United States Department of Labor
Employees' Compensation Appeals Board

CARMELLA M. LARFFARELLO, Appellant	)	
and	)	**Docket No. 04-1639**
	)	**Issued: December 23, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Boston, MA, Employer	)	

Appearances:
William E. Shanahan, Esq., for the appellant
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 June 9, 2004 appellant filed a timely appeal from the March 8, 2004 merit decision of the Office of Workers' Compensation Programs, which denied modification of an earlier decision to reduce her compensation to zero for failure to participate in vocational rehabilitation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the reduction of compensation.

ISSUE

The issue is whether the Office properly reduced appellant's compensation to zero under 5 U.S.C. § 8113(b) for failure to participate in vocational rehabilitation.

FACTUAL HISTORY

On February 8, 1999 appellant, then a 31-year-old distribution clerk, sustained an injury in the performance of duty when she caught her foot in a hole or crack in concrete flooring and

twisted her left knee. The Office accepted her claim for left knee sprain and authorized arthroscopic surgery. She received compensation for wage loss.[1]

Appellant sustained another injury in the performance of duty on August 31, 2001, when she slipped in a restroom and hit her left knee against the toilet. The Office accepted her claim for left knee sprain and again paid compensation for wage loss.[2]

Dr. Robert S. Cummings, Jr., appellant's attending orthopedic surgeon, certified temporary total disability. On April 29, 2002 Dr. Mordechai Kamel, an orthopedic surgeon and Office referral physician, reported that appellant needed additional medical treatment but was capable of returning to duty full time with restrictions. On May 23, 2002 the Office asked the employing establishment to review the work capacity evaluation completed by Dr. Kamel and make, if available, a suitable job offer or assignment. On June 22, 2002 the employing establishment proposed a modified distribution clerk position. On June 26, 2002 the Office found that the assignment was consistent with appellant's medical restrictions and was appropriate. On that same day, the employing establishment offered appellant the assignment and gave her until July 10, 2002 to accept the offer or refuse.

Dr. Cummings continued to keep appellant off work and the Office continued to pay compensation for wage loss. On July 23, 2003 appellant notified the Office that she was unable to accept the job offer based on her doctor's opinion on the nature of her knee injury.

On October 7, 2002 the Office referred the case to its vocational rehabilitation specialist. A rehabilitation counselor, who was to follow up on the job assignment, made initial contact with appellant on October 23, 2002. On October 24, 2002 he noted that a meeting was scheduled with appellant on October 29, 2002. He also noted: "LDA [light-duty assignment] of June 26, 2002 was refused by IW [injured worker] because of ongoing medical problems. Please advise. Thank you." The counselor noted a possible change in appellant's medical status.

On November 1, 2002 the Office informed appellant that her failure to accept a suitable job assignment supported a finding that she was refusing to cooperate with the Office's vocational rehabilitation efforts. The Office notified her that her compensation might be reduced to zero under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 if she did not contact the claims examiner within 30 days "to make a good faith effort to participate in vocational rehabilitation efforts to return you to gainful employment by accepting the offered work assignment."

Vocational rehabilitation reports show that the rehabilitation counselor met with appellant on October 29, 2002: "Extensive review of IW's medical status, treatment and concerns." On November 1, 2002 he reported that appellant would accept the June 26, 2002 limited-duty assignment with reservations: appellant requested an independent medical review of her rehabilitation status to establish, in addition to the accepted left knee sprain and contusion, a differential diagnosis of reflex sympathetic dystrophy causally related to the August 31, 2001 employment injury. The rehabilitation counselor noted appellant's initial reluctance to accept

[1] OWCP File No. 01-0363722.

[2] OWCP File No. 01-2003679.

the limited-duty assignment but also noted that her concerns were addressed. He reported goals as follows: "Supportive counseling as indicated. Return to work part-time/full-time?"

On November 26, 2002 appellant refused the offer in writing based on Dr. Cummings' advice and indicated that a report from Dr. Cummings supporting her denial would be forthcoming.

In a decision dated December 31, 2002, the Office reduced appellant's compensation to zero under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 as a result of her refusal to participate in vocational rehabilitation: "The evidence of record shows that our office afforded you the opportunity to participate in a vocational rehabilitation program to return you to employment based on your medical restrictions, education, experience and other factors and that you declined to participate." The Office further found as follows:

> "Your failure to undergo the essential preparatory effort of vocational testing does not permit this office to determine what would have been your wage-earning capacity had you in fact undergone the testing and rehabilitation effort. Therefore, under the provisions of [s]ection 10.519 of the regulations, it is assumed, in the absence of evidence to the contrary, that the vocational rehabilitation effort would have resulted in your return to work at the same or higher wages than for the position you held when injured."

In a decision dated March 8, 2004, the Office reviewed the merits of appellant's claim and denied modification of the December 31, 2002 decision. The Office explained that, according to FECA Bulletin No. 99-28 (issued August 30, 1999), a claimant who refuses to accept a temporary job assignment will be considered to have refused to undergo a vocational rehabilitation effort when so directed, as stated in 20 C.F.R. § 10.519(b).[3] The Office noted that "it was incumbent upon claimant to cooperate with the vocational rehabilitation process by accepting the temporary limited-duty assignment based on the work restrictions outlined by … Dr. Kamel. Failure to do so resulted in the Office properly invoking the penalty sanction under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519."[4]

LEGAL PRECEDENT

Section 8104(a) of the Federal Employees' Compensation Act ("Act") provides: "The Secretary of Labor [*i.e.*, the Office] 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."[5]

[3] Although the Office described the job as a temporary assignment, nothing in the offer itself or in the employing establishment's correspondence identifies the job as temporary.

[4] FECA Bulletin No. 99-28 (issued August 30, 1999) expired on August 29, 2000 and was not incorporated into Office procedures. The purpose of the bulletin was to provide guidance with respect to short-term job offers made to employees who were in the early stages of recovery from work-related injuries.

[5] 5 U.S.C. § 8104(a).

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 have probably been his wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary."[6]

Section 10.519 of the implementing regulations provides:

"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 meeting 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 direction of [the Office]."[7]

[6] *Id*. at § 8113(b).

[7] 20 C.F.R. § 10.519 (1999).

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[8]

ANALYSIS

Section 8113(b) of the Act authorizes the Office to reduce compensation "after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased." The Office made no such finding when it reduced appellant's compensation on December 31, 2002, and it remains unclear how accepting the June 26, 2002 offer of limited duty would probably have substantially increased appellant's wage-earning capacity. Without this necessary finding, the Office improperly invoked the penalty of reducing appellant's compensation under section 8113(b).

The Board notes that the June 26, 2002 offer of limited duty was not a product of the vocational rehabilitation effort: The determination of work limitations, the employing establishment's review of the work capacity evaluation and identification of a possible job, the Office's finding that the job was appropriate, the formal extension of the offer and appellant's initial refusal all occurred months before the Office referred appellant to a vocational rehabilitation specialist. So it is difficult to characterize appellant's refusal of an offer made on June 26, 2002 as a failure to participate in a vocational rehabilitation effort that began on October 7, 2002.

Moreover, at no point during the vocational rehabilitation process did the rehabilitation counselor charge appellant with obstruction or failure to make a good faith effort. Under Office procedures, the rehabilitation specialist will advise the Office of noncooperation that occurs during the initial interview, while the rehabilitation counselor will document in progress reports submitted to the specialist any instances where the claimant fails to communicate or cooperate with the counselor or refuses to participate or make a good faith effort. The rehabilitation specialist will then provide the Office with a Form OWCP-3 that details the claimant's noncooperation or nonparticipation.[9] No such reporting took place in this case. The rehabilitation counselor did report on December 4, 2002 that he was unable to contact appellant and that repeated telephone calls were not returned, but he made no suggestion that this constituted obstruction, and the Office did not reduce appellant's compensation for failure to return these calls.

In the December 31, 2002 decision, the Office reduced appellant's compensation to zero for "failure to undergo the essential preparatory effort of vocational testing" and found that this failure "does not permit this office to determine what would have been your wage-earning capacity had you in fact undergone the testing and rehabilitation effort." Vocational testing was never an issue in this case. The rehabilitation plan was to place appellant with her previous employer. The employing establishment identified a job based on Dr. Kamel's work capacity evaluation, a job that the Office found to be appropriate and consistent with her medical

[8] *Harold S. McGough*, 36 ECAB 332 (1984).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.0813.11 (December 1993).

restrictions,[10] so it would appear that sections 10.519(b) and (c) of the regulations, describing what action the Office will take when a suitable job has not been identified because of the claimant's failure or refusal, do not apply. The Office has not explained how appellant's refusal of the job prevented a determination of what would have been her wage-earning capacity had she accepted.

CONCLUSION

The Board finds that the Office improperly reduced appellant's compensation to zero under 5 U.S.C. § 8113(b). The Office did not find, nor does the evidence establish, that accepting the June 26, 2002 offer of limited duty would probably have substantially increased appellant's wage-earning capacity. Further, where the offer refused was not a product of the rehabilitation effort and the rehabilitation counselor did not report obstruction or failure to make a good faith effort, the evidence does not support that appellant failed to apply for and undergo vocational rehabilitation when so directed. Finally, there is no evidence that she failed or refused to undergo vocational testing, as the Office found in its December 31, 2002 decision.

ORDER

IT IS HEREBY ORDERED THAT the March 8, 2004 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 23, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[10] The Board makes no finding whether a conflict in medical opinion exists between Dr. Cummings and Dr. Kamel on the extent of appellant's injury-related disability for work.