

On November 21, 2002 appellant, then a 46-year-old route carrier, sustained a neck injury when a truck backed into her postal vehicle while in the performance of duty. By letter

dated December 4, 2002, the Office accepted her claim for cervical trapezius strains. The claim was also accepted for torticollis. Appellant also suffers from high blood pressure.

By letter dated August 30, 2006 to Dr. Alan G. Shepard, an attending Board-certified neurologist, the employing establishment inquired as to whether appellant would be able to perform modified-duty work. He responded that a functional capacity evaluation was necessary to determine whether appellant could handle the job.

By letter dated September 20, 2006, the employing establishment referred appellant to the MacNeal Clearing Clinic for a functional capacity evaluation.

By letter dated April 25, 2007, the Office referred appellant to a rehabilitation counselor for the development of a vocational rehabilitation program. In a report dated May 28, 2007, Ms. Julie L. Base, a vocational counselor noted that appellant had not engaged in any type of work activity for over four years. Appellant believed that she was too disabled to engage in any type of work activity and was "outraged" that the Office would consider her a candidate for vocational rehabilitation. Ms. Base noted that appellant was frequently argumentative and noncooperative. Appellant stated that she would not undergo a functional capacity evaluation and that Ms. Base should obtain results from a prior evaluation performed in November 2006. However, she would not sign the authorization form allowing the consultant to obtain this medical report. Ms. Base also noted that appellant advised her of severe pain during the November 2006 functional capacity evaluation and that the facility advised her that she was not a candidate to undergo an evaluation due to her symptomology.

By letter dated June 6, 2007, the Office informed appellant that it had been advised that she had impeded the rehabilitation efforts of her vocational counselor in that she refused to undergo a functional capacity evaluation. Appellant had 30 days from the date of the letter to give a good reason for not participating in the vocational rehabilitation effort and, that if she did not comply, the rehabilitation effort would be terminated and action taken to reduce her compensation.

In a June 29, 2007 report, Ms. Base noted she received a June 27, 2007 telephone call from appellant's husband, who indicated that appellant was scheduled for a functional capacity evaluation the following day. She spoke with a physical therapist from MacNeal Clearing Clinic, who indicated that appellant was seen in November 2006 but that a full functional capacity evaluation was not performed due to her complaints of pain and the fact that her blood pressure was significantly elevated. On June 28, 2007 Ms. Base indicated that she again contacted MacNeal Clearing Clinic and was informed that appellant's husband called the clinic in the morning and left a message that his wife was cancelling the appointment due to illness. On June 27, 2007 appellant's husband called and stated that appellant was in considerable pain and took pain medication. He informed Ms. Base that during the night of June 27, 2007 and the morning of June 28, 2007 appellant was vomiting and he was unsure if this was a result of the pain medication or the flu. Ms. Base spoke with a representative from MacNeal Clearing Clinic, who advised her that in the future appellant must pick another facility for evaluation as this was her third cancellation without adequate notice.

By letter dated July 25, 2007, appellant was referred to a different facility for a functional capacity evaluation scheduled for August 9, 2007. On August 9, 2007 she reported for the functional capacity evaluation at Orthosport Physical Therapy. The physical therapist recorded appellant's history and noted that she stated that she was in pain. When she greeted appellant and directed her by touching her shoulder, appellant said, "Don't touch me." The therapist indicated that it would be necessary to touch her during the evaluation. Appellant's blood pressure was 150/78, her breathing was heavy and rapid and she appeared agitated. The therapist noted that appellant did appear to have right-sided torticollis in the neck and what appeared to be tremors in her upper extremities. She noted difficulty in getting measurement due to jerking movements. The therapist advised that appellant had good muscle tone in the upper and lower extremities. She noted that appellant was unable to complete a straight leg raise while sitting, although she appeared to have shaved her legs. The therapist noted that she could not complete the evaluation because appellant stated that she was in too much pain and was going to the hospital. Appellant left the clinic with her husband.

By decision dated October 26, 2007, the Office reduced appellant's compensation to zero effective October 28, 2007 due to her refusal to participate with vocational rehabilitation.

On November 5, 2007 appellant requested reconsideration. She contended that she tried to complete the August 9, 2007 testing but was unable to do so due to severe pain. Appellant stated that she never refused to take a functional capacity evaluation or attend a physician's appointment.

In a note dated November 1, 2007, Dr. Jean E. Bourand, a Board-certified family practitioner, indicated that appellant was under her care and unable to attend the functional capacity test on June 28, 2007 but was able to attend on July 12, 2007.

By decision dated December 12, 2007, the Office found that the evidence was insufficient to warrant modification of the October 26, 2007 decision.

By letter dated March 3, 2008, appellant, through her representative, requested reconsideration. She submitted an emergency physician report dated August 9, 2007 from Dr. Guy Miller, an osteopath, who indicated that appellant presented herself with a complaint of neck pain, spasm and left side chest pain. Dr. Miller diagnosed spasmodic torticollis, atypical chest pain and left bundle branch on electrocardiogram.

In a February 15, 2008 note, Dr. Bourand indicated that, after reviewing the emergency record of August 9, 2007, it was clear that appellant was in severe pain due to her torticollis and could not complete the functional capacity evaluation that date.

A new functional capacity evaluation was ordered and appellant went to MedVoc Rehabilitation on August 1, 2008. Appellant attended but the test was not completed. She was ordered to obtain a cardiac clearance. In an April 22, 2008 report, the vocational consultant indicated that none of appellant's several functional capacity evaluations have been completed due to her subjective complaints of pain or noncontrolled hypertension. The consultant indicated that, without this test, there was no basis on which to determine her work capabilities.

By decision dated April 25, 2008, the Office denied modification of the December 12, 2007.

LEGAL PRECEDENT

Section 8104(a) of the Act¹ 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.² 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.³

Section 8113(b) of the Act further provides that, 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 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.⁴ 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.⁵ Under section 8104 of the Act, the employee's failure to willingly cooperate with

¹ 5 U.S.C. § 8104(a).

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

³ *Id.* The Office's regulations provide: In determining what constitutes "suitable work for a particular disabled employee, [it] 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).

⁴ 5 U.S.C. § 8113(b).

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

vocational rehabilitation may form the basis for terminating the rehabilitation program and the reduction of monetary compensation.⁶ The Office's implementing regulations state:

If an employee without good cause fails or refusing to apply for, undergo, participate in or continue to participate in a vocational rehabilitation effort when so directed, [the Office] will act as follows:

* * *

“(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 [it] 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].⁷

ANALYSIS

By letter dated April 25, 2007, the Office directed appellant to undergo vocational rehabilitation pursuant to 5 U.S.C. § 8104. The purpose of rehabilitation services is to assist injured workers in a return to work.⁸ Although appellant did communicate with her vocational counselor, she exhibited a pattern of obstructive behavior towards the vocational rehabilitation process. This was particularly evinced by her failure to complete any functional capacity evaluation. When the vocational counselor initially approached appellant about having a vocational capacity evaluation, the counselor noted that appellant refused and told the counselor to utilize the results from a prior evaluation in November 2006. However, appellant repeatedly refused to sign the authorization form to allow the counselor to obtain this report. Furthermore, the counselor noted that appellant told her that she had been unable to complete the November 2006 functional capacity evaluation due to severe pain.

⁶ 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).

⁷ 20 C.F.R. § 10.519.

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Functions of the Medical Unit: Rehabilitation Services*, Chapter 3.200.1 (November 1990).

By letter dated June 6, 2007, the Office issued a preliminary determination that appellant had refused to cooperate with her vocational counselor and that sanctions would be imposed if she did not comply. A June 28, 2007 appointment was set for appellant's vocational capacity evaluation. However, her husband called the facility on the morning of the evaluation and stated that appellant was too sick to attend. On August 9, 2007 another attempt was made to complete the testing. On that date appellant did show for her appointment. However, her cooperation was highly questionable as shown by the fact that she objected to the therapist touching her, which appellant was unable to complete a straight leg raise or do many other tests because she indicated she was in too much pain yet her muscle tone appeared to be good and she appeared to have shaved her legs. The Office procedure manual provides that specific instances of noncooperation with rehabilitation efforts include refusing or impeding early vocational rehabilitation efforts and specifically include failing to cooperate with functional capacity evaluations.⁹ Accordingly, due to appellant's lack of cooperation with the vocational counselor in obtaining a functional capacity evaluation, the Board finds that the Office properly reduced appellant's compensation to zero by decision dated October 26, 2007. The Office also reviewed appellant's requests for reconsideration on the merits but determined that the evidence was not sufficient to modify the decision reducing her compensation. Although appellant submitted emergency room records for treatment on August 9, 2007, the day of one of her functional capacity test, this report is insufficient to establish that appellant disabled from completing the test. This report listed her complaints and noted that she had spasmodic torticollis. However, it did not indicate that she could not have completed the functional capacity test. Appellant's physician indicated that, upon review of the emergency room note, it was clear that appellant could not complete the functional capacity evaluation on August 9, 2007 due to "severe pain due to her torticollis." This brief note is insufficient to explain appellant's inability to complete this test. Dr. Bourand does not explain why appellant could not cooperate with a test designed to measure her functional capacity taking in account her accepted work injuries. Furthermore, his conclusion appears to be based on appellant's subjective complaints of pain relayed to the emergency room personnel rather than on any objective tests. Accordingly, the Office properly found that appellant's new evidence did not require modification of the prior decision reducing her compensation benefits to zero.

The Board accordingly finds that appellant without good cause failed to cooperate with vocational rehabilitation when so directed under 5 U.S.C. § 8104. Pursuant to 5 U.S.C. § 8113(b), the Office may reduce appellant's compensation in accordance with what would probably have been her wage-earning capacity in the absence of the failure, until appellant in good faith complies with the direction of the Secretary.

In this case a suitable job has not been identified, as the failure to participate occurred in the early but necessary stages of the rehabilitation effort. Under 20 C.F.R. § 10.519, in the absence of contrary evidence 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. Based on the evidence, the Board finds that it properly reduced appellant's compensation to zero.

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.813.11(a) November 1996).

CONCLUSION

The Board finds that the Office properly reduced appellant's wage-loss compensation effective October 28, 2007 because of her failure to fully cooperate with vocational rehabilitation.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 25, 2008 and December 12 and October 26, 2007 are affirmed.

Issued: April 8, 2009
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