United States Department of Labor
Employees' Compensation Appeals Board

MARILOU CARMICHAEL, Appellant	)	
and	)	**Docket No. 04-2068**
	)	**Issued: April 15, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Brookline, MA , Employer	)	

Appearances:
Richard Heavey, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On August 18, 2004 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated June 18, 2004, which reduced her compensation to zero on the grounds that she did not cooperate with the initial steps of a vocational rehabilitation plan by refusing an offered light-duty position.[1] Under 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly reduced appellant's wage-loss compensation benefits to zero under 5 U.S.C. § 8113 on the grounds that she refused to cooperate with the preliminary stages of vocational rehabilitation by refusing an offered light-duty position. On appeal appellant asserted that she refused the position as it was not within her medical restrictions. She noted that, in an April 7, 2004 decision, an Office hearing representative found that the Office improperly reduced her wage-loss compensation benefits to zero as there was no

[1] On appeal appellant, through her attorney, stated that she did not wish to appeal an April 7, 2004 decision of the Office as it found in her favor.

request that she participate in vocational rehabilitation. Yet, on June 18, 2004, the hearing representative issued a decision affirming the Office's May 12, 2003 decision. Appellant noted that the texts of the April 7 and June 18, 2004 decisions were identical except for their conclusions. She also noted that no new evidence was submitted between April 7 and June 18, 2004.

FACTUAL HISTORY

The Office accepted that, on November 20, 2000, appellant, then a 45-year-old letter carrier, sustained a right ankle strain. Following treatment by Dr. E. John Lentini, an attending osteopath Board-certified in family practice, she returned to light-duty work in December 2000.[2] She remained under medical treatment by Dr. Lentini and Dr. Sally A. Rudicel, an attending Board-certified orthopedic surgeon. Both physicians recommended sedentary duty with no standing or walking. Appellant remained on light duty with intermittent absences. She stopped work on July 27, 2001 and did not return. Appellant received wage-loss compensation on the periodic rolls effective August 12, 2001.

Appellant was treated by Dr. Peter Dewire, an attending Board-certified orthopedic surgeon of professorial rank, who submitted September 24 and October 15, 2001 reports noting a history of injury and treatment. On examination, Dr. Dewire found limited dorsiflexion of the right foot. He obtained x-rays showing a small fleck fracture of the calcaneus. Dr. Dewire opined that he could not identify an etiology for appellant's pain either by diagnostic studies or findings on examination.[3] He prescribed a right heel lift.

In a March 4, 2002 report, Dr. Lentini prescribed a right heel lift and ankle brace. He limited walking and standing to 30 minutes, limited bending, climbing and squatting and prohibited climbing stairs.[4]

On March 7, 2002 the Office requested that the employing establishment formulate a job description for appellant based on the restrictions provided given by Dr. Dewire. The employing establishment requested a copy of appellant's restrictions on March 12, 2002. The Office forwarded a copy of Dr. Lentini's March 4, 2002 report.

In March 30 and April 4, 2002 reports, Dr. George B. McManama, Jr., a Board-certified orthopedic surgeon, performed a fitness-for-duty examination. He diagnosed chronic right peroneal tendinitis secondary to the accepted right ankle strain. Dr. McManama found appellant

[2] A November 28, 2000 bone scan of the right foot and ankle was indicative of a bone bruise or occult fracture of the distal fibula. A March 8, 2001 magnetic resonance imaging (MRI) scan of the right foot and ankle was within normal limits.

[3] September 24, 2001 right foot and ankle x-rays showed "mild degenerative changes at the tarsonavicular joint space with some flattening of the long plantar arch." A September 28, 2001 computerized tomography scan of appellant's right ankle showed a "[p]robable tiny cortical tear" of the anterolateral margin of the os calsis. November 30, 2001 electromyography and nerve conduction velocity studies showed a right superficial peroneal neuropathy, likely at the ankle.

[4] Dr. Lentini renewed these restrictions in a July 3, 2002 report.

capable of light duty with limited walking and standing and no bending, squatting, kneeling or stair climbing.

On May 16, 2002 the employing establishment offered appellant a limited-duty assignment at the employing establishment's Brookline station. The job required auditing "CFS" mail, picking up express mail from a hub facility, delivering express mail, answering the telephone and other duties within her restrictions as assigned by the manager. The restrictions noted were "[a]void walking or standing beyond 30 minutes per shift. Avoid all bending, squatting, kneeling and climbing activities." On May 17, 2002 the employing establishment added "avoid stairs" to the listed restrictions.

In a May 16, 2002 letter, the Office advised appellant that the offered position was consistent with her medical restrictions. By letter received on May 20, 2002, appellant responded that the offered position exceeded her prescribed restrictions against climbing stairs, delivering mail or commuting by public transportation.

In a May 22, 2002 report, Dr. Stephen F. Koelbel, an attending Board-certified physiatrist, provided a history of injury and treatment. On examination, he found mild edema and tenderness of the right ankle with a significantly reduced range of motion. Dr. Koelbel diagnosed chronic ankle pain referable to a peroneal tendon injury and possible peroneal nerve injury caused by the accepted right ankle strain. In a June 3, 2002 follow-up report, Dr. Koelbel found that appellant was at maximum medical improvement. He stated that appellant could perform limited-duty work if her commute and assigned duties required only minimal standing and walking.[5]

On June 19, 2002 the Office appointed a field nurse, Diane Gendron, to coordinate appellant's medical management and assist her in returning to full-time limited-duty work, with a long-term goal of returning to full duty. In a June 20, 2002 letter, the Office advised appellant that Ms. Gendron could answer questions about her claim, assure that she received appropriate medical attention and that her "eventual return to full regular[-]duty employment [was] accomplished in a safe and timely fashion in coordination with" her physician. Ms. Gendron submitted periodic medical management reports from June 24, 2002 through March 2003, describing her conversations with appellant's claims examiner and her attempts to determine the status of the claim. Ms. Gendron called appellant approximately once a month to discuss the status of the claim but did not meet with her or request to meet with her.

In a June 26, 2002 letter, the Office advised appellant that her refusal to accept the offered light-duty position constituted a failure to cooperate with vocational rehabilitation efforts under section 8113(b) of the Act. The Office noted that her continued unjustified refusal to participate in vocational rehabilitation would result in a reduction of her wage-loss compensation benefits to zero. The Office afforded appellant 30 days in which to provide her reasons for refusal.

[5] In an accompanying form report, Dr. Koelbel noted that appellant had sustained a 17 percent permanent impairment of the right lower extremity as dorsiflexion of the right foot was limited to -3 degrees, plantar flexion to 40 degrees and eversion to 20 degrees.

On September 6, 2002 the Office referred appellant, the medical record and a statement of accepted facts to Dr. Stanley Hom, a Board-certified orthopedic surgeon specializing in hand surgery, for a second opinion examination. Dr. Hom submitted a September 18, 2002 report finding appellant capable of working full-time restricted duty, including climbing stairs and using public transportation.

In a letter dated September 24, 2002, the Office advised appellant to make a good faith effort to participate in vocational rehabilitation or her monetary compensation benefits could be reduced to zero.

In October 30 and November 4, 2002 letters, appellant asserted that she was unable to perform the offered light-duty position as she could not climb stairs. Appellant noted that the only physician of record who found her able to climb stairs was Dr. Hom, who was a hand specialist. She submitted October 24 and 26, 2002 reports from Dr. Rudicel and an October 30, 2002 report from Dr. Koelbel prohibiting stair climbing.

The Office found a conflict of medical opinion between Dr. Dewire, for appellant, and Dr. Hom, for the government. It referred appellant, the medical record and a statement of accepted facts, to Dr. Forrest N. Maddix, a Board-certified orthopedic surgeon, for an impartial medical examination. In a December 5, 2002 report, Dr. Maddix provided a history of injury and treatment and reviewed the medical record. On examination, he found appellant unable to heel walk. Dr. Maddix observed a restricted range of right ankle motion and tenderness to palpation posterior to the medial malleolus. He stated that "[a]ny occupation which would require more than the minimal amount of walking or standing, or especially repeated stair climbing, should be avoided on an indefinite and probably permanent basis." Dr. Maddix found appellant capable of sedentary work "with occasional short walking and standing." He noted that there was no contraindication to appellant using public transportation.

The Office closed the field nurse intervention effort on April 30, 2003 as it appeared that appellant's wage-loss compensation benefits would soon be "terminated."

By decision dated May 12, 2003, the Office reduced appellant's compensation to zero under section 8113(b) of the Act on the grounds that her refusal of the May 2002 light-duty job offer constituted failure to participate in vocational rehabilitation without good cause. The Office noted that appellant's monetary compensation was reduced to zero as she failed to "undergo the essential preparatory effort of vocational rehabilitation" used to determine her wage-earning capacity.

Appellant requested an oral hearing, held December 16, 2003.[6] At the hearing, she asserted that, as the Office never offered her vocational rehabilitation services, it was erroneous to find that she refused to participate in vocational rehabilitation. She noted that the Office field

[6] Prior to the hearing, appellant submitted a June 11, 2003 report from Dr. Michael A. Ayers, an orthopedic surgeon, finding appellant capable of full-time light-duty work with limited walking, standing or climbing stairs.

nurse called her once a month to check on the status of the claim but had never met with her.[7] Following the hearing, appellant submitted a December 16, 2003 letter, again asserting that the Office never requested that she participate in vocational rehabilitation. She expressed her willingness to cooperate with vocational rehabilitation if the Office offered her such services.

By decision dated and finalized April 7, 2004, the Office hearing representative reversed the Office's May 13, 2003 decision, finding that the evidence did not support that appellant failed to cooperate with vocational rehabilitation. The hearing representative found that the Office improperly reduced appellant's wage-loss compensation benefits to zero "instead of developing whether or not she failed to accept suitable employment." The hearing representative directed that the Office reinstate appellant's compensation benefits.

In a May 12, 2004 email message, the Office requested that the director of the Office's Branch of Hearings and Review examine the Office hearing representative's April 7, 2004 decision. The Office noted that its procedures permitted terminating an employee's compensation under 5 U.S.C. § 8106(c) for refusing to accept suitable work. The director of the Office's Branch of Hearings and Review responded that the file should be "handed to [him]."

By decision dated and finalized June 18, 2004, the Office hearing representative affirmed the Office's May 13, 2003 decision, finding that the Office properly reduced her wage-loss compensation benefits to zero under section 8113(b) of the Act as she did not accepted the light-duty position offered to her in May 2002. The hearing representative found that appellant's refusal was "sufficient evidence that [she] failed to comply with vocational rehabilitation."

LEGAL PRECEDENT

Section 8104(a) of the Federal Employees' Compensation Act[8] 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.[9] 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

[7] At the hearing, appellant also alleged that the offered position was not within her medical restrictions as it required heavy lifting, stair climbing and walking. She submitted a chronology of her attempt at commuting from her home in Quincy to the site of the offered light-duty position in Brookline. Appellant noted that the journey took approximately one and a half hours, taking two public transit trains, climbing 68 steps and walking for 21 minutes.

[8] 5 U.S.C. § 8104(a).

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

employee to suitable employment.[10] 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.[11]

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.[12] Office procedures require that prior to reduction of compensation a claimant be notified of the provisions of section 8113(b) and provided an opportunity to either resume participation in vocational rehabilitation or provide reasons for not continuing participation.[13] Under section 8104 of the Act, and the employee's failure to willingly cooperate with vocational rehabilitation may form the basis for terminating the rehabilitation program and the reduction of monetary compensation.[14] In this regard, the Office's implementing 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:"
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> * * *
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> (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.
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> (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

[10] *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).

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

[12] 5 U.S.C. § 8113(b).

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

[14] *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).

> 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]."[15]

ANALYSIS

The Board finds that appellant's refusal of the light-duty job offer did not constitute a refusal to undergo vocational rehabilitation such that the Office could then reduce her compensation under section 8113(b) of the Act. In a June 18, 2004 decision, the Office found that appellant's refusal of the employing establishment's May 16, 2002 job offer constituted a "refusal to undergo vocational rehabilitation," justifying reduction of her monetary compensation to zero under section 10.519(c) of the applicable regulations. The Board notes, however, that while refusal of a light-duty job offer may result in sanctions under section 8106 of the Act,[16] it does not constitute a failure or refusal with the early or necessary stages of vocational rehabilitation under section 8113 of the Act and its implementing regulations.[17] The Office's application of section 8113 to reduce appellant's monetary compensation to zero was in error.

The Office's June 18, 2004 decision found that the employing establishment's May 16, 2002 light-duty job offer constituted vocational rehabilitation. However, there is no evidence of record of any vocational rehabilitation in this case. On March 7, 2002 the Office requested that the employing establishment formulate a job offer for appellant based on her current medical restrictions. The Office provided a copy of appellant's work restrictions but did not otherwise participate in formulating the job offer. The May 16, 2002 job offer was the product of the employing establishment. This distinction is critical as vocational rehabilitation is a function of the Office, not the employing establishment.[18] The Board has held that a light-duty job offer from the employing establishment, made in the absence of vocational rehabilitation by the Office, does not constitute vocational rehabilitation.[19]

The Board further finds that the activities of Ms. Gendron, the Office medical management field nurse, do not constitute vocational rehabilitation. The primary role of the Office field nurse, as described in the Office's procedures, is to attempt to "identify light or limited duty for the claimant" at the employing agency, with the goal of reemployment in the previous position.[20] The Office's procedures contemplate that such activities do not constitute

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[15] 20 C.F.R. § 10.519.

[16] 5 U.S.C. § 8106.

[17] *Rebecca L. Eckert*, 54 ECAB ___ (Docket No. 01-2026, issued November 7, 2002).

[18] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813 (April 1995). *See also Lawrence J. Anctil*, Docket No. 01-461 (issued November 8, 2002).

[19] *See Rebecca L. Eckert*, *supra* note 17.

[20] *Supra* note 18 at Chapter 2.813.6.b-g, "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).

vocational rehabilitation but may result in a referral to a vocational rehabilitation specialist for a formal vocational rehabilitation plan.[21] The Office's 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."[22] However, in this case, appellant's telephone conversations with Ms. Gendron concerned medical management, not vocational rehabilitation. Also, Ms. Gendron never met with appellant and there is no indication of record that she requested to do so. The nurse's telephone conversations do not constitute vocational rehabilitation.[23]

The Office did not assign Ms. Gendron to appellant's case until June 19, 2002, more than one month following the employing establishment's May 16, 2002 job offer. The nurse 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.[24] Ms. Gendron was directed only to provide medical management to return appellant to work at the employing establishment. The Office articulated this objective in its June 19 and 20, 2002 letters, stating that Ms. Gendron's assignment was to coordinate appellant's medical management and assist her in returning to full-time limited-duty work and eventually to full duty at the employing establishment. There is no mention of any plan to assess appellant's vocational skills, retrain her for a different occupation and assist her in finding work.

Thus, Ms. Gendron's 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.[25]

For these reasons, the Office failed to meet its burden of proof to reduce appellant's monetary compensation benefits. Therefore, the June 18, 2004 decision will be reversed.

CONCLUSION

The Board finds that the Office improperly reduced appellant's monetary compensation benefits to zero on the grounds that she did not cooperate with vocational rehabilitation, as the

[21] *Id*. at 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).

[22] 20 C.F.R. § 10.519(a) and (b).

[23] *Ruth E. Leavy*, 55 ECAB ___ (Docket No. 03-1197, issued January 27, 2004).

[24] *Supra* note 18 at Chapter 2.0813-6.b, "Placement with Previous Employer" (FECA Tr. No. 94-5, December 1993).

[25] *Ruth E. Leavy*, *supra* note 23.

record demonstrates that the May 16, 2002 job offer did not constitute vocational rehabilitation. On return of the case record, appellant's compensation should be reinstated.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 18, 2004 is reversed.

Issued: April 15, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member