

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

MARY LOUISE A. ZAKREWSKI, Appellant)

and)

DEPARTMENT OF THE TREASURY,)
INTERNAL REVENUE SERVICE,)
Philadelphia, PA, Employer)

**Docket No. 04-723
Issued: August 20, 2004**

Appearances:
Mary Louise A. Zakrewski, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On January 21, 2004 appellant filed a timely appeal of a September 8, 2003 merit decision of the Office of Workers' Compensation Programs, which reduced her wage-loss compensation to zero. Appellant also appealed a November 19, 2003 nonmerit decision denying her September 12, 2003 request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of appellant's claim.

ISSUES

The issues are: (1) whether the Office properly suspended appellant's wage-loss compensation under 5 U.S.C. § 8113 on the grounds that she refused to cooperate with the preliminary stages of vocational rehabilitation; and (2) whether the Office properly denied appellant's September 19, 2003 request for reconsideration.

FACTUAL HISTORY

The Office accepted that on or before June 1, 2001 appellant, then a 40-year-old data transcriber, sustained bilateral carpal tunnel syndrome in the performance of duty. She received

compensation for total disability beginning in January 2002. Appellant was terminated from the employing establishment effective June 15, 2002, as she did not meet performance standards during a probationary period.

Appellant underwent a right median nerve release on January 28, 2002 and a left median nerve release on October 11, 2002.¹ The Office advised appellant by November 15, 2002 letter that as the employing establishment was unable to offer her light-duty work, a vocational rehabilitation plan would be developed to assess her skills and identify appropriate employment. Following a course of occupational therapy, Dr. Okunski,² released appellant to light duty as of March 13, 2003, with restrictions against using computers, vibratory tools or performing any job requiring repetitive hand or wrist motion.³ Dr. Okunski reiterated these restrictions through September 10, 2003.

To obtain additional information regarding appellant's work limitations, the Office referred her to Dr. Stephen F. Latman, a Board-certified orthopedic surgeon, for a second opinion examination. In April 1 and 2, 2003 reports, Dr. Latman found no objective findings other than surgical scars on both wrists. He noted that a ganglion at the base of the right third finger was due to bicycle riding and not work factors. A May 1, 2003 functional capacity evaluation demonstrated that appellant could perform full-time light-duty work with lifting limited to 20 pounds and typing restricted to "an occasional basis." Dr. Latman reviewed the evaluation on May 23, 2003 and concurred with the recommended restrictions.

On June 5, 2003 the Office referred appellant for vocational rehabilitation services and on June 10, 2003 authorized "plan development with full testing" by Dennis L. Mohn, a vocational rehabilitation counselor. The Office advised appellant by June 10, 2003 letter of the referral to Mr. Mohn and instructed her to contact the Office "in the next week to discuss [her] future."

In a June 20, 2003 letter, Mr. Mohn noted that in a telephone conversation, appellant wanted to delay involvement in vocational rehabilitation until a pending evaluation of her left upper extremity and because she just had dental surgery. He stated that appellant agreed to meet him for an initial interview on June 30, 2003 in the lobby of a nearby Holiday Inn and conference center. However, appellant did not attend the meeting. In a July 1, 2003 letter to appellant, Mr. Mohn advised her that she had not submitted medical evidence justifying delaying the vocational rehabilitation plan or her failure to attend the scheduled interview. Mr. Mohn

¹ On November 13, 2002 appellant filed an occupational disease claim for ganglion cyst at the base of the right ring finger, which she attributed to repetitive motion at work on or before January 28, 2001. In a November 18, 2002 report, Dr. Walter Okunski, an attending Board-certified plastic surgeon, opined that the ganglion was not work related although appellant believed it was. As there is no final decision of record regarding the ganglion, this claim is not before the Board on the present appeal.

² In February 15 and 27, 2003 letters, appellant requested to change physicians from Dr. Okunski, alleging that he was skeptical about her condition and would not authorize appropriate treatment. In a March 17, 2003 letter, the Office denied appellant's request pending receipt of a planned second-opinion evaluation. On appeal, appellant did not raise the issue of the denial of her request to change physicians.

³ Appellant was previously released to light-duty work on December 20, 2002 by Dr. Michael F. Busch, an orthopedic surgeon and second opinion physician.

requested that appellant meet him on July 14, 2003 in the lobby of the Holiday Inn at 9:30 a.m. to conduct the initial interview.

On July 3, 2003 appellant telephoned the Office and requested to change vocational rehabilitation counselors. She asserted that she felt “uncomfortable” as Mr. Mohn demanded that she meet him at a hotel and wanted “a full description” of her physical appearance in order to identify her, but refused to register with the hotel receptionist so that she could identify him. Appellant again requested to change counselors in a July 9, 2003 letter, noting that Mr. Mohn first asked to come to her home. As an alternative she suggested meeting at a public library for the initial interview but Mr. Mohn insisted on the Holiday Inn. Appellant also noted that Mr. Mohn refused to postpone the initial interview until after planned testing on her left upper extremity.

In a July 3, 2003 letter, the Office advised appellant that the initial interview with Mr. Mohn had been rescheduled for July 14, 2003 in the lobby of the same Holiday Inn. The Office requested appellant to “fully cooperate with Mr. Mohn” and the vocational rehabilitation process.

As appellant did not appear for the July 14, 2003 interview, the Office advised her in a July 21, 2003 letter that her failure to attend the scheduled June 30 and July 14, 2003, appointments constituted a refusal to participate in vocational rehabilitation efforts. The Office explained that if she continued to refuse and did not show good cause, her compensation benefits would be reduced to zero under section 8113 of the Federal Employees’ Compensation Act. The Office instructed appellant to provide her reasons for refusal within 30 days.

In a July 23, 2003 report, Mr. Mohn noted that appellant left a telephone message for him on June 27, 2003 asking to postpone the June 30, 2003 meeting until after scheduled tests on her left arm in late July. Mr. Mohn telephoned appellant on June 27, 2003 to confirm the meeting, but appellant left a return message again requesting postponement. Mr. Mohn left a message in reply that appellant was to report for the meeting as scheduled. On July 3, 2003 appellant telephoned Mr. Mohn and asserted that she had told him that she would not be attending the June 30, 2003 meeting and that she would request a change of counselors.

In an August 11, 2003 letter, the Office denied appellant’s request to change vocational rehabilitation counselors and found that her “reasons for noncompliance [were] unacceptable.” The Office also advised appellant to contact the Office or Mr. Mohn by August 21, 2003 “to make a good effort to participate in the rehabilitation program or provide good reason for not participating.” Mr. Mohn submitted an August 22, 2003 report stating that appellant had not contacted him.

By decision dated September 8, 2003, the Office reduced appellant’s compensation to zero under section 8113(b) of the Act on the grounds that she failed to cooperate with vocational rehabilitation efforts without good cause.⁴

⁴ In a September 18, 2003 closure report, Mr. Mohn stated that the vocational rehabilitation effort was being closed as appellant’s failure to meet with him on two occasions constituted refusal to cooperate with rehabilitation efforts.

Appellant disagreed and in a September 12, 2003 letter requested reconsideration. She asserted that an Office claims examiner told her on July 3, 2003 that she could switch counselors but the Office then denied that she could do this. In a September 19, 2003 letter, appellant noted that Mr. Mohn was not “professional or safe” and that she was “suspicious because he wanted to meet where there were few people around” and refused to leave his name with the hotel receptionist. She expressed willingness to participate in vocational rehabilitation efforts with a new counselor. Appellant reiterated these assertions in September 29 and October 17, 2003 letters.

By decision dated November 19, 2003, the Office denied appellant’s request for reconsideration on the grounds that the evidence submitted in support thereof was repetitious of evidence previously submitted and therefore insufficient to warrant a merit review.

LEGAL PRECEDENT -- ISSUE 1

Section 8104(a) of the Act⁵ 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 which emphasize returning partially disabled employees to suitable employment and determining their wage-earning capacity.⁶ 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 in returning the employee to suitable employment.⁷ Where reemployment at the employing establishment is not possible, the Office will assist the claimant in finding work with a new employer and sponsor necessary vocational training.⁸

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 such failure the wage-earning capacity of the individual would likely have increased substantially, “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 directions of the Office.⁹ Office procedures require that prior to reduction of compensation a claimant be notified of the provision of section 8113(b) and provided an opportunity to either resume participation in

⁵ 5 U.S.C. § 8104(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813 (April 1995).

⁷ *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).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.3 (April 1995).

⁹ 5 U.S.C. § 8113(b).

vocational rehabilitation or provide reasons for not continuing participation.¹⁰ Under section 8104 of the Act an employee's failure to willingly cooperate with vocational rehabilitation may form the basis for terminating the rehabilitation program and the reduction of monetary compensation.¹¹ In this regard, the Office's implementing 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--

(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]."¹²

ANALYSIS -- ISSUE 1

In this case, by decision dated September 8, 2003, the Office reduced appellant's compensation to zero on the grounds that her failure to attend scheduled June 30 and July 14, 2003 interviews with a vocational rehabilitation counselor constituted an unjustified refusal to participate in the preliminary stages of vocational rehabilitation.

The Office referred appellant to Mr. Mohn, a vocational rehabilitation counselor, on June 10, 2003. Mr. Mohn instructed her to meet him in the lobby of a Holiday Inn and conference center on June 30, 2003 for an initial interview. Although appellant tried to postpone the meeting due to pending medical tests, her primary objection to the meeting was its location. She explained in a July 3, 2003 telephone call and July 9, 2003 letter that she was "uncomfortable" meeting Mr. Mohn at a hotel. Appellant requested to change vocational rehabilitation counselors due to what she characterized as Mr. Mohn's unprofessional conduct.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11(b) (December 1993).

¹¹ See *Wayne E. Boyd*, 49 ECAB 202 (1997) (the Board found that the Office properly reduced the claimant's wage-loss compensation benefits as he failed to cooperate with the early and necessary stages of developing an appropriate training program).

¹² 20 C.F.R. § 10.519.

The Office advised appellant in a July 3, 2003 letter of the importance of fully cooperating with the vocational rehabilitation effort and instructed her to meet Mr. Mohn on July 14, 2003 at the hotel. Despite this advisement, appellant failed to attend the July 14, 2003 meeting.

In an August 11, 2003 letter, the Office advised appellant that her reasons for refusing to cooperate were unacceptable. The Office reminded appellant of her obligation to either cooperate with Mr. Mohn and the vocational rehabilitation effort or show good cause for her refusal. The Office requested that appellant contact Mr. Mohn by August 21, 2003 “to make a good faith effort” to participate in the rehabilitation program. The Board notes that making a telephone call or sending a letter to Mr. Mohn would not have involved meeting him at a hotel. However, despite the Office’s advisements and the simplicity of its request, appellant did not contact Mr. Mohn. Her statement that she was uncomfortable in meeting Mr. Mohn at a hotel does not establish good cause for her refusal to attend the meeting. The record establishes that appellant initially agreed to a meeting in the public lobby of the Holiday Inn, but did not attend the meeting was rescheduled but she did not attend the meeting. Appellant has not presented any evidence or substantial reasons to support her failure to cooperate with the designated vocational rehabilitation counselor.

Under the facts and circumstances of this case the Board finds that appellant has not established “good cause” for failing to cooperate with the initial stages of vocational rehabilitation.¹³ Even if she felt justified in refusing to meet Mr. Mohn on June 30, 2003 the Office’s July 3, 2003 letter informed her of the need for vocational rehabilitation. Once she received this letter, appellant knew or should have known the importance of cooperating with the counselor and the ramifications of her continued failure to cooperate. Appellant was certainly well informed by the Office’s August 11, 2003 letter of the critical need to contact Mr. Mohn, yet she refused to do so. Regarding appellant’s request to postpone vocational rehabilitation until after testing on her left upper extremity, she did not submit medical evidence contradicting Dr. Latman’s May 23, 2003 opinion that she was capable of full-time light-duty work. Thus, she has not established good cause for refusal on medical grounds. Appellant therefore failed, without good cause, to participate in preliminary vocational rehabilitation meetings such that she failed to participate in the “early but necessary stages of a vocational rehabilitation effort.”¹⁴

As it has been established that appellant failed to participate in the early stages of vocational rehabilitation, it must now be determined whether the record indicates that had she cooperated, she would have returned to work with no loss of wage-earning capacity. The Act’s implementing regulation provide that when an employee fails to participate in the early stages of vocational rehabilitation, it cannot be determined what his or her wage-earning capacity would

¹³ *Philip J. Kerrigan* (Docket No. 03-1087, issued September 16, 2003) (the Board found that the claimant’s accusations that the vocational rehabilitation counselor refused to properly interpret the medical record and would not pursue a self-employment plan did not demonstrate good cause for failure to cooperate with the initial stages of vocational rehabilitation).

¹⁴ 20 C.F.R. § 10.519(b); *David L. Maes*, 54 ECAB ____ (Docket No. 03-1334, issued July 22, 2003); *see also Linda M. McCormick*, 44 ECAB 958 (1993) (claimant refused to participate in the preliminary stages of vocational rehabilitation and did not present evidence indicating that her participation in vocational rehabilitation would not have resulted in a return to work with no loss of wage-earning capacity).

have been had there been no failure to participate.¹⁵ Thus, it is assumed, in the absence of evidence to the contrary, that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity.¹⁶ In the present case, appellant did not submit evidence to refute such an assumption. The Board finds that there is no evidence of record indicating that vocational rehabilitation would not have resulted in appellant's return to work at a wage equal to or higher than that she was earning at the time of her employment injury. Thus, the Office properly applied the provision of 5 U.S.C. § 8113(b) in finding that appellant had no loss of wage-earning capacity and in reducing her monetary compensation to zero.¹⁷

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.¹⁸ Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁹ When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.²⁰

ANALYSIS -- ISSUE 2

In the present case, appellant did not submit relevant and pertinent new evidence in support of her September 12, 2003 request for reconsideration. Appellant submitted letters dated September 12, 19 and 29 and October 17, 2003. These letters reiterate appellant's previous allegations, set forth in a July 3, 2003 telephone call and July 9, 2003 letter that Mr. Mohn, the vocational rehabilitation counselor assigned to her case was unprofessional as he wished to meet her in a hotel lobby and wanted her to describe herself so he could identify her. The Board has

¹⁵ See 20 C.F.R. § 10.519(b), (c); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Service*, Chapter 2.813.11(a) (November 1996).

¹⁶ 20 C.F.R. § 10.519(c); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Service*, Chapter 2.813.11(a) (November 1996).

¹⁷ *Asline Johnson*, 41 ECAB 438 (1990). The Board notes that should appellant began to cooperate with her vocational rehabilitation counselor then from that point forward she will be entitled to appropriate wage-loss compensation.

¹⁸ 20 C.F.R. § 10.606(b)(2) (2003).

¹⁹ 20 C.F.R. § 10.608(b) (2003).

²⁰ *Annette Louise*, 54 ECAB ____ (Docket No. 03-335, issued August 26, 2003).

held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening the case.²¹

Therefore, the Office correctly found in its November 19, 2003 decision, that appellant did not submit relevant and pertinent new evidence not previously considered by the Office justifying her refusal to cooperate with the preliminary stages of vocational rehabilitation. As appellant's letters failed to raise substantive legal questions or to submit new relevant and pertinent evidence not previously reviewed by the Office, the Office properly refused to reopen her claim for a merit review. Consequently, appellant is not entitled to a review of the merits of the claim based upon any of the above-noted requirements under 10.606(b)(2) of the Act's implementing regulation. Accordingly, the Board finds that the Office properly denied appellant's September 12, 2003 request for reconsideration.

CONCLUSION

The Board finds that the Office properly reduced appellant's wage-loss compensation to zero effective September 8, 2003, as she failed to present good cause for her failure to cooperate in the preliminary stages of vocational rehabilitation and did not submit evidence that had she participated as directed, she would not have returned to work with no loss of wage-earning capacity. The Board further finds that the Office's November 19, 2003 decision denying appellant's September 12, 2003 request for a merit review is proper under the facts and circumstances of this case.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 19 and September 8, 2003 are affirmed.

Issued: August 20, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

²¹ *Denis M. Dupor*, 51 ECAB 482 (2000); *Howard A. Williams*, 45 ECAB 853 (1994); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).