United States Department of Labor
Employees' Compensation Appeals Board

D.K., Appellant	)	
and	)	**Docket No. 07-1671**
	)	**Issued: November 7, 2008**
DEPARTMENT OF LABOR, OFFICE OF ADMINISTRATIVE LAW JUDGES, West Covina, CA, Employer	)	

Appearances:
Hank Royal, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 12, 2007 appellant timely appealed the March 26, 2007 merit decision of the Office of Workers' Compensation Programs, which denied modification of the hearing representative's March 30, 2006 decision.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office properly suspended all wage-loss compensation from December 28, 2004 to January 4, 2005 for failure to cooperate in vocational rehabilitation; and (2) whether the Office properly reduced appellant's wage-loss compensation effective August 7, 2005 because of her failure to fully participate in vocational rehabilitation.

[1] The hearing representative affirmed two Office decisions that reduced appellant's compensation because of a failure to participate in vocational rehabilitation.

FACTUAL HISTORY

Appellant, a 68-year-old legal technician, has two accepted claims. On or about December 1, 2001 she sustained an employment-related cervicobrachial strain (File No. xxxxxxx691). Appellant sustained another work-related injury on August 9, 2002, when she stumbled and fell while arising from her desk. She stopped work following the August 9, 2002 injury. The Office initially accepted appellant's August 9, 2002 traumatic injury for right ankle sprain and right ankle contusion, but later expanded the claim to include lumbar sprain (File No. xxxxxx349).[2] Appellant also sustained a consequential injury on September 13, 2002 when she fell at home, fracturing the third toe on her left foot. The Office placed her on the periodic compensation roll.

A conflict arose concerning appellant's ability to return to work. Therefore, the Office referred her to Dr. David Wren, Jr., a Board-certified orthopedic surgeon, for an impartial medical evaluation. In a report dated June 4, 2004, Dr. Wren found that appellant's right ankle sprain, lumbar sprain and third left toe fracture had resolved. However, there was evidence of right ankle tenosynovitis and traumatic severe osteoarthritis, which he believed was aggravated by the August 9, 2002 employment injury. Dr. Wren also diagnosed cervical disc disorder with spondylosis, cervical radiculitis and right shoulder impingement and capsulitis. Additionally, he believed that appellant's cervicobrachial had not yet resolved. With respect to appellant's lumbar spine, Dr. Wren diagnosed multilevel disc bulging, degeneration and facet joint arthritis. He also noted L5 and S1 nerve root radiculopathy. According to Dr. Wren, appellant's current back, neck, right shoulder and bilateral arm and hand problems were exacerbated by the August 9, 2002 employment injury.

Dr. Wren advised that appellant could not perform the full duties of her date-of-injury position. However, appellant was capable of performing modified duties.[3] Dr. Wren recommended a workplace accommodation that would permit the use of a four-wheel walker and a motorized scooter.[4] He also noted that, if the scooter did not fit appellant's workstation, then she should be able to transfer to an ergonomic chair. Dr. Wren recommended that appellant begin working four hours a day, three days per week. After three to four weeks, he proposed increasing appellant's work week to five days, while continuing a four-hour workday. Dr. Wren indicated that these time limitations should remain in effect for another four to six weeks, at which point appellant would be reevaluated by her treating physician to ascertain whether her workday could be increased beyond four hours.

[2] Appellant previously fractured her right ankle in 1995, which required surgical intervention. She also had a prior history of lumbar degenerative disc disease.

[3] Dr. Wren submitted a June 21, 2004 work capacity evaluation (Form OWCP-5c) outlining appellant's numerous and varied physical limitations.

[4] Appellant utilized a four-wheel walker at the time of her June 4, 2004 examination. The Office authorized both a four-wheel walker and a motorized scooter in October 2002. However, appellant had been without a motorized scooter since June 2003 when she returned it to the medical supply company because it was in need of repair. Since that time appellant and her treating physician tried unsuccessfully to gain authorization from the Office for a replacement scooter.

In August 2004, the Office advised the employing establishment of Dr. Wren's recent findings. It also assigned a field nurse on August 23, 2004. On September 2, 2004 the employing establishment offered appellant a modified job as a legal assistant in accordance with Dr. Wren's findings. The job offer included worksite accommodations for a four-wheel walker and a motorized scooter. Appellant declined the offer on September 14, 2004. By letter dated September 30, 2004, the Office informed appellant that it considered the September 2, 2004 part-time, modified legal assistant job offer suitable, and advised appellant that she had 30 days to accept the position or provide a written explanation for her refusal.[5]

Since being assigned the case on August 23, 2004, the field nurse had not met or spoken directly with appellant. But she had spoken with appellant's husband. On September 30, 2004 the Office advised appellant to contact the assigned field nurse so that arrangements could be made to obtain a motorized scooter. It explained that the scooter would not be authorized until appellant met with the nurse and occupational therapist at a medical supply company. According to the Office, this proposed meeting was necessary to "determine the basic, unadorned motorized scooter meeting [appellant's] particular needs." It instructed appellant to contact the field nurse within 10 days otherwise her inaction might be construed as a failure to cooperate in the rehabilitation process.

On October 9, 2004 appellant's husband telephoned the field nurse and also wrote her a letter on his wife's behalf. The letter advised of an upcoming appointment with appellant's treating physician. It also noted that appellant's walker had recently been stolen and, therefore, she would need another walker and a cane before she could attend a meeting at the medical supply store.

On November 16, 2004 appellant sent a fax to the field nurse regarding an appointment appellant scheduled with a medical supply vendor (MedSolutions) for noon on Thursday, November 18, 2004. Appellant indicated that she found a vendor with four-wheel motor scooters and walkers. She further noted that the vendor was able to attach a hitch to the car to carry the motor scooter. Appellant asked the field nurse to meet her and her husband at the vendor's Brentwood, CA location. In a brief reply, also sent via fax, the field nurse stated she was unable to meet appellant because she had "20 other appointments."[6]

On November 23, 2004 the Office advised appellant that she had not complied with the instructions given her on September 30, 2004. It further noted that appellant's actions were construed as a refusal to cooperate with nurse intervention, and by association, the vocational rehabilitation efforts of the Office. Appellant was given 10 days to telephone the field nurse.[7] The Office further noted that the field nurse would arrange a date and time to meet with the

[5] Because of a technical error, the Office reissued the suitability determination on October 19, 2004.

[6] In a follow-up letter dated November 24, 2004, the field nurse stated that appellant's November 16, 2004 request did not provide sufficient time to coordinate a meeting among three individuals. The field nurse also indicated that the Brentwood, CA facility was a two-hour drive from her San Francisco office and, therefore, she would have to set aside a five-hour block in her schedule to assist with the purchase of the motorized scooter. No further mention was made of the "20 other appointments."

[7] The claims examiner specifically noted that the call was not to be made by appellant's husband.

occupational therapist at a medical supply company enrolled in the program. Appellant was also told that because she was "not working and ... [was] receiving compensation, [she] must be available to meet at the earliest convenience of the field nurse and occupational therapist." The Office warned appellant that, if she did not comply within the designated time frame, the rehabilitation efforts would end and her compensation would be reduced accordingly.

On November 26, 2004 appellant spoke with the field nurse via telephone. On November 29, 2004 appellant, her husband and the field nurse met in a restaurant parking lot in San Pablo, CA. The field nurse interviewed appellant in the back seat of an automobile because of appellant's difficulty ambulating. On December 2, 2004 the field nurse contacted appellant to schedule a meeting with MedSolutions for December 13, 2004. She followed up their conversation with a letter confirming the December 13, 2004 appointment.

Appellant fell at home on December 4, 2004, and according to her husband, she was heavily medicated and not coherent enough to meet with the field nurse. Appellant's husband went to MedSolutions on Saturday, December 11, 2004, where he learned from a store representative that a meeting had been scheduled for Monday, December 13, 2004. Because he was unavailable that Monday, appellant's husband cancelled the December 13, 2004 appointment and tentatively rescheduled for either Saturday, December 18, 2004 or Monday, December 20, 2004. Appellant's husband explained that his attendance and input was necessary because the mobile home park where he and his wife resided had numerous restrictions regarding exterior modifications to the property that might impact the selection of particular equipment.

The field nurse advised the Office that she was unavailable for either of the two December 2004 dates proposed by appellant's husband. She then left it to MedSolutions to schedule a meeting with appellant. After several failed attempts, the vendor reached appellant's husband by telephone on December 16, 2004. At that time he advised the vendor that his wife would not be available on either December 18 or 20, 2004. On December 21, 2004 appellant's husband called MedSolutions and advised that he was having difficulty reaching the assigned occupational therapist. The vendor's representative indicated that the occupational therapist's participation was unnecessary.[8] Appellant's husband asked if it was possible to meet on January 10, 11 or 12, 2005. The vendor was amenable to meeting with appellant on those dates.

The time allotted for nursing services (120 days) expired and the field nurse issued a closure report on December 27, 2004.

On December 28, 2004 the Office reduced appellant's wage-loss compensation to zero because of her refusal to cooperate with "nurse services." Compensation was reduced to zero because, as the Office explained, it was not in a position "to determine what would have been [appellant's] wage-earning capacity had [she] in fact undergone the rehabilitation effort."

Appellant met with the medical supply vendor at her home on January 5, 2005. The MedSolutions representative took measurements of appellant's home and submitted a quote to the Office on January 18, 2005. With only slight modification, the Office approved the items

[8] The record indicates that the occupational therapist was unavailable until January 10, 2005.

appellant selected. On January 21, 2005 the Office informed MedSolutions of its authorization of a four-wheel motorized scooter, rolling walker, scooter lift and vehicle hitch.

The Office reinstated appellant's monetary compensation retroactive to January 5, 2005.

Because of a disagreement between appellant's husband and the vendor regarding equipment delivery and installation services, MedSolutions advised the Office on February 22, 2005 that it was cancelling appellant's order.[9] On March 10, 2005 the Office advised appellant that it had to find a new equipment vendor.

On April 1, 2005 the Office assigned a rehabilitation counselor to the case. The counselor's specific mandate was to "coordinate the assessment and purchase" of a four-wheel walker, motorized scooter and ergonomic chair. The walker was designated as appellant's property and the motorized scooter and ergonomic chair were designated as property of the employing establishment and were to remain at appellant's worksite. The Office advised appellant on May 2, 2005 that the motorized scooter would remain at the workplace, and therefore, housing and vehicle modifications were no longer necessary. However, the four-wheel walker would be available for use both at home and at work.

On May 9, 2005 the employing establishment extended another job offer to appellant. It was the same part-time, modified legal assistant position appellant received on September 2, 2004. The offer did not specify a start date, however, appellant was instructed to respond by May 23, 2005. Appellant signed and accepted the position on May 10, 2005, but waited another 10 days before mailing her acceptance to the employing establishment.

On May 23, 2005 the rehabilitation counselor wrote appellant asking that she contact her immediately to schedule a mutually convenient appointment time. She noted appellant's recent acceptance of the job offer and explained that she had been unable to contact appellant.[10] The counselor's stated objective for the meeting was to "verify necessary equipment properties[,] coordinate a worksite evaluation, and ... ensure a smooth transition back to work."

On May 26, 2005 the Office authorized the rehabilitation counselor to select the equipment she deemed most appropriate. Over the next two-week period the rehabilitation counselor selected and arranged delivery for a motorized scooter, ergonomic chair and four-wheel walker. The first two items were scheduled for delivery at the employing establishment. However, the four-wheel walker was to be shipped to appellant's street address in San Pablo, CA, which the rehabilitation counselor obtained from the employing establishment. But unbeknownst to both the employing establishment and the rehabilitation counselor, appellant had sold her mobile home in San Pablo, CA on or about May 22, 2005.

[9] Appellant's husband was under the impression that modifications would be made to their mobile home to accommodate the motorized scooter. However, these particular services were not part of the quote MedSolutions forwarded to the Office in January 2005.

[10] Appellant's telephone had been disconnected. The May 23, 2005 letter was mailed to appellant's P.O. Box in San Pablo, CA.

On June 15, 2005 the rehabilitation counselor wrote to appellant at the San Pablo, CA street address obtained from the employing establishment. She advised appellant that the necessary equipment had been selected based on height and weight information obtained from Dr. Wren's June 2004 report. The counselor also noted that the motorized scooter and ergonomic chair were being delivered to the worksite and the four-wheel walker was to be delivered to the San Pablo, CA street address. In closing, the counselor remarked that the rehabilitation process would operate much more smoothly with appellant's voluntary participation, but it would nonetheless continue to advance without appellant's direct input.

After an unsuccessful attempt to deliver the four-wheel walker, the Office learned on June 17, 2005 that appellant no longer resided at the mobile home park in San Pablo, CA. Appellant was reportedly touring the country with her husband in their fifth-wheel trailer.

The motorized scooter and the four-wheel walker were delivered to the employing establishment in late-June 2005. The ergonomic chair arrived approximately one month later.

The Office wrote appellant on June 20, 2005 regarding her lack of cooperation with the rehabilitation counselor. It specifically noted that appellant had not responded to either the May 23 or June 15, 2005 letters from the rehabilitation counselor. The Office was further noted that the rehabilitation counselor had been unable to reach appellant by telephone as her number had been disconnected. Appellant was warned that her compensation could be reduced for failure to participate in vocational rehabilitation. She was given 30 days within which to contact both the claims examiner and the rehabilitation counselor.

Appellant contacted the Office on several occasions in July 2005 regarding her medical insurance coverage and she provided a telephone number where she could be reached. However, she did not contact the rehabilitation counselor.

Appellant also contacted the employing establishment on July 29, 2005 concerning her return to work. That same day the employing establishment sent appellant a letter advising her that all the necessary equipment was in place and that she should report for duty on August 8, 2005.

On August 2, 2005 the Office reduced appellant's compensation for her refusal to participate in vocational rehabilitation. It noted that appellant had not responded to its June 20, 2005 letter and she had not demonstrated good cause for her failure to comply. Appellant's compensation was reduced based on her earning potential as a part-time, modified legal assistant. The reduction was effective close of business on August 6, 2005.[11]

Appellant called the Office on August 5, 2005 inquiring about whether the rehabilitation counselor could meet her at her dentist's office on August 9, 2005. She also advised the Office that she would not be reporting to work because she did not have transportation. On August 8, 2005 the claims examiner attempted to reach appellant at the telephone number she had provided, but was unsuccessful. The Office then sent appellant a letter advising her to contact

[11] The Office made a slight computation error regarding appellant's new compensation rate. Accordingly, an amended decision was issued on August 5, 2005.

the rehabilitation counselor. It also indicated that the rehabilitation counselor was available to arrange transportation to work.

Appellant did not report to work on August 8, 2005 because of an alleged abscessed tooth she planned on having extracted on August 9, 2005. The employing establishment extended appellant's report date until August 10, 2005. Upon her return to work appellant was expected to provide the employing establishment medical documentation for her absence on August 8 and 9, 2005. Appellant did not report to work on August 10, 2005. She relocated to Albuquerque, NM and advised the Office of her new mailing address several months later. The Office instructed the rehabilitation counselor to close the case effective February 9, 2006.

Appellant requested a review of the written record regarding the December 28, 2004 and August 5, 2005 decisions. By decision dated March 30, 2006, the Office hearing representative affirmed both decisions.

On December 26, 2006 appellant requested reconsideration. Her representative argued that the services provided by the field nurse and rehabilitation counselor did not constitute vocational rehabilitation. Counsel specifically noted that the rehabilitation counselor's April 1, 2005 assignment was limited to coordinating the assessment and purchase of a four-wheel walker, motorized scooter and ergonomic chair. He argued that these particular services were not traditional vocational rehabilitation services as identified under the applicable regulations.

Appellant subsequently participated in an Office directed medical examination. In a February 12, 2007 report, Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon and Office referral physician, found that all of appellant's accepted conditions had resolved.[12]

By decision dated March 26, 2007, the Office denied modification of the hearing representative's decision. In response to appellant's argument that she had not received vocational rehabilitation services, the Office explained that there was no "need for [appellant] to undergo vocational testing, training, development of a placement plan (sic) as a suitable position was offered ... and accepted...." The Office also found Dr. Swartz's February 12, 2007 directed examination probative evidence of appellant's current medical condition.

LEGAL PRECEDENT

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,

[12] The Office relied upon Dr. Swartz's opinion as a basis for terminating all compensation and medical benefits as of May 11, 2007. This decision, however, was reversed by the Branch of Hearings & Review on February 20, 2008.

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 [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 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 direction of [the Office]."[13]

ANALYSIS

The Office suspended all monetary compensation during the period December 28, 2004 to January 4, 2005 on the basis that appellant had not fully cooperated with the field nurse who had been assigned to assist in the procurement of certain medical equipment. Assuming *arguendo* that the field nurse's limited involvement in the procurement of a four-wheel walker and motorized scooter constituted "vocational rehabilitation" services, appellant's purported lack of cooperation should not have resulted in the suspension of all monetary compensation. The Office reduced appellant's compensation to zero on the premise that it could not determine what would have been appellant's wage-earning capacity had she fully cooperated with the field nurse. This assertion by the Office lacks support in the record.

When the Office terminated appellant's compensation in December 2004, appellant had already received a part-time, limited-duty job offer from the employing establishment, which included pertinent salary information. Moreover, the Office advised appellant on September 30, 2004 that the offered position was suitable. The field nurse's services were engaged to assist in obtaining a four-wheel walker and motorized scooter so that appellant could return to work as a part-time, limited-duty legal assistant, initially working 12 hours per week.[14] The Board finds there was ample information in the record for the Office to determine appellant's wage-earning capacity as a part-time, limited-duty legal assistant. Consequently, the Office's decision to

[13] 20 C.F.R. § 10.519 (2008); *see* 5 U.S.C. § 8113(b) (2000).

[14] It is noteworthy that neither the field nurse nor occupational therapist participated in any direct meetings with appellant and the medical supply company involving the selection of the four-wheel walker and motorized scooter. In fact, the field nurse essentially abrogated her responsibilities effective December 13, 2004 when she asked the medical equipment vendor to contact appellant to arrange a meeting. This meeting between appellant and the vendor ultimately took place on January 5, 2005 and did not include a representative from the Office. In retrospect, there appears to have been no legitimate basis for postponing the meeting appellant had originally scheduled with the same vendor for November 18, 2004.

suspend all compensation during the period December 28, 2004 to January 4, 2005 is reversed as it contravenes 20 C.F.R. § 10.519(a).

Appellant questioned whether the field nurse and rehabilitation counselor actually provided "vocational rehabilitation" services. Both individuals were essentially involved in the procurement of medical and/or office equipment. When the Office assigned a rehabilitation counselor in April 2005, she received a fairly limited mandate. The Office specifically instructed the rehabilitation counselor to "coordinate the assessment and purchase" of a four-wheel walker, motorized scooter and ergonomic chair. By the time a rehabilitation counselor received her assignment on April 1, 2005, a "suitable" position had already been identified and an appropriate four-wheel walker and motorized scooter had been selected and payment authorized. The only task not previously addressed was the acquisition of an ergonomic office chair. Other than the rehabilitation counselor's specific mandate to obtain certain office and medical equipment, the Office did not have in place a formal vocational rehabilitation program.

While appellant was perhaps less than cooperative, the Office was not at the time engaged in what one traditionally considers vocational rehabilitation services. The applicable regulation provides:

> "(a) [The Office] may, in its discretion, provide vocational rehabilitation services as authorized by 5 U.S.C. [§] 8104. These services include assistance from registered nurses working under the direction of [the Office]. Among other things, these nurses visit the worksite, ensure that the duties of the position do not exceed the medical limitations as represented by the weight of medical evidence established by [the Office], and address any problems the employee may have in adjusting to the work setting. The nurses do not evaluate medical evidence; [the Office] claims staff perform this function.
>
> "(b) Vocational rehabilitation services may also include vocational evaluation, testing, training, and placement services with either the original employer or a new employer, when the injured employee cannot return to the job held at the time of injury. These services also include functional capacity evaluations, which help to tailor individual rehabilitation programs to employees' physical reconditioning and behavioral modification needs, and help employees to meet the demands of current or potential jobs."[15]

In a broad, general sense, the Office was involved in an effort to return appellant to work with her former employer. However, every effort of this type does not necessarily involve initiating formal vocational rehabilitation services. Facilitating the purchase of certain office and medical equipment was an ancillary step in the process of returning appellant to work. It was not

[15] 20 C.F.R. § 10.518 (2008).

vocational rehabilitation.[16] The mere fact that the Office assigned a nurse, occupational therapist and rehabilitation counselor to aid in the equipment acquisition process does not mean appellant received "vocational rehabilitation" services. Appellant obtained similar medical equipment in October 2002 without much fanfare or direct involvement from the Office, other than its authorizing payment.

The purchase of standard, noncustomized medical and office equipment is not what one generally considers vocational or medical rehabilitation services. Therefore, appellant's purported noncooperation does not justify a reduction or termination of monetary compensation. By the time the Office issued its August 2, 2005 decision reducing appellant's compensation, the four-wheel walker, motorized scooter and ergonomic chair were already in place at the employing establishment. All that remained for appellant to do was report for work on August 8, 2005, as directed by the employing establishment.[17] The Board finds that the Office improperly reduced appellant's monetary compensation effective August 7, 2005 based on failure to cooperate with vocational rehabilitation efforts.

CONCLUSION

The Office improperly suspended all wage-loss compensation from December 28, 2004 to June 4, 2005. The Board also finds that the Office improperly reduced appellant's wage-loss compensation effective August 7, 2005.

[16] According to the Office procedural manual, the various stages and services in the vocational rehabilitation process include: (1) initial interview to discuss available services and the claimant's attempts to return to work; (2) efforts to place the claimant with his or her previous employer; (3) medical rehabilitation services such as physical, occupational, and speech therapy, orthotics, prosthetics and psychiatric counseling; (4) job search guidance and counseling; (5) vocational testing and work evaluations; (6) vocational training when a return to the previous employer is not feasible; (7) placement with a new employer; and (8) follow-up services after reemployment. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.6 (December 1993).

[17] While appellant did not report to work on or after August 8, 2005, this fact is not particularly relevant with respect to the current issue before the Board. The Office did not terminate compensation for failure to accept an offer of suitable work. *See* 5 U.S.C. § 8106(c); 20 C.F.R. § 10.517.

ORDER

IT IS HEREBY ORDERED THAT the March 26, 2007 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 7, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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