

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA AMBROSE and U.S. POSTAL SERVICE,
POST OFFICE, New Orleans, LA

*Docket No. 03-878; Submitted on the Record;
Issued September 16, 2003*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation for wage loss to zero effective May 18, 2002 under 5 U.S.C. 8113(b); and (2) whether the Office abused its discretion in refusing to reopen appellant's claim for further review of the merits.

On March 6, 2001 appellant, then a 44-year-old mail processor, filed an occupational disease claim alleging that her federal duties, which included keying, pushing, pulling and lifting caused her to develop cervical disc displacement. The claim form indicated that appellant stopped work on July 12, 2000 and had not returned. She had been working in a limited-duty position from a prior claim.

On May 4, 2001 the Office accepted the condition of cervical strain. Appellant was additionally diagnosed as positive for a C4-5 and C5-6 disc herniation.

On June 21, 2001 the Office authorized a registered nurse to provide medical management services to appellant.

On November 2, 2001 Dr. Joseph Rauchwerk, a Board-certified orthopedic surgeon, completed a work capacity evaluation form, indicating that appellant could work eight hours a day with restrictions.

By letter dated November 29, 2001, the employing establishment made a limited-duty job offer as a modified clerk to appellant at the employing establishment. A copy of the job offer was forwarded to the Office on December 4, 2001.

On December 17, 2001 the nurse assigned to the case reported that appellant had returned the job offer with an attached form, which noted that she had a follow-up appointment with Dr. Rauchwerk for December 3, 2001 and January 2, 2002. The top of the form, which listed disability status, advised that appellant was "total temporary" from December 3, 2001 to

January 2, 2002. The nurse indicated that, when she received the form, she telephoned the physician's office and was advised that it was just an appointment note and there was nothing in appellant's chart that voided the release written by Dr. Rauchwerk. The nurse indicated that she left several telephone messages for appellant on December 4, 5 and 10, 2001. She additionally indicated that the physician's report of December 3, 2001 was also requested.

In a January 4, 2002 letter, the Office advised appellant that the modified-duty job assignment at the employing establishment was within her medical restrictions, as put forth by Dr. Rauchwerk and that her refusal without good cause to accept the job offer could be seen as a refusal to undergo vocational rehabilitation. The Office stated: "The following specific circumstances support a finding that you are refusing to cooperate with the nurse intervention and by association, the vocational rehabilitation efforts of the [Office]." The Office found that appellant had been offered employment within her work tolerance limitations and failed to accept the employment and refused to return to work. The Office noted that her refusal was without good reason and advised that under section 8113(b): "[I]f you do not undergo vocational rehabilitation as directed, including nursing services and [the Office] finds that your wage-earning capacity would likely have increased a great deal, [the Office] may reduce your compensation. The amount of the reduction will be based on what you probably would have earned had you undergone nurse intervention and/or vocational rehabilitation." The Office advised that it would assume that nurse intervention would have resulted in a return to work with no wage-earning capacity. The Office would then reduce appellant's compensation to zero, so long as she failed to comply in good faith with its directions concerning nursing services. The Office instructed appellant to report for the modified work or advise within 30 days as to her reasons for not participating with the nurse's efforts to return her to gainful employment.

In a January 7, 2002 letter, appellant disputed the activities of the nurse and noted that the subject of vocational rehabilitation had never been discussed. She further indicated that Dr. Rauchwerk placed her on disability until January 9, 2002.

Appellant continued to dispute the Office's determination that the limited-duty job offer was medically feasible.

On March 28, 2002 the nurse assigned to the case advised that appellant had not returned to modified duty despite her release. She additionally indicated that appellant did not respond to her certified letter of February 20, 2002, in which she requested that appellant forward the results of the nerve conduction velocity (NCV), electromyogram (EMG) and functional capacity evaluation (FCE) to either her or Dr. Harold M. Stokes, a Board-certified orthopedic hand surgeon.

By decision dated May 1, 2002, the Office invoked 5 U.S.C. § 8113(b) and reduced appellant's compensation to zero, effective May 18, 2002, as a result of her refusal to participate in connection with the registered nurse in this case as part of vocational rehabilitation. The Office noted that it had sent appellant a letter dated January 4, 2002 and had requested that she either report to her modified-job assignment within 30 days or advise the Office, in writing, as to why she could not report to her employing establishment. The Office noted that its letter advised that, if appellant did not respond, her entitlement to compensation would be reduced. The Office stated that it had only received a March 7, 2002 report from Dr. Scott M. Fried, an orthopedic

and hand surgeon, which although, it indicated that appellant could not return to her former job duties, failed to address the modified-duty assignment.

By letter dated May 6, 2002, appellant requested reconsideration. Copies of correspondence to her senator, some of which were already of record, were submitted along with a letter dated May 5, 2002, expressing her disagreement with the Office's decision. Copies of previously submitted disability certificates and physician reports were submitted along with an April 3, 2002 report from Dr. Rauchwerk.

By decision dated July 22, 2002, the Office denied appellant's request for reconsideration, finding that she had not provided sufficient information to warrant a merit review of its previous decision.

The Board finds that the Office improperly invoked the penalty provision of 5 U.S.C. § 8113(b).

Section 8104(a) of the Federal Employees' Compensation Act 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."¹ 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.² 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.³ Such efforts will be initially directed at returning the partially disabled employee with the employing establishment.⁴ 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.⁵

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

¹ 5 U.S.C. § 8104(a).

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

³ *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's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors." 20 C.F.R. § 10.500(b).

⁴ *See supra* note 2 at Chapter 2.813.3. The Office's regulations 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.

⁵ *See supra* note 2 at Chapter 2.813.3.

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 Office.⁶ 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.⁷ In this regard, the Office’s implementing federal regulations state:

“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, [FCE] 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].”⁸

The Office’s reduction of appellant’s compensation to zero under section 8113(b) of the Act is based on the presumption that the assignment of a staff nurse in this case constituted part of a vocational rehabilitation effort. The record, however, does not support such a presumption. There is no evidence that the Office developed a vocational rehabilitation plan.

⁶ 5 U.S.C. § 8113(b).

⁷ See *Wayne E. Boyd*, 49 ECAB 202 (1997) (the employee failed to cooperate with the early and necessary stage of developing a training program).

⁸ 20 C.F.R. § 10.519.

Rather, the Office had referred appellant to a staff nurse and, during that time, had found that a modified job offer from the employing establishment was considered suitable. While regulations indicate that vocational rehabilitation services include assistance from registered nurses working under the direction of the Office, nurse services and vocational rehabilitation services are not one in the same. Office procedures explain that usually vocational rehabilitation services do not begin until nurse services end, though it may be important to begin vocational counseling during the period of nurse intervention. The nurse assigned to the case is responsible for identifying cases that may benefit from vocational services. He or she should communicate this recommendation to the claims examiner involved in the case.⁹ There is no evidence here that the registered 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.

As the record fails to establish that the Office directed appellant to undergo vocational rehabilitation, neither section 8114(b) of the Act nor section 10.519 of the implementing regulations justifies the reduction of appellant's compensation.¹⁰

Further, the record in this case casts doubt on the Office's finding that appellant was noncooperative at the time of the reduction of compensation. The job offer developed by the employing establishment stands independent of any vocational rehabilitation effort of the Office or with the field nurse services. The December 17, 2001 status report from the nurse to the Office revealed that she had yet to obtain the physician's report of December 3, 2001. Although the March 28, 2002 status report from the nurse to the Office revealed that appellant had not responded to a certified letter of February 20, 2002, in which appellant was requested to forward the results of her EMG/NCV and FCE to either the nurse or Dr. Stokes, the medical evidence already of record, specifically Dr. Rauchwerk's November 14, 2001 report, had already indicated a change in appellant's working capacity from full time to part time. There is no evidence that that offered position was made available to appellant through the efforts of the field nurse assigned in this case.¹¹ The facts of this case do not establish that appellant refused or failed to undergo any testing, interviews, counseling or was uncooperative in the early or necessary stages

⁹ See *supra* note 2 at Chapter 3.201.4.b (April 1993) (Staff Nurse Services).

¹⁰ Cf. *Rebecca L. Eckert*, Docket No. 01-2026 (issued November 7, 2002) (failure to report to work after a limited-duty position was secured for the claimant was neither a failure to cooperate with vocational rehabilitation, nor a failure to cooperate with field nurse services).

¹¹ The Board notes that, although the Office had found the offered position suitable, its determination is fraught with errors. At the onset, the Office claims examiner did not clearly state upon what medical evidence such determination was based. This is important in light of the fact of appellant's preexisting medical conditions. See *James Henderson, Jr.*, 51 ECAB 268 (2000). The Board notes that appellant had a previous claim (160298625) for an injury sustained on March 7, 1997, which was accepted by the Office for bilateral carpal tunnel syndrome. Appellant was working in that permanent modified clerk position when she filed the current claim pertaining to her cervical condition. The Board further notes that the Office failed to address Dr. Fried's reports concerning appellant's hands and use of her upper extremities and ability to work only part time in a sedentary position or clarify why Dr. Rauchwerk had subsequently changed his mind in his November 14, 2001 report concerning appellant's ability to work full time.

of vocational rehabilitation, a prerequisite for invoking the penalty provision of section 10.519(c). This does not constitute either a failure to cooperate with the field nurse or a refusal in the early stages of a vocational rehabilitation effort.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.¹² The Office failed to meet its burden of proof in this case.¹³

The July 22 and May 1, 2002 decisions of the Office of Workers' Compensation Programs are reversed.

Dated, Washington, DC
September 16, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

¹² *Harold S. McGough*, 36 ECAB 332 (1984).

¹³ In light of the disposition of this issue, the second issue in this case is rendered moot.