

accepted that appellant sustained subluxation of lumbar vertebrae due to his work duties and paid compensation for total disability. Appellant returned to work for the employing establishment in late November 2003 and then stopped work on December 17, 2004 claiming that he sustained another back injury.¹ The Office accepted that appellant sustained a lumbar strain on December 17, 2004 and paid compensation for total disability.

On April 2, 2002 the Office informed appellant that it had assigned a registered nurse to help him recover from his work-related injury and to facilitate his return to full regular duty employment or his progression from limited-duty to full regular-duty employment. It noted that the nurse would “coordinate the medical aspects of your care” and facilitate the flow of information. The Office authorized a registered nurse, Joann Montgomery, to assist appellant in this process and indicated that she would be contacting him to arrange for a meeting.

Appellant began to communicate with Ms. Montgomery on a periodic basis. The Office referred appellant to Dr. Stephen K. Taylor, a physician Board-certified in preventive medicine and rehabilitation, who determined in a May 14, 2004 report, that appellant could return to work with restrictions on lifting.

In early June 2004 the employing establishment offered appellant a limited-duty position as a passenger screener, a position which had been approved by Dr. Taylor. Appellant did not accept the position and indicated that he was physically unable to perform its duties.

By letter dated June 16, 2004, the Office advised appellant that the limited-duty position was still available and stated, “You are undergoing [Office]-directed vocational rehabilitation efforts with a registered nurse. This allows your employer to offer you a temporary assignment pending further recovery from the work-related injury, of which you are required to accept.” The Office discussed 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 regarding the necessity of cooperating with vocational rehabilitation efforts. It further stated, “You are hereby directed to contact both me and the registered nurse within 30 days from the date of this letter to make a good faith effort to participate in the rehabilitation effort to return you to gainful employment.” The Office indicated that if appellant did not provide a good reason within 30 days for not participating in vocational rehabilitation, it would end the rehabilitation effort and reduce his compensation under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519. The Office noted that, unless contrary evidence was submitted, the Office would assume that vocational rehabilitation would have resulted in his return to work with no loss of wage-earning capacity and therefore his compensation would be reduced to zero.

In July 2004 the employing establishment modified its prior job offer to provide for physical job requirements that were less strenuous than those contained in the prior offer. The Office sent appellant a July 23, 2004 letter, containing instructions that were similar to those contained in its June 16, 2004 letter.² By letter dated September 22, 2004, the Office again

¹ Prior to his return to work, appellant met on several occasions, at the Office’s direction, with a registered nurse as part of an effort to return him to work.

² The Office subsequently provided appellant with additional time to show good cause for not accepting the position.

advised appellant that he was being granted a final 15 days to accept the limited-duty passenger screener position offered by the employing establishment without penalty. It indicated that if appellant did not accept the position within that period, the rehabilitation effort would end and his compensation would be reduced under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.

Appellant did not accept the offered position and continued to indicate that he was physically unable to perform its duties.

By decision dated October 13, 2004, the Office invoked 5 U.S.C. § 8113(b) and reduced appellant's compensation to zero effective October 13, 2004. The Office stated that appellant had "the opportunity to participate in a vocational rehabilitation effort with a registered nurse to return you to temporary assignment pending further recovery of your work-related injury; however, you elected not to accept the temporary assignment."³ The Office noted that appellant had been directed to make a good faith effort to participate in vocational rehabilitation efforts with a registered nurse. It stated that appellant was provided with an opportunity to comply or show good cause for not complying with such efforts, but that he did not contact the Office "for the purpose of participating in the rehabilitation effort with a registered nurse" and therefore did not show good cause for not complying. It indicated that, in the absence of contrary evidence, it was assumed that vocational rehabilitation would have resulted in appellant's return to work with no loss of wage-earning capacity.

LEGAL PRECEDENT

The Federal Employees' Compensation Act, in 5 U.S.C. § 8113(b) states:

"If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of this title, the [Office], 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 his wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the [Office]."⁴

Section 10.519(b) and (c) of the Office's regulation provides that, if a suitable position is not identified because of the failure or refusals to cooperate in the early but necessary stages of a vocational rehabilitation effort, *i.e.*, meeting with nurse, interviews, testing, counseling, functional capacity evaluations or work evaluations, then 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 will reduce compensation to zero. This reduction will remain in

³ The Office indicated that the medical evidence showed that appellant could perform the passenger screener job offered by the employing establishment.

⁴ 5 U.S.C. § 8113(b).

effect until such time as the employee acts in good faith to comply with the direction of the Office.⁵

Section 8104(a) of the Act⁶ 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 by which, an emphasis is placed on returning partially disabled employees to suitable employment and/or determining their wage-earning capacity.⁷ 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.⁸ Such efforts will be initially directed at returning the partially disabled employee to work with the employing establishment.⁹ 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.¹⁰

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 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.¹¹ 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

⁵ 20 C.F.R. § 10.519(b) and (c).

⁶ 5 U.S.C. § 8104(a).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.2 (August 1995).

⁸ *Id.* The Office’s regulation provides: “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).

⁹ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.3 (August 1995). The Office’s regulation 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.

¹⁰ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.3 (August 1995).

¹¹ 5 U.S.C. § 8113(b).

reduction of monetary compensation.¹² In this regard, the Office's implementing federal 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--

(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, 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 directions of [the Office].”¹³

ANALYSIS

The Office accepted a claim for subluxation of lumbar vertebrae and lumbar strain. In April 2002, the Office advised appellant that he had been assigned a field nurse, Ms. Montgomery, who was assigned to monitor appellant's medical status and progress and develop a medical management plan appropriate to the case. The Office's October 13, 2004 decision reduced appellant's compensation to zero on the grounds that he refused to cooperate with vocational rehabilitation efforts without good cause. It indicated that appellant's refusal to accept a limited-duty passenger screener position offered by the employing establishment, a

¹² See *Wayne E. Boyd*, 49 ECAB 202 (1997) (the employee failed to cooperate with the early and necessary stage of developing a training program).

¹³ 20 C.F.R. § 10.519.

position which was offered while he worked with Ms. Montgomery, constituted such a failure to cooperate with vocational rehabilitation efforts.

The Board finds that appellant's refusal to accept the offered position did not constitute a refusal to undergo vocational rehabilitation without good cause such that the Office could reduce his compensation under section 8113(b) of the Act. The Board notes that the refusal to accept the position did not constitute a failure or refusal with the early or necessary stages of vocational rehabilitation under section 8113 of the Act or the implementing regulations.¹⁴ The Office's application of section 8113 to reduce appellant's monetary compensation to zero was therefore in error.

The Office's decision appears to be premised on the supposition that the position offered by the employing establishment was developed in conjunction with a vocational rehabilitation effort, *i.e.*, the referral for nurse intervention to work with appellant's treating physician on a medical management plan in order to return to work. The Office decision therefore implicitly found that the nurse services constituted a vocational rehabilitation effort. The Board finds, however, that the record does not demonstrate that Ms. Montgomery was involved in a vocational rehabilitation effort.¹⁵

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 establishment, with the goal of reemployment in the previous position.¹⁶ This preliminary reemployment effort often occurs prior to the Office's determination of permanent disability, which would then allow for formal vocational rehabilitation. Such an effort does not provide the disabled worker any additional skills or training needed to reenter the labor market in a new position. The Office's procedures recognize this lack of vocational rehabilitation by stating that if the Office field nurse's attempts to return the disabled worker to limited duty at the employing establishment fail, the claimant may then be referred to a vocational rehabilitation counselor for services such as vocational testing including medical rehabilitation, work evaluations, vocational training, counseling, placement and follow-up services.¹⁷ The Office's procedures note that "at the end" of nurse services, the nurse may recommend a "limited referral" to a vocational rehabilitation specialist for placement services with the previous employer.¹⁸ The Office's procedures contemplate that field nurse intervention ends prior to referring the claimant to a vocational

¹⁴ See *Rebecca L. Eckert*, 54 ECAB ___ (Docket No. 01-2026, issued November 7, 2002).

¹⁵ *Id.*

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.6(b) (December 1993).

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.6(c)-(g) (December 1993).

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.5(c)(1) (November 1996).

rehabilitation specialist for a formal vocational rehabilitation plan.¹⁹ However, in this case there was never a referral for vocational rehabilitation; rather there was a referral for nurse intervention to work with appellant's treating physician on physical rehabilitation and medical management plans in which appellant would return to work. The first mention of vocational rehabilitation is the June 17, 2004 letter, in which the Office stated that appellant's refusal to accept the offered position was seen as a refusal to undergo vocational rehabilitation.

The Office's regulations characterize the field nurse as part of the early vocational rehabilitation process, but do not equate the assignment of the Office field nurse with vocational rehabilitation. At 20 C.F.R. § 10.519(b), the Office's regulation state that meetings with the Office field nurse are one of the "early but necessary stages of a vocational rehabilitation effort." Similarly, under 20 C.F.R. § 10.519(a), the regulation states that the "vocational rehabilitation planning process" includes meetings with the Office field nurse. However, as in this case, meetings with the Office field nurse could concern matters unrelated to vocational rehabilitation, such as medical management. Therefore, meetings with the Office field nurse do not automatically constitute vocational rehabilitation.

At 20 C.F.R. § 10.518(a), the Office's regulation states that "vocational rehabilitation services include assistance from" an Office field nurse, such as visiting the worksite, ensuring that the duties of the position do not exceed the medical limitations and addressing any problems the employee may have in adjusting to the work setting. However, the regulation does not specify when in the process such visits and investigations are to occur.²⁰ In this case, the nurse was directed to work with the treating physician on a physical rehabilitation plan for return to work and also to provide a medical management plan. The Office articulated this objective in its April 2, 2002 letter. There was no mention of any plan to assess appellant's vocational skills, retrain him for a different occupation and assist him in finding work. Additionally, there is no evidence that the 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.

The Board finds that the Office field nurse's activities were limited to the role set forth in the Office's procedures, *i.e.*, of attempting to return appellant to full duty at the employing establishment and medical management services, a preliminary reemployment effort which does not constitute vocational rehabilitation. Thus, this case can therefore be distinguished from those in which the claimant was referred to a vocational rehabilitation specialist²¹ and where the Board found that there was a vocational rehabilitation plan in effect.²² Therefore, appellant's failure to

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.5(c)(3)(a) (November 1996) (claimants can be referred for an occupational rehabilitation plan 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)."

²⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.6(b) (December 1993).

²¹ *Terrence E. Moore*, Docket No. 03-769 (issued August 26, 2003).

²² *Thomas C. Gilbert*, Docket No. 01-2125 (issued February 21, 2003).

accept the limited-duty passenger screener position offered by the employing establishment did not constitute a failure to undergo a vocational rehabilitation plan. The Office did not meet its burden of proof to reduce appellant's monetary compensation benefits.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to justify reducing appellant's compensation to zero under 5 U.S.C. § 8113(b).

ORDER

IT IS HEREBY ORDERED THAT the October 13, 2004 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 13, 2005
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member