

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

L.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New Castle, DE, Employer**

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**Docket No. 10-485
Issued: September 13, 2010**

Appearances:

*Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 16, 2009 appellant, through her representative, filed a timely appeal from the June 17, 2007 merit decision of the Office of Workers' Compensation Programs reducing her compensation benefits to zero. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to reduce appellant's compensation benefits to zero under section 8113(b) of the Federal Employees' Compensation Act on the grounds that she refused to cooperate with her assigned field nurse.

FACTUAL HISTORY

On February 4, 2009 appellant, a 34-year-old letter carrier, filed a traumatic injury claim alleging that she sustained injuries to her left arm, shoulder, elbow and wrist on January 29, 2009 when she slipped and fell on ice while carrying mail. She stopped working on the date of injury

and was paid appropriate compensation for lost wages. The Office accepted appellant's claim for contusions, sprains and strains of the left shoulder, wrist and arm.¹

On April 7, 2009 the Office referred appellant to the Nurse Intervention Program, for medical management services. Sandra Williams, a registered nurse, was directed to provide professional services for contact with the employee, employer and attending physician and to develop an appropriate medical management plan. The Office informed appellant that Ms. Williams had been assigned to assist in her recovery from her employment-related injury; that she was appellant's advocate and that she would obtain information in order to determine how the Office could assist in her recovery.

In a letter dated April 6, 2008, Ms. Williams introduced herself and provided her contact information. She asked appellant to sign and return an enclosed consent form authorizing her to speak directly with her treating physician. In a May 6, 2009 report of an initial evaluation, Ms. Williams stated that she had not yet received the signed consent form. In a May 6, 2009 letter, she advised appellant that she had not received the signed consent, which was necessary for her to interface with her physician. Ms. Williams indicated that she was enclosing another form for appellant's signature.

In a letter dated May 14, 2009, the Office informed appellant that her refusal without good cause to sign and return the consent form would be seen as a refusal to cooperate with Ms. Williams' intervention program and, by association, a refusal to cooperate with the vocational rehabilitation efforts of the Office. Noting that her continued failure to cooperate could result in reduction of her compensation benefits to zero, the Office allowed appellant 15 days to contact Ms. Williams, return the signed consent form and make a good faith effort to participate in her efforts to return her to gainful employment.

In a June 6, 2009 progress report, Ms. Williams stated that appellant had not returned her telephone calls and she had not received the signed consent form. A June 17, 2009 e-mail to the claims examiner reflected that she had not received the consent form as of that date.

By decision dated June 17, 2009, the Office reduced appellant's compensation benefits to zero as of that date under section 8113(b) of the Federal Employees' Compensation Act and section 10.519 of the implementing federal regulations. It found that as appellant had not cooperated with Ms. Williams, she had not cooperated with vocational rehabilitation efforts. Her failure to cooperate did not permit the Office to determine what would have been her wage-earning capacity. The Office determined that, in absence of evidence to the contrary, Ms. Williams' intervention effort would have resulted in a return to work at wages at least as high as those for the position held when she was injured.

¹ On August 20, 2008 appellant filed a traumatic injury claim for a left shoulder sprain (File No. xxxxxx220). She filed five other traumatic injury claims, which were handled as "short form closures:" File No. xxxxxx641 (March 28, 2006 -- alleging contusion of the right hand); File No. xxxxxx027 (September 9, 2006 -- alleging dizziness); File No. xxxxxx584 (October 27, 2006 -- left knee sprain); File No. xxxxxx714 (May 2, 2007 -- right ankle sprain) and File No. xxxxxx269 July 10, 2007 -- alleging dehydration).

LEGAL PRECEDENT

Section 8104(a) of the Act pertains to vocational rehabilitation and provides that the Secretary of Labor may direct a permanently disabled individual whose disability is compensable under that subchapter to undergo vocational rehabilitation. The Secretary shall provide for furnishing the vocational rehabilitation services.² 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.³ 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.⁴ Such efforts will be initially directed at returning the partially disabled employee to work with the employing establishment.⁵ 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.⁶

Section 8113(b) of the Act provides that 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.⁷

² 5 U.S.C. § 8104(a).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813 (August 1995).

⁴ *Id.* The Office's regulations provide: "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).

⁵ See *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000). See also *supra* note 3 at Chapter 2.813.3 (August 1995). The Office's regulations provide: "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.

⁶ See *supra* note 3 at Chapter 2.813.3.

⁷ 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 direction of [the Office]."⁸

ANALYSIS

The Board finds that the Office improperly reduced appellant's compensation benefits to zero for failure to cooperate with Ms. Williams' intervention program.

The Office accepted the claim for contusions, sprains and strains of the left shoulder, wrist and arm. By letter dated April 7, 2009, it advised appellant that a case management nurse had been assigned to assist in her recovery from her employment-related injury; that she was appellant's advocate and that she would obtain information in order to determine how the Office could assist in her recovery. Its June 17, 2009 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 the activities of

⁸ 20 C.F.R. § 10.519.

Ms. Williams, the Office medical management field nurse, did not constitute vocational rehabilitation.

The primary role of the Office field nurse, as described in its 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.⁹ The Office’s procedures contemplate that such activities do not constitute vocational rehabilitation, but may result in a referral to a vocational rehabilitation specialist for a formal vocational rehabilitation plan.¹⁰ Its regulations state that meetings with an Office field nurse may constitute planning for vocational rehabilitation or be part of the “early, but necessary stages of a vocational rehabilitation effort.”¹¹ In this case, however, Ms. Williams’ responsibilities involved only medical management, not vocational rehabilitation. Appellant’s failure to return the consent form did not impede efforts towards job placement, but rather delayed Ms. Williams’ ability to communicate with appellant’s doctor. Ms. Williams’ letters and telephone calls attempting to obtain a signed consent form do not constitute vocational rehabilitation.¹²

Ms. Williams, the nurse assigned to appellant’s case, did not perform any of the activities set forth at 20 C.F.R. § 10.518(a) which constitute vocational rehabilitation, such as “visit[ing] the work site, ensur[ing] that the duties of the position do not exceed the medical limitations and address[ing] any problems the employee may have in adjusting to the work setting.” Her activities were only part of an attempt to return appellant to limited duty at the employing establishment, with the long-term goal of a return to full duty.¹³ On April 7, 2009 the Office directed Ms. Williams only to provide professional services for contact with the employee, employer and attending physician and to develop an appropriate medical management plan. There was no mention of any plan to assess appellant’s vocational skills, retrain her for a different occupation or assist her in finding work. Additionally, there is no evidence that Ms. Williams identified appellant’s case as one that might benefit from vocational rehabilitation.

The Board finds that Ms. Williams’ activities were limited to the role set forth in the Office’s procedures of attempting to return appellant to full duty at the employing establishment, a preliminary reemployment effort which does not constitute vocational rehabilitation as contemplated by the Act, the implementing regulations or the Office’s procedures.¹⁴ The

⁹ See *supra* note 3 at Chapter 2.813.6.b-g (April 1995); “Placement with Previous Employer” (FECA Tr. No. 94-5, December 1993), at 2.0813.5.c(1) and (3)(a) (FECA Tr. No. 97-03, November 1996).

¹⁰ *Id.* at Chapter 2.813.5.c(3)(a) (claimants can be referred for an occupational rehabilitation plan (ORP) 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....”) (FECA Tr. No. 97-03, November 1996).

¹¹ 20 C.F.R. § 10.519(a) and (b).

¹² *Ruth E. Leavy*, 55 ECAB 294 (2004).

¹³ *Supra* note 3 at Chapter 2.813-6.b, “Placement with Previous Employer” (FECA Tr. No. 94-5, December 1993).

¹⁴ *Marilou Carmichael*, 56 ECAB 451 (2005). See also *Ozine J. Hagan*, 55 ECAB 681 (2004); *Ruth E. Leavy*, *supra* note 12.

Office's application of section 8113 to reduce appellant's monetary compensation to zero was in error. Therefore, the June 17, 2009 decision will be reversed.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to reduce appellant's monetary compensation to zero on the grounds that she did not cooperate with vocational rehabilitation. Appellant is entitled to reinstatement of her compensation retroactive to the date of suspension on June 17, 2009.

ORDER

IT IS HEREBY ORDERED THAT the June 17, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 13, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board