

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

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A.T., Appellant )

and )

U.S. POSTAL SERVICE, SOUTHERN )  
MARYLAND GENERAL MAIL FACILITY, )  
Capitol Heights, MD, Employer )

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**Docket No. 07-1270**

**Issued: September 26, 2007**

*Appearances:*

*Appellant, pro se*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge

MICHAEL E. GROOM, Alternate Judge

JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 9, 2007 appellant filed a timely appeal from a June 27, 2006 merit decision of the Office of Workers' Compensation Programs, reducing her compensation to zero for failing 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 monetary compensation to zero under 5 U.S.C. § 8113(b) effective May 26, 2006 on the grounds that she did not cooperate with vocational rehabilitation.

**FACTUAL HISTORY**

On April 14, 1989 appellant, then a 25-year-old manual clerk, filed a traumatic injury claim. She hurt her hip on that date as a result of negligent behavior of a forklift driver.

Appellant stopped work on April 15, 1989. By letter dated May 5, 1989, the Office accepted her claim for a bruised lumbar region and right buttock. Appellant returned to work on July 5, 1989.

On July 17, 1991 appellant filed a traumatic injury claim alleging that on July 16, 1991 she hurt her lower back and both sides of her buttocks when she dropped sacks of mail. She stopped work on July 17, 1991. By letter dated October 2, 1991, the Office accepted appellant's claim for low back strain. Appellant returned to limited-duty work on November 19, 1991.

On September 17, 1992 appellant filed a claim alleging that she sustained a recurrence of disability on July 31, 1992 causally related to her July 16, 1991 employment injury. The Office accepted her claim for lumbar disc rupture at L5-S1 and lumbar radiculopathy.

On December 14, 2000 appellant alleged that she sustained a recurrence of disability on November 6, 2000 due to her July 16, 1991 employment injury. She did not return to work. Dr. Eric G. Dawson, an attending orthopedic surgeon, found that appellant continued to experience symptoms of her employment-related injuries and that she was totally disabled for work.

By letter dated February 7, 2005, the Office referred appellant to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for a second opinion medical examination. In a March 16, 2005 medical report, Dr. Smith provided a history of appellant's April 14, 1989 and July 16, 1991 accepted employment-related injuries, recurrences of disability and medical treatment. He reviewed the results of magnetic resonance imaging (MRI) scans and reported essentially normal findings on physical and neurological examination. Dr. Smith opined that appellant's April 14, 1989 employment injuries had resolved and that she had reached maximum medical improvement. He further opined that she did not sustain a herniated disc at L5-S1 due to the July 16, 1991 employment incident because a subsequent film from September 1992 showed a degenerative disc of long-standing nature which caused no high-grade stenosis. Dr. Smith stated that appellant had a normal neurologic examination that showed no objective evidence of chronic radiculopathy. He concluded that there was no objective evidence that appellant had any ongoing residuals of her accepted employment-related injuries. Dr. Smith further concluded that she could return to regular-duty work without restriction and that she was capable of participating in vocational rehabilitation.

On May 12, 2005 the Office referred appellant for vocational rehabilitation based on Dr. Smith's March 16, 2005 report. Beginning August 1, 2005, appellant routinely met with her assigned rehabilitation counselor when requested. She also maintained regular communications with her counselor but from the outset of the rehabilitation process, she stated that her attending physician opined that she should refrain from performing her previous work duties and that Dr. Smith's opinion was incorrect. On January 4, 2006 the Office authorized the vocational rehabilitation counselor to develop an employment plan with a new employer because the employing establishment could not offer appellant suitable work based on her medical restrictions. Appellant underwent vocational testing and computer training in accordance with her rehabilitation counselor's instructions.

On April 5, 2006 Barbara A. Monroe, a vocational rehabilitation counselor, advised the Office that a training rehabilitation plan had been completed and that appellant had refused to

sign it. Appellant stated that she should be given a position at the employing establishment. Ms. Monroe advised her about her physical limitations, work experience, the need for new skills and the employing establishment's inability to provide her with employment. Appellant stated that she did not want to take a position that paid half her previous wages. Ms. Monroe referred her to the Office's website to read its explanation on how her compensation would be affected. Appellant agreed to read the information but contended that her standard of living would be impacted greatly. Ms. Monroe recommended that the Office send a letter of obstruction to appellant due to her refusal to sign the training rehabilitation plan.

On April 10, 2006 Ms. Monroe again advised the Office that appellant obstructed the reasonable development of vocational rehabilitation procedures by refusing to commit to the vocational rehabilitation plan. She recommended that the Office send appellant a warning letter outlining her responsibility to cooperate and to provide a good faith effort to undergo job placement and the sanctions that may be placed on her compensation for failing to cooperate.

By letters dated April 13 and May 3, 2006, the Office advised appellant of the consequences under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 for failing without good cause to participate in vocational rehabilitation. Appellant was afforded 30 days to provide justification for her failure to continue participating in the Office-approved job placement program.

In a May 24, 2006 letter, appellant denied that she refused to cooperate with the vocational rehabilitation plan. She contended that the problem with the plan was that it did not offer her gainful employment, noting that the salary of the offered jobs was less than her previous pay. Appellant further contended that Dr. Smith's report contradicted the findings of her attending physician. She stated that he made no attempt to correspond with her physician regarding her medical condition or to deliver the results of his examination to his office. Appellant alleged that Dr. Smith was currently under investigation by the Board of Physicians Quality Assurance and the Office of the Attorney General.

In reports dated May 2 and 18, 2006, Dr. Dawson found that appellant continued to experience symptoms of her work-related back injury based on diagnostic test results and that she could not return to work. He disagreed with Dr. Smith's findings, contending that his opinion was not substantiated. Dr. Dawson stated that it was incomprehensible that Dr. Smith did not provide any findings or comments regarding the diagnostic test results yet, he cleared appellant to return to work. He contended that Dr. Smith's opinion was not substantiated by medical rationale. Dr. Dawson had severe reservations about appellant returning to workplace duties.

On June 14, 2006 appellant advised the Office that her vocational rehabilitation counselor gave her incorrect information and did not explain that the Office would pay the difference in pay after she returned to work in a lower paying position. She stated that she would not sign the training form because it did not explain this clearly. Appellant repeated disagreement with Dr. Smith.

By decision dated June 27, 2006, the Office reduced appellant's wage-loss compensation on the grounds that she refused to participate in the vocational rehabilitation program. It found that had appellant participated in good faith in vocational rehabilitation she would have returned

to work at the same or higher wages than the position she held at the time of injury. The Office, therefore, reduced her compensation to zero, effective May 26, 2006.

### **LEGAL PRECEDENT**

Section 8104(a) of the Federal Employees' Compensation Act<sup>1</sup> pertains to vocational rehabilitation and provides that "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.<sup>2</sup> 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.<sup>3</sup>

Section 8113(b) of the Act further provides that, "[i]f 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."<sup>4</sup> 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.<sup>5</sup> Under section 8104 of the Act, 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.<sup>6</sup>

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<sup>1</sup> 5 U.S.C. § 8104(a).

<sup>2</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813 (August 1995).

<sup>3</sup> *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).

<sup>4</sup> 5 U.S.C. § 8113(b).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11b (November 1996).

<sup>6</sup> *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).

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:"

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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.

(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]."<sup>7</sup>

### ANALYSIS

Dr. Dawson, an attending physician, found that appellant had residuals of her April 14, 1989 and July 16, 1991 employment-related injuries and that she was totally disabled. However, he did not provide any medical rationale explaining how or why appellant's residuals and resultant disability were causally related to her accepted employment injuries.

The Office referred appellant to Dr. Smith, for a second opinion medical examination. Dr. Smith provided a history of appellant's accepted employment injuries, reviewed diagnostic test results and reported essentially normal findings on physical and neurological examination. He opined that there was no objective evidence establishing that appellant had any residuals of her accepted employment-related injuries. Dr. Smith further opined that she could perform her regular work duties and was capable of participating in vocational rehabilitation. The weight of the medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.<sup>8</sup> Dr. Smith fully discussed the history of injury and explained that there were no objective findings to establish that appellant had any continuing employment-related residuals or disability and, thus, she was able to perform her regular work duties and she could participate in

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<sup>7</sup> 20 C.F.R. § 10.519; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11a (November 1996).

<sup>8</sup> *See Ann C. Leanza*, 48 ECAB 115 (1996).

vocational rehabilitation. The Board, therefore, finds that Dr. Smith's opinion is detailed, well rationalized and based upon a complete and accurate history. His opinion represents the weight of the medical opinion evidence in finding that appellant is not totally disabled from employment.

Based on Dr. Smith's March 16, 2005 report, the Office referred appellant to vocational rehabilitation. On April 5, 2006 she refused to sign a rehabilitation plan. Appellant told Ms. Monroe, a vocational rehabilitation counselor, that she wanted a position at the employing establishment and that she did not want to take a position that paid her half her previous wages. Although appellant agreed to read the information regarding how her wages would be impacted on the Office's website as advised by Ms. Monroe, she stated that her standard of living would be impacted greatly by accepting a lesser paying job. Ms. Monroe recommended that the Office issue a letter of obstruction to appellant due to her refusal to sign the rehabilitation plan. On April 10, 2006 she again advised the Office that appellant had refused to sign the rehabilitation plan. Ms. Monroe recommended that the Office issue a warning letter to appellant regarding her responsibility to cooperate and provide a good faith effort to undergo job placement and the sanctions to be imposed on her compensation. In letters dated April 13 and May 3, 2006, the Office noted appellant's refusal to cooperate with vocational rehabilitation and informed her that she had 30 days to participate in such efforts or provide good cause for her refusal. It notified her that her compensation would be reduced if she did not comply with its instructions. In a response dated May 24, 2006, appellant denied that she refused to cooperate with the vocational rehabilitation plan. She contended that the plan did not provide gainful employment because the salaries of the offered jobs were less than her previous pay. Appellant further contended that Dr. Smith's opinion contradicted Dr. Dawson's opinion. She noted that Dr. Smith made no attempt to correspond with Dr. Dawson or to provide him with the results of his examination. Appellant indicated that Dr. Smith was currently under investigation by the Board of Physicians Quality Assurance and the Attorney General's office. On June 14, 2006 she stated that her counselor gave her incorrect information and did not explain that the Office would pay the difference in her pay after she returned to work in a lower paying position. Appellant did not sign the plan because it failed to clearly explain the Office's payment policy.

The Board finds that appellant's contention that her standard of living would be greatly impacted if she signed the rehabilitation plan for a position that paid less than her previous position and that neither the rehabilitation plan nor Ms. Monroe clearly explained the Office's payment of compensation based on her loss of wage-earning capacity in a new position do not constitute good cause for her failure to participate in vocational rehabilitation. Ms. Monroe directed appellant to review this information on the Office's website which explained how her wages would be impacted but she failed to do so. Appellant's statement that Dr. Smith was being investigated does not constitute good cause for her failure to participate in vocational rehabilitation. There are no investigative findings of record establishing that Dr. Smith committed any wrongdoing. Although Dr. Smith's opinion regarding appellant's ability to perform her regular work duties and participate in vocational rehabilitation differs from that of Dr. Dawson, his opinion constitutes the weight of the medical opinion evidence.

Appellant submitted Dr. Dawson's reports dated May 2 and 18, 2006 and his treatment note dated May 18, 2006. Dr. Dawson's reports and treatment note are insufficient to meet appellant's burden of proof to show good cause for failing to participate in vocational

rehabilitation. Although this evidence found that appellant continued to experience residuals of her employment-related injuries and that she was disabled for work, Dr. Dawson did not provide any medical rationale explaining how or why her residuals and resultant disability were causally related to her April 14, 1989 and July 16, 1991 employment injuries. Further, he has not adequately explained the basis for his conclusion that vocational rehabilitation would not benefit appellant in view of Dr. Smith's findings. Additionally, Dr. Dawson's finding that appellant could potentially be harmed by her return to work is a fear of future injury which is not compensable under the Act.<sup>9</sup> Consequently, his reports and treatment note are insufficient to overcome the weight accorded Dr. Smith's opinion.

Appellant failed to cooperate in the early stages of vocational rehabilitation. The Act's implementing regulation provides that, when an employee fails to participate in vocational rehabilitation, it cannot be determined what his or her wage-earning capacity would have been had there been no failure to participate.<sup>10</sup> It is thus assumed, absent evidence to the contrary, that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity.<sup>11</sup> Appellant did not submit any evidence to refute this assumption. The Office therefore properly found that she had no loss of wage-earning capacity and reduced her monetary compensation to zero.

### **CONCLUSION**

The Board finds that the Office properly reduced appellant's monetary compensation to zero under 5 U.S.C. § 8113(b) of the Act effective May 26, 2006 on the grounds that she did not cooperate with the preliminary stages of vocational rehabilitation.

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<sup>9</sup> See *Manuel Gill*, 52 ECAB 282 (2001).

<sup>10</sup> 20 C.F.R. § 10.519(b).

<sup>11</sup> *Id.* at § 10.519(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 27, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 26, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board