United States Department of Labor
Employees' Compensation Appeals Board

JERRY HINOJOSA, Appellant	)	
and	)	**Docket No. 05-1952**
	)	**Issued: December 22, 2005**
DEPARTMENT OF VETERANS AFFAIRS, NATIONAL CEMETERY, Riverside, CA, Employer	)	

Appearances:
Jerrell E. Woolridge, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 20, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated July 14, 2005, denying modification of a September 9, 2003 decision reducing his wage-loss compensation benefits to zero for failure to cooperate with vocational rehabilitation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's wage-loss compensation benefits to zero under 5 U.S.C. § 8113(b) for failure to cooperate with vocational rehabilitation.

FACTUAL HISTORY

On April 28, 2003 appellant, then a 44-year-old cemetery caretaker, filed a traumatic injury claim alleging that he sustained pain in his stomach and back after lifting a 100-pound object. The Office accepted his claim for lumbar strain and a ventral hernia.

Appellant filed a second claim on May 14, 2003 alleging that he injured his left shoulder on April 28, 2003 when he fell after lifting the 100-pound object.

On June 6, 2003 the Office assigned appellant a case management nurse for medical management services. The Office stated that the nurse had been assigned to "assist you in your recovery from your work[-]related injury" and was to "assist in coordinating the medical aspects of your care and facilitating the flow of information between you, your doctors, your employer and the [Office]." In a June 6, 2003 letter to the nurse, the Office emphasized that his function was to provide "medical management services" as part of the nurse intervention program. On June 16, 2003 the nurse contacted appellant, who advised that he did not wish to be involved with medical management services.

By letter dated June 17, 2003, the Office informed appellant that refusal to cooperate with nurse intervention services was equivalent to refusing to cooperate with vocational rehabilitation services and his compensation could be reduced to zero. On June 24, 2003 the nurse noted that appellant was still unwilling to sign the consent form for medical management services.

The medical management nurse completed a report on July 6, 2003 stating that appellant was cooperating fully. On September 9, 2003 the nurse reported that appellant's representative had directed his attending physician and staff not to provide information to him. He placed the case in interrupted status.

By decision dated September 9, 2003, the Office reduced appellant's compensation benefits to zero under section 8113(b)[1] of the Federal Employees' Compensation Act on the grounds that he refused to cooperate with rehabilitation services.

By decision dated December 10, 2003, the Office denied appellant's claim for a left shoulder injury.

On May 19, 2004 appellant requested reconsideration of the December 10, 2003 decision.[2] He also requested reconsideration of the September 9, 2003 Office decision which reduced his compensation benefits to zero.

By decision dated August 17, 2004, the Office denied appellant's request for reconsideration of the September 9, 2003 decision.

[1] 5 U.S.C. § 8113(b).

[2] The Office has not issued a final decision addressing this request for reconsideration. Therefore, the Board may not consider this issue on appeal. 20 C.F.R. § 501.2(c).

In an April 7, 2005 decision, the Board remanded the case for further merit review.[3] By decision dated July 14, 2005, the Office denied modification of its September 9, 2003 decision.[4]

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden to support that the disability has ceased or lessened before it may terminate or modify compensation benefits.[5]

Section 8104(a) of the Act[6] 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]

[3] *See* Docket No. 05-200 (issued April 7, 2005).

[4] Appellant submitted additional evidence subsequent to the July 14, 2005 decision. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board has no jurisdiction to consider this evidence for the first time on appeal.

[5] *See Kevin M. Fatzer,* 51 ECAB 407 (2000).

[6] 5 U.S.C. § 8104(a).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services,* Chapter 2.813 (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 employees' demonstrated commuting area, the employees' qualifications to perform such work and other relevant factors." 20 C.F.R. § 10.500(b).

[9] *See supra* note 7. Chapter 2.813.3 (August 1995). The Office's regulation provides: "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 supra* note 7 at Chapter 2.813.3.

The 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]."[11]

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.[12] 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 --
>
> > (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

[11] 5 U.S.C. § 8113(b).

[12] *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 stage of developing a training program).

> 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]."[13]

ANALYSIS

The Office accepted appellant's claim for a lumbar strain and a ventral hernia. By letter dated June 6, 2003, the Office advised him that he had been assigned a case management nurse. The intervention nurse was assigned to monitor appellant's medical status and progress and assist in coordinating the medical aspects of his care and facilitating the flow of information between appellant, his doctors, the employing establishment and the Office. The Office's September 9, 2003 decision reduced appellant's compensation to zero on the grounds that his refusal to cooperate with field nurse services constituted a refusal to undergo vocational rehabilitation without good cause.

The Board finds that appellant's refusal to cooperate with the nurse intervention program and medical management plan of the nurse 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 Office found that appellant's refusal to cooperate in the medical management plan constituted a refusal to undergo vocational rehabilitation, justifying reduction of his monetary compensation under section 10.519(c) of the Office's regulations. The Board notes, however, that refusal to cooperate in the medical management plan did not constitute a failure or refusal to cooperate with the early or necessary stages of vocational rehabilitation under section 8113 of the Act or the implementing regulations. The Office's application of section 8113 to reduce appellant's monetary compensation to zero was, therefore, in error.

The Office's decision is premised on the June 6, 2003 referral for nurse intervention. The Office decision finds that the nurse services constituted a vocational rehabilitation effort. The Board finds, however, that the record does not demonstrate that the Office field nurse was involved in a vocational rehabilitation effort.

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.[14] 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, medical rehabilitation, work evaluations, vocational training, counseling,

[13] 20 C.F.R. § 10.519.

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.6(b)-(g) (November 1996).

placement and follow-up services.[15] 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.[16] The Office's procedures contemplate that field nurse intervention ends prior to referring the claimant to a vocational rehabilitation specialist for a formal vocational rehabilitation plan.[17] However, in this case, there was never a referral for vocational rehabilitation; rather, there was a referral for nurse intervention to work with appellant on physical rehabilitation to facilitate his return to work. The first mention of vocational rehabilitation is the June 17, 2003 letter in which the Office stated that his refusal to cooperate with the field nurse 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 states 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 Office's regulations 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 regulations provides that vocational rehabilitation services include assistance from an Office field nurse, such as visiting the work site, ensuring that the duties of the position do not exceed medical limitations and addressing any problems the employee may have in adjusting to the work setting. However, the regulations do not specify when in the process such visits and investigations are to occur.[18] In this case, the nurse was directed to work with appellant on a physical rehabilitation plan to facilitate his return to work. The Office articulated these objectives in the June 6, 2003 letter, indicating that the nurse would "assist you in your recovery from your work[-]related injury" and "in coordinating the medical aspects of your care and facilitating the flow of information between you, your doctors, your employer and the [Office]." In the June 6, 2003 letter to the nurse, the Office emphasized that his function was to provide "medical management services." There is no mention of any plan to assess appellant's vocational skills, retrain him for a different position and assist him in finding work.

The Board finds that the field nurse's activities were limited to the role set forth in the Office's procedures, *i.e.*, of attempting to return appellant to work at the employing establishment and providing medical management services, a preliminary reemployment effort

[15] *Id.* at Chapter 2.813.6(c)-(g).

[16] *Id.* at Chapter 2.813.5(c)(1) (November 1996)

[17] *Id.* at Chapter 2.813.5(c)(3) (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").

[18] *Id.* at Chapter 2.813.5(c).

which does not constitute vocational rehabilitation as contemplated by the Act, the implementing regulations or the Office's procedures.[19] Consequently, the Office did not meet its burden of proof in reducing appellant's monetary compensation benefits.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof in reducing appellant's monetary compensation to zero on the grounds that he did not cooperate with vocational rehabilitation.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 14, 2005 is reversed.

Issued: December 22, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[19] *See Marilou Carmichael*, 56 ECAB __ (Docket No. 04-2068, issued April 15, 2005); *Ruth E. Leavy*, 55 ECAB __ (Docket No. 03-1197, issued January 27, 2004).