

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

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**JAMES WHITEHEAD, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Cleveland, OH, Employer**

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**Docket No. 04-41  
Issued: February 9, 2004**

*Appearances:*  
*James Whitehead, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member

**JURISDICTION**

On October 1, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated May 15 and September 24, 2003 in which the Office found that appellant was in noncompliance with nurse assistance from May 15 through July 7, 2003 and therefore was not entitled to compensation for this time period. Since appellant filed his appeal within a year of the Office's last merit decision on September 24, 2003, the Office has jurisdiction to review the case on the merits pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

**ISSUE**

The issue is whether the Office properly reduced appellant's monetary compensation to zero for the period May 15 to July 7, 2003 for failure to cooperate with vocational rehabilitation.

**FACTUAL HISTORY**

The Office accepted appellant's claim for lumbar myofascitis, right shoulder strain, herniated lumbar disc, right shoulder impingement and arthroscopic surgery resulting from the March 9, 2001 employment injury. Appellant stopped working after the injury but returned to

work six hours a day with restrictions. On July 20, 2002 appellant stopped working to undergo surgery and did not return to work since that date. On March 6, 2003 the Office referred appellant to a field nurse, Brenda Buzanski, to assist in his recovery and return to work. By certified letter dated March 10, 2003, Ms. Buzanski informed appellant that the Office asked her to meet with him regarding his workers' compensation claim. She stated, however, that despite numerous attempts, she had been unable to reach him by telephone, and provided a number for him to call and if she was unavailable, to leave his name, telephone number, and a convenient time to reach him.

By letter dated April 1, 2003, the Office also informed appellant that a registered nurse had tried to contact him by telephone and by certified letter but he did not contact the nurse. The Office stated that unless appellant produced evidence to the contrary, it would assume that nurse intervention would have resulted in his return to work with no loss of wage-earning capacity, and would reduce his compensation to zero. The Office gave appellant 30 days to provide "good reason" for not participating in the rehabilitation effort.

By letter dated April 17, 2003, the Office reminded appellant of his need to respond to its April 1, 2003 letter regarding his failure to cooperate with the nurse. The Office stated that appellant had the remainder of the 30 days to respond.

In a report dated May 15, 2003, Ms. Buzanski stated that she had contacted appellant, after receiving a number from his physician's office, on April 28, 2003. Appellant had advised her that he had received neither the certified letter nor the April 1, 2003 letter from the Office. Appellant advised that he did not wish to continue with case management services until he spoke with the claims examiner for verification. The Office placed the claim in "Nurse Interrupt Status" effective May 14, 2003 until appellant agreed to cooperate with case management services.

By decision dated May 15, 2003, the Office reduced appellant's compensation benefits to zero pursuant to 5 U.S.C. § 8113(b) for failure to participate in good faith with the rehabilitation program.

By letter dated July 15, 2003, appellant requested reconsideration of the Office's decision. Appellant stated that he became aware of the Office's decision only after not receiving his monthly benefits. He stated that he did not receive any correspondence about a nurse being assigned or a notice threatening to stop his compensation for noncompliance. Appellant requested "mercy" regarding his nonpayment from May to June 2003. He stated that he was currently unable to work and his family depended on him to provide shelter and income. Appellant stated that he was "more than willing" to cooperate with the Office or anyone involved in the case. Appellant requested that his benefits be reinstated.

In a report dated August 2, 2003, Ms. Buzanski indicated that appellant had begun to cooperate with her effective July 8, 2003.

In a merit decision dated September 24, 2003, the Office denied appellant's request for modification. The Office stated that appellant complied with services on July 8, 2003 as evidenced by the nurse's reports and that the sanction for noncooperation was lifted effective

July 8, 2003. The Office stated that health benefits and optional life insurance premiums were reinstated to May 15, 2003. The Office stated, however, that compensation could not be paid retroactively for the period May 15 through July 7, 2003 due to his failure to cooperate. Further, the Office noted that there was no evidence to suggest that appellant had not received the Office's letters as they had not been returned as undeliverable.

### **LEGAL PRECEDENT**

Section 8104(a) of the Federal Employees' Compensation Act 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.<sup>1</sup> 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.<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 returning the employee to suitable employment.<sup>3</sup> Such efforts will be initially directed at returning the partially disabled employee to the employing establishment.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> Under this section of the Act, an employee's failure to willingly cooperate with

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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 2.813.2 (December 1993).

<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> *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.3 (December 1993). The Office's regulations 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.

<sup>5</sup> *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.3 (December 1993).

<sup>6</sup> 5 U.S.C. § 8113(b).

vocational rehabilitation may form the basis for termination of the rehabilitation program and the reduction of monetary compensation.<sup>7</sup> In this regard, the Office's implementing federal 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:

(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].”<sup>8</sup>

### ANALYSIS

In this case, the Office's reduction of appellant's compensation to zero under section 20 C.F.R. § 10.519(c) for the period from May 15 through July 7, 2003 is based on the presumption that the nurse's efforts to contact appellant and work with him constituted part of vocational rehabilitation efforts. The Office found that appellant's failure to respond to Ms. Buzanski's calls or to her certified March 11, 2003 letter or to the Office's letter dated April 1, 2003 showed that appellant did not cooperate in the vocational rehabilitation effort during the relevant time

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<sup>7</sup> See *Wayne E. Boyd*, 49 ECAB 202 (1997) (the employee failed to cooperate with the early and necessary stage of developing a training program).

<sup>8</sup> 20 C.F.R. § 10.519.

period.<sup>9</sup> The Office's finding, however, is not consistent with the Office's implementing regulations. Appellant's failure to return Ms. Buzanski's calls or to respond to her and the Office's correspondence has not been established as a failure to cooperate with vocational rehabilitation services as contemplated by the Act. There is no evidence that there was any vocational rehabilitation effort in place. Appellant's failure to cooperate with a nurse does not constitute a failure or refusal with the early or necessary stages of vocational rehabilitation under section 8113 of the Act and the implementing regulations.<sup>10</sup> For these reasons, the Office failed to meet its burden of proof to reduce appellant's monetary compensation to zero.

### **CONCLUSION**

Since appellant's failure to respond to Ms. Buzanski's efforts to contact him during the period from May 15 through July 7, 2003 was not a failure to cooperate with vocational rehabilitation efforts, the Office erred in reducing appellant's compensation to zero during this time period.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the September 24 and May 15, 2003 decisions of the Office of Workers' Compensation Programs be reversed.

Issued: February 9, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

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<sup>9</sup> There was no evidence that the March 11 and April 5, 2003 letters were sent to the wrong address.

<sup>10</sup> See *Rebecca L. Eckert*, 53 ECAB \_\_\_\_ (Docket No. 01-2026, issued November 7, 2002).