

FACTUAL HISTORY

The Office accepted that on March 31, 2005 appellant, then a 49-year-old letter carrier, sustained bilateral knee contusions due to a fall at work.¹ Appellant received compensation from the Office for periods of disability.

A September 7, 2005 magnetic resonance imaging (MRI) scan of appellant's left knee showed type III signal changes consistent with a tear of the medial meniscus, chondromalacia within the lateral femoral condyle, type II signal changes of the lateral meniscus, joint effusion and nonspecific prepatellar soft tissue edema.

Appellant received regular treatment from Dr. Albert Graziosa, a Board-certified orthopedic surgeon. On February 6, 2007 Dr. Robert Israel, a Board-certified orthopedic surgeon serving as an Office referral physician, determined that appellant could return to her regular work with her employer. On November 13, 2007 Dr. Graziosa found that she could return to limited-duty work for four hours per day.

The Office found that there was a conflict in the medical opinion between Dr. Graziosa and Dr. Israel regarding appellant's ability to work. It referred her to Michael J. Katz, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the matter. In a December 19, 2007 report, Dr. Katz advised that both of appellant's knees had normal range of motion and were stable to varus and valgus stress. Appellant's left knee exhibited moderate swelling. Dr. Katz diagnosed internal derangement of her left knee with residual internal derangement of her right knee resolved and stated:

"Total disability no longer exists. [Appellant's] total disability should only have been for approximately three months following this incident of March 31, 2005. The claimant is partially disabled and would be capable of seated work at this time. The claimant is limited in standing, stooping, and bending. The claimant does have residuals with extended standing. Left knee arthroscopy should be approved at the current time."²

In April 2008 the employer offered appellant a modified letter carrier position on a full-time basis but she rejected the position.³ On August 22, 2008 the Office referred appellant for participation in a vocational rehabilitation program.

In a November 17, 2008 letter, the Office advised appellant that she was being referred to a vocational rehabilitation program designed to return her to work. Appellant was informed that Yaakov Taitz would serve as her vocational rehabilitation counselor. The Office stated, "You

¹ Appellant previously sustained a right knee contusion and right medial meniscus tear. She underwent three arthroscopies to the right knee and one arthroscopy to the left knee by history.

² Dr. Katz indicated that appellant could sit for eight hours per day, sit for three hours, stand for three hours and lift up to 20 pounds.

³ The Office was unable to determine whether the offered job was suitable because the job description did not delineate the amount of time that appellant would be required to stand.

are required by [the Office] to cooperate with the rehabilitation specialist and to undertake rehabilitation activities directed toward suitable employment, or benefits may be terminated or reduced. You are also required to seek suitable work, and to accept suitable work if it is offered to you.”⁴

Appellant met with Mr. Taitz on December 1, 2008 for two hours to discuss her vocational rehabilitation program. She detailed her work history and noted that she was receiving social security benefits for her knee injury.

In a December 18, 2008 report, Mr. Taitz reported the findings of vocational testing which appellant underwent on December 4, 2008. With respect to appellant’s educational history, she graduated in 1987 from Hostos Community College in the Bronx with an associate’s degree in public administration. The testing she underwent during a period of five hours included the Test of Adult Basic Education (TABE), Career Assessment Inventory (CAI) and Career Scope. Mr. Taitz indicated that the TABE scores indicated a good reading level of 5.4 and a good math level of 6.6. The CAI test revealed appellant’s interest in humanitarian, business detail and protective areas and the Career Scope test showed her interest in clerical, security and child care areas. Appellant scored average in general learning ability and form and numerical reasoning, she had average reading and math skills and she had above average clerical and spatial aptitudes. Mr. Taitz stated that, based on the test results and medical records, appellant was qualified to enter the following occupations: credit clerk, dispatcher for a maintenance service, collection clerk, rehabilitation clerk, fingerprint clerk and appointment clerk.

During a January 9, 2009 meeting, Mr. Taitz selected six sedentary occupations for appellant’s consideration and gave her advice on job search techniques. Appellant advised Mr. Taitz that she might elect to take early retirement and that she wanted to go to the Social Security Administration office to discuss the possibility of dropping her receipt of Office compensation. Mr. Taitz explained to appellant the benefits of working and the possibility of continuing to work until she received her pension. On several occasions in January and February 2009, appellant advised him that she was still undertaking research in order to make a decision about whether to take disability retirement.

On February 27, 2009 appellant stated, “I want to close my compensation case. I feel I’m not capable to work because my medical condition...”⁵ In a rehabilitation action report of February 27, 2009, Mr. Taitz checked a status box indicating, “Claimant obstruction: claimant does not appear at scheduled hearings, fails to carry out agreed actions.” He noted that on February 27, 2009 appellant informed him that she did not want to continue with the rehabilitation services. Appellant wished to get social security benefits and that she would do fine without compensation under the Act. In February 27, 2009 vocational rehabilitation reports, Mr. Taitz stated that appellant “decided to terminate rehabilitation services because she is not planning to go back to work.” He explained the consequences of the decision to appellant but she seemed

⁴ The letter was sent to appellant’s address of record in Bronx, NY.

⁵ The statement was made on a form entitled, “Individual rehabilitation placement plan and job search plan and agreement.” The form listed three positions under the heading “job goal” -- rehabilitation clerk, collection clerk and appointment clerk.

resolved to continue with it. Appellant expected to move to Puerto Rico in the summer to help care for her grandchildren and understood the consequences of her decision.

In a March 4, 2009 letter, the Office advised appellant that it had received information from Mr. Taitz that she had discontinued good faith participation in her vocational rehabilitation program. It stated, "The information received shows that you no longer want to participate with your counselor because you want to close your compensation case." It informed appellant that, under section 8113(b) of the Act, if an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed, the Office may reduce compensation based on what probably would have been the individual's wage-earning capacity had he or she not failed to apply for and undergo vocational rehabilitation. Office regulations further provide that, if an individual without good cause fails or refuses to participate in the essential preparatory efforts of rehabilitation efforts, the Office will assume, in the absence of evidence to the contrary, that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity and compensation will be reduced accordingly. The Office directed appellant to make a good faith effort to participate in the rehabilitation effort within 30 days or, if she believed she had good cause for not participating in the effort, to provide reasons and supporting evidence of such good cause within 30 days. It stated that if these instructions were not followed within 30 days action would be taken to reduce her compensation.

Appellant submitted a document identifying dates of physical therapy in December 2009 and a note from Dr. Graziosa indicating the need for physical therapy.

In a December 11, 2009 decision, the Office reduced appellant's compensation to zero effective December 20, 2009 under 5 U.S.C. § 8113(b) to reflect her loss of wage-earning capacity had she continued to participate in vocational rehabilitation efforts. It determined that appellant had failed, without good cause, to undergo vocational rehabilitation as directed. The Office found that appellant had not fully participated in the early but necessary stages of the vocational rehabilitation effort and stated, "Therefore, under the provisions of [s]ection 10.519(c) of the regulations, it is assumed, in the absence of evidence to the contrary, that the vocational rehabilitation effort would have resulted in your return to work at the same or higher wages than for the position you held when injured."

Appellant requested a telephonic hearing with an Office hearing representative. During the March 2, 2010 hearing, she testified that she had only received the first letter from vocational rehabilitation, but did not receive the letters regarding her failure to cooperate. Appellant met with Mr. Taitz and told him that her condition did not permit her to work because it hurt so much. Mr. Taitz told her to "write a note" so she wrote a note "that said to close my case." Counsel contended that such decision by appellant was not an informed decision on her part. In response to a question regarding whether she was willing to cooperate with rehabilitation efforts, appellant stated, "I feel good, I could work. But I think first they have to do the surgery. Because I need a surgery. I need physical therapy and they never approve it.... If I feel good, I could work...."

Appellant submitted a December 7, 2009 report in which Dr. Graziosa stated that she continued to report pain in her knees, especially after long periods of standing and walking. Dr. Graziosa noted that the physical examination continued unchanged, with tenderness diffusely

around portions of the knee. He diagnosed bilateral knee contusion, internal derangement and arthrosis and noted that appellant was totally disabled. In a January 6, 2010 report, Dr. Graziosa found total disability and indicated that her examination findings were basically unchanged from prior examination. In a March 15, 2010 form report, he diagnosed bilateral knee contusion and arthrosis and noted that appellant was totally disabled from April 1, 2005 to the present. On April 21, 2010 Dr. Graziosa indicated that appellant had permanent total disability and noted that she had full extension of her knees with mild crepitus at the extremes of motion.

In a May 11, 2010 decision, the Office hearing representative affirmed the December 11, 2009 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.⁶ Section 8113(b) of the Act provides that, if an individual, without good cause, fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of the Federal Employees' Compensation Act, 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 his [or her] wage-earning capacity in the absence of the failure," until the individual in good faith complies with the direction of the Office.⁷

Sections 10.519(b) and (c) of Title 20 of the Code of Federal Regulations,⁸ the implementing regulations of 5 U.S.C. § 8113(b), further provide 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 [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]."

⁶ *Betty F. Wade*, 37 ECAB 556 (1986).

⁷ 5 U.S.C. § 8113(b).

⁸ 20 C.F.R. § 10.519(b) and (c).

It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed.⁹

ANALYSIS

The Office accepted that on March 31, 2005 appellant sustained bilateral knee contusions due to a fall at work and she received Office compensation for periods of disability. In December 2007 Dr. Katz a Board-certified orthopedic surgeon serving as an impartial medical specialist, found that appellant could perform limited-duty work. Appellant was later referred to an Office-sponsored vocational rehabilitation program designed to return her to work.

In the present case, the Office properly reduced appellant's compensation to zero effective December 20, 2009 on the grounds that she failed without good cause to participate in the early stages of vocational rehabilitation efforts. The record reveals that shortly after completing an initial vocational testing session on December 4, 2008 she advised her rehabilitation counselor, Mr. Taitz, that she was considering electing to receive retirement disability instead of Office compensation. In a February 27, 2009 statement, appellant stated, "I want to close my compensation case. I feel I'm not capable to work because my medical condition." Mr. Taitz noted that appellant advised him that she decided to terminate rehabilitation services because she is not planning to go back to work. He indicated that he explained the consequences of the decision to appellant but she seemed resolved to continue with it. Appellant indicated that she wished to receive disability retirement instead of Office compensation and was prepared "to take a big cut in income."

The Office notified appellant in a March 4, 2009 letter that she failed to participate in the early stages of vocational rehabilitation efforts. Appellant was provided 30 days to participate in such efforts or state good cause for not doing so. Her compensation would be reduced to zero if she did not comply within 30 days with the instructions contained in the letter. Appellant did not, however, participate in vocational rehabilitation efforts or provide good cause for not doing so within 30 days of the Office's March 4, 2009 letter.¹⁰

Appellant claimed that she only received the first letter regarding the initiation of the vocational rehabilitation program but did not receive any subsequent letters regarding her failure to cooperate with such efforts, including the March 4, 2009 letter. The record reveals that all the letters and decisions were duly mailed to appellant's address of record. Therefore it is presumed, in the absence of evidence to the contrary, that these documents were received by appellant. No evidence to rebut this presumption has been submitted by appellant.

Appellant also claimed that her physical condition prevented her from participating in vocational rehabilitation efforts. She submitted reports dated between December 2009 and

⁹ *Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991).

¹⁰ After her compensation was reduced effective December 20, 2009, appellant did not provide a clear indication that she wished to resume participation in vocational rehabilitation efforts. During a March 2, 2010 telephonic hearing with an Office hearing representative, appellant provided an equivocal answer in response to a question regarding whether she wished to resume participation in vocational rehabilitation efforts.

April 2010 in which Dr. Graziosa, an attending Board-certified orthopedic surgeon, indicated that she was totally disabled from work. However, these reports contained extremely limited findings on physical examination and did not contain a rationalized medical opinion that appellant's physical condition rendered her unable to participate in vocational rehabilitation efforts. Therefore, appellant has not shown good cause for her failure to continue cooperating with vocational rehabilitation efforts.

Appellant's self-directed closure of her vocational rehabilitation program constituted a failure without good cause to participate in preliminary vocational rehabilitation efforts.¹¹ Office regulations provide that, in such a case, it cannot be determined what would have been the employee's wage-earning capacity had there been no failure to participate and it is assumed, in the absence of evidence to the contrary, that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity.¹² Appellant did not submit sufficient evidence to refute such an assumption and the Office had a proper basis to reduce her disability compensation to zero effective December 20, 2009.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation to zero effective December 20, 2009 due to her failure without good cause to cooperate with the early stages of vocational rehabilitation efforts.

¹¹ See 20 C.F.R. § 10.519(b). Appellant completed one session of vocational testing and Mr. Taitz discussed with her six sedentary positions to consider. However, prior to the time appellant obstructed vocational rehabilitation efforts, no position or group of positions had been clearly identified for job search purposes and no job search had been started.

¹² See 20 C.F.R. § 10.519(b) and (c). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11a (December 1993).

ORDER

IT IS HEREBY ORDERED THAT the May 11, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 11, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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