

Office accepted appellant's claim for neck strain, right shoulder contusion, head contusion and sprained right ankle.

The Office referred appellant to Diane McCarthy for medical management services and directed her to provide professional services for contact with the employee, employer and attending physician and to develop an appropriate medical management plan. On February 22 and 24, 2005 appellant telephoned the Office to request that a different field nurse be assigned. He noted that Ms. McCarthy had been assigned as his field nurse in his previous claim and contended that she was dishonest, racially prejudiced and unethical. In a letter dated March 1, 2005, Ms. McCarthy stated that she had been unable to reach appellant by telephone and informed him that she had scheduled a medical appointment for him. In a letter dated March 10, 2005, the Office informed appellant that his refusal without good cause to meet with the field nurse would be seen as a refusal to undergo vocational rehabilitation and could result in reduction of his compensation benefits to zero. The Office allowed appellant 30 days for a response. Appellant responded on March 24, 2005 and repeated his charges against Ms. McCarthy."

By decision dated May 18, 2005, the Office suspended appellant's compensation benefits effective May 18, 2005 under section 8113(b) of the Act and section 10.519 of the implementing federal regulations. The Office found that as appellant did not cooperate with his field nurse, he had not cooperated with vocational rehabilitation efforts.

Appellant requested an oral hearing on November 20, 2005. By decision dated June 15, 2006, the Branch of Hearings and Review denied his request for an oral hearing as untimely.

Appellant requested reconsideration on July 7, 2006. By decision dated August 24, 2006, the Office declined to reopen his claim for consideration of the merits on the grounds that his request for reconsideration was not timely and did not contain clear evidence of error. Appellant appealed this decision to the Board. By decision dated March 14, 2007, the Board remanded the case for the Office to review the merits of appellant's claim as the Branch of Hearings and Review had delayed action on his untimely request for an oral hearing for more than six months. The facts and the circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

By decision dated May 1, 2007, the Office reviewed the merits of appellant's claim and found that he had failed to cooperate with the field nurse and denied modification of its May 18, 2005 decision.

Appellant, through his representative, requested reconsideration on August 22, 2007 and submitted evidence that he was willing to cooperate with nursing services. By decision dated November 16, 2007, the Office reviewed the merits of appellant's claim and found that he had not submitted sufficient evidence to warrant modification of the May 18, 2005 decision.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden to support that the disability has ceased or lessened before it may terminate or modify compensation benefits.²

Section 8104(a) of the Act³ 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

Section 8113(b) of the Act 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 her wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary.”⁸

² *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

³ 5 U.S.C. § 8104(a).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813 (August 1995).

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 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 2; *see also supra* note 4 at Chapter 2.813.3 (August 1995). The Office’s regulation provides: “The term return to work as used in this subpart is not limited to return 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 effort 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.

⁸ 5 U.S.C. § 8113(b).

The Office's regulations address failure to undergo vocational rehabilitation, stating:

"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 [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 circumstance 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). The reduction will remain in effect until such time as the employee acts in good faith to comply with the directions of [the Office]."⁹

ANALYSIS

The Office accepted appellant's claim for neck strain, right shoulder contusion, head contusion and sprained right ankle. By letter dated February 16, 2005, the Office advised appellant that Ms. McCarthy was assigned to him for medical management services. The Board finds that the record does not establish that the Office's field nurse was involved in a vocational rehabilitation effort. As the Board noted in *Ozine J. Hagan*,¹⁰ the regulations do not equate the assignment of an Office nurse with vocational rehabilitation. While the regulations state that the vocational rehabilitation planning process may include meetings with a nurse,¹¹ a meeting with a nurse may concern matters unrelated to vocational rehabilitation, such as medical management. When there is no evidence of vocational rehabilitation services, such as referral to a rehabilitation counselor, discussion of a rehabilitation plan, assessment of vocational skills,

⁹ 20 C.F.R. § 10.519.

¹⁰ 55 ECAB 681 (2004); *Sean C. Dockery*, 56 ECAB 652, 655 (2005).

¹¹ See 20 C.F.R. § 10.519(b).

retraining or assistance in finding work, then it is improper for the Office to reduce appellant's compensation under 5 U.S.C. § 8113(b).¹²

The February 16, 2005 letter was not a referral for vocational rehabilitation; rather, it was a referral for nurse intervention to work with appellant on medical management to facilitate his return to work. By letter dated March 10, 2005, the Office advised that appellant's refusal to cooperate with the field nurse was seen as a refusal to undergo vocational rehabilitation. However, there is no evidence to support a finding that the referral to nurse management was pursuant to a vocational rehabilitation plan. In the February 16, 2005 letter to the nurse, the Office emphasized that her function was to provide medical management services. There is no mention of any plan to assess appellant's vocational skills, retrain him for a different position and assist him in finding work.

The Board finds that the field nurse's activities were limited to the role set forth in the Office's procedures, *i.e.*, of attempting to return appellant to work at the employing establishment and providing medical management services, a preliminary reemployment effort which does not constitute vocational rehabilitation as contemplated under the Act, the implementing regulations or the Office's procedures.¹³ Appellant's refusal to cooperate with the nurse intervention program does not constitute a failure or refusal to cooperate with the early or necessary stages of vocational rehabilitation under section 8113 of the Act. The Office's application of section 8113 to suspend appellant's monetary compensation was in error. Consequently, it did not meet its burden of proof in reducing appellant's monetary compensation benefits.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof in reducing appellant's monetary compensation to zero on the grounds that he did not cooperate with vocational rehabilitation. Appellant is entitled to reinstatement of his compensation retroactive to the date of suspension on May 18, 2005.

¹² *Ozine J. Hagan, supra* note 10.

¹³ A.V., Docket No. 06-777 (issued December 5, 2006).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 16 and May 1, 2007 are reversed.

Issued: June 23, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board