.[15] The Office's procedures note that: "at the end" of nurse services, the nurse may recommend a "limited referral" to a vocational rehabilitation specialist for placement services with the previous employer.[16] The Office's procedures contemplate that field nurse intervention ends prior to referring the claimant to a vocational

[11] *See Silas Perkins*, Docket No. 03-380 (issued June 27, 2003).

[12] *Rebecca L. Eckert*, 54 ECAB ___ (Docket No. 01-2026, issued November 7, 2002).

[13] *Id*.

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.6(b), "Placement with Previous Employer" (issued December 1993).

[15] *Id*. at Chapter 2.813.6(c)-(g) (issued December 1993).

[16] *Id*. at Chapter 2.813.5(c)(1) (issued November 1996).

rehabilitation specialist for a formal vocational rehabilitation plan.[17] However, in this case, there was never a referral for vocational rehabilitation; rather there was a referral for nurse intervention to work with appellant's treating physician on physical rehabilitation and medical management plans in which appellant would return to work. The first mention of vocational rehabilitation is the June 4, 2003 letter in which the Office stated that appellant's refusal to cooperate with the staff nurse was seen as a refusal to undergo vocational rehabilitation.

The Office's regulation characterize the field nurse as part of the early vocational rehabilitation process, but do not equate the assignment of the Office field nurse with vocational rehabilitation. At 20 C.F.R. § 10.519(b), the Office's regulations state that meetings with the Office field nurse are one of the "early but necessary stages of a vocational rehabilitation effort." Similarly, under 20 C.F.R. § 10.519(a), the regulations state that the "vocational rehabilitation planning process" includes meetings with the Office field nurse. However, as in this case, meetings with the Office field nurse could concern matters unrelated to vocational rehabilitation, such as medical management. Therefore, meetings with the Office field nurse do not automatically constitute vocational rehabilitation.

At 20 C.F.R. § 10.518(a), the Office's regulation state that "vocational rehabilitation services include assistance from" an Office field nurse, such as visiting the worksite, ensuring that the duties of the position do not exceed the medical limitations and addressing any problems the employee may have in adjusting to the work setting. However, the regulations do not specify when in the process such visits and investigations are to occur.[18] In this case, the nurse was directed to work with the treating physician on a physical rehabilitation plan for return to work and also to provide a medical management plan. The Office articulated this objective in the April 25, 2003 letters, requesting that the nurse "assist in coordinating the medical aspects of your care and facilitating the flow of information between you, your doctors, your employer and the [Office]." In an April 25, 2003 letter, the Office emphasized that the nurse's function was to provide a "medical management plan." There is no mention of any plan to assess appellant's vocational skills, retrain her for a different occupation and assist her in finding work. Additionally, there is no evidence that the nurse had identified appellant's case as one that might benefit from vocational rehabilitation services and there is no evidence that she ever communicated such a recommendation to the claims examiner. Appellant had returned to light duty on November 18, 2002; thus, there was no need in this case for the nurse to assist appellant with vocational rehabilitation.

The Board finds that the Office field nurse's activities were limited to the role set forth in the Office's procedures, *i.e.*, of attempting to return appellant to full duty at the employing establishment and medical management services, a preliminary reemployment effort which does not constitute vocational rehabilitation. Thus, this case can therefore be distinguished from those

[17] *Id*. at Chapter 2.813.5(c)(3)(a) (issued November 1996) (claimants can be referred for an occupational rehabilitation plan formulated by an Office rehabilitation specialist when "[i]ntervention by the FN [field nurse] has ended but the claimant has moderate to severe physical limitations or deconditioning, or has not had an assessment of physical limitations and has not returned to work)."

[18] *Id*. at Chapter 2.813.6(b), "Placement with Previous Employer" (issued December 1993).

in which the claimant was referred to a vocational rehabilitation specialist[19] and where the Board found that there was a vocational rehabilitation plan in effect.[20] The Office did not meet its burden of proof to reduce appellant's monetary compensation benefits.[21]

CONCLUSION

The Board finds that the Office did not meet its burden of proof to reduce appellant's monetary compensation to zero.

ORDER

IT IS HEREBY ORDERED THAT the July 18, 2003 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 27, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[19] *Terrence E. Moore*, Docket No. 03-769 (issued August 26, 2003).

[20] *Thomas C. Gilbert*, Docket No. 01-2125 (issued February 21, 2003).

[21] In light of the Board's reversal of the Office's July 18, 2003 decision reducing compensation to zero, the Board need not consider the issues of whether the Office properly denied merit review and an oral hearing.