U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAWRENCE J. ANCTIL and U.S. POSTAL SERVICE,
POST OFFICE, Manchester, NH

Docket No. 01-461; Submitted on the Record;
Issued November 8, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to justify reducing appellant's compensation to zero under 5 U.S.C. § 8113(b).

On March 6, 1998 appellant, then a 47-year-old postal carrier, sustained an employment-related lumbar strain.[1] He stopped work for various periods and received appropriate compensation from the Office.[2] On June 25, 1998 appellant underwent a functional capacity evaluation. He completed tasks, which were consistent with full-time work at the sedentary-light to light work level. However, given the fact that appellant exhibited submaximal effort, it was estimated that he could perform full-time work at the light to light-medium work level. In a report dated December 8, 1998, Dr. Giles C. Floyd, a Board-certified orthopedic surgeon to whom the Office referred appellant, indicated that he could perform full-time work with restrictions including no lifting of more than 25 pounds. In a report dated October 6, 1999, Dr. William Parker Rix, another Board-certified orthopedic surgeon, to whom the Office referred appellant, noted that he could perform light work on a full-time basis with sitting, standing and moving around at will.[3]

In a report dated January 24, 2000, Dr. Loratta Guzzi, an attending osteopath, stated that appellant could perform very light duty of a sedentary nature.[4]

[1] Appellant had previously sustained an employment-related back strain and herniated disc on March 13, 1977. He underwent low back surgeries in 1977 and 1979, which were authorized by the Office.

[2] Appellant returned to work for the employing establishment in a limited-duty position on May 4, 1998. He has not worked since June 5, 1998.

[3] The Office indicated that there was a conflict in the medical evidence at the time of the referral to Dr. Rix, but it does not appear that such a conflict existed at that time.

[4] Dr. Guzzi indicated that appellant should start working 20 hours a week and gradually work his way up to a 40-hour week.

On May 19, 2000 the employing establishment offered appellant a limited-duty position. The position included the performance of such duties as answering telephones and casing mail for four hours a day. It required lifting up to 20 pounds, kneeling for 1/2 hour a day, standing for 1 hour a day and walking for 2 hours a day.[5] By letter dated May 24, 2000, the Office advised appellant of its determination that the offered limited-duty position was within his work capabilities. The Office provided appellant with 14 days to accept the position or provide reasons for not doing so.

On May 26, 2000 the Office made a referral for field nurse intervention for the purpose of ensuring appellant's return to full regular-duty employment. The Office authorized a registered nurse, Barbara Foglia, to provide medical management services to appellant. The Office notified the nurse case manager that she could contact the treating physician to coordinate medical treatment and the employing establishment to clarify the requirements of appellant's job.

On May 26, 2000 the Office informed appellant that it had assigned a registered nurse, Ms. Foglia, to facilitate his recovery and return him to full regular-duty employment. The Office advised that Ms. Foglia would be contacting him shortly. The Office explained Ms. Foglia's role as follows:

> "In addition to learning more about you and any medical difficulties you may have, Ms. Foglia will explain our Federal Employees' Compensation [Act] and attempt to answer any questions you have about your claim. Our objective is to assure that you receive appropriate medical attention throughout your recovery period and that your eventual return to full regular-duty employment is accomplished in a safe and timely fashion in cooperation with your attending physician and employing [establishment]."

On May 26, 2000 the Office also advised Dr. Guzzi that it had assigned Ms. Foglia to help coordinate appellant's medical management. The Office informed Dr. Guzzi that Ms. Foglia could obtain medical records, answer questions about the compensation process, approve noninvasive diagnostic procedures, convey requests for approval of therapeutic modalities and help coordinate medical work restrictions with the employer.

By letter dated May 31, 2000, the Office advised appellant that, although vocational rehabilitation included steps toward reemployment such as nurse visitation, interviews, testing, counseling, guidance and work evaluations, it also included appropriate temporary work assignments offered by an employer which have been determined to be within medical limitations. It noted that a refusal to accept an appropriate temporary work assignment might be seen as refusal to undergo a vocational rehabilitation. The Office indicated that appellant had not yet accepted a position offered by the employing establishment on May 19, 2000, which was within his physical limitations. It discussed 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 regarding the necessity of cooperating with vocational rehabilitation efforts. The Office noted that, unless contrary evidence was submitted, the Office would assume that vocational rehabilitation would have resulted in his return to work with no loss of wage-earning capacity

[5] In December 1999 the employing establishment had offered appellant a limited-duty position. He declined the position by indicating that he was physically incapable of performing its duties.

and, therefore, his compensation would be reduced to zero. It further stated: "You are hereby directed to contact me within 30 days from the date of this letter to make a good faith effort to participate in vocational rehabilitation efforts to return you to gainful employment by accepting the offered assignment." The Office indicated that if appellant did not provide a good reason within 30 days for not participating in vocational rehabilitation, it would end the rehabilitation effort and reduce his compensation under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.

Appellant advised the Office that he was refusing the job offer by the employing establishment due to his physical condition. He submitted additional reports, dated in May and June 2000, in which Dr. Guzzi stated that he could only perform sedentary work beginning on May 24, 2000.[6]

By decision dated August 14, 2000, the Office invoked 5 U.S.C. § 8113(b) and reduced appellant's compensation to zero effective August 14, 2000. The Office noted that, by letter dated May 31, 2000, appellant had been directed to make a good faith effort to participate in vocational rehabilitation efforts. It stated that appellant was provided with an opportunity to comply or show good cause for not complying with such efforts, but that he had failed to comply or show good cause for not complying. The Office stated: "Your noncompliance with [the Office's] Nurse Intervention Services by failing to accept the limited-duty assignment offered to you by the [employing establishment] constitutes a refusal to cooperate with the vocational rehabilitation efforts of the [Office]." It indicated that, in the absence of contrary evidence, it was assumed that vocational rehabilitation would have resulted in appellant's return to work with no loss of wage-earning capacity.

The Board finds that the Office failed to meet its burden of proof to justify reducing appellant's compensation to zero under 5 U.S.C. § 8113(b).

The Office reduced appellant's compensation to zero on the basis that he failed to cooperate in the early and necessary stages of vocational rehabilitation. The Board is not persuaded, however, that the Office properly reduced appellant's monetary compensation to zero under the facts of this case.

Section 8104(a) of the 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."[7] Under this section of the Act, the Office has developed procedures by which an emphasis is placed on returning disabled employees to suitable employment and/or determining their wage-earning capacity.[8] If it is determined that the injured employee is prevented from returning to the date-of-injury job, vocational

[6] In one of the reports, Dr. Guzzi indicated that appellant should start working two hours a day and then increase his hours to four hours a day if possible. He noted that appellant was totally disabled from March 6, 1998 to May 24, 2000.

[7] 5 U.S.C. § 8104(a).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.2 (December 1993).

rehabilitation services may be provided to assist returning the employee to suitable employment.[9] Such efforts will be initially directed at returning the disabled employee with the employing establishment.[10] 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.[11]

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 have been his wage-earning capacity in the absence of the failure, until the individual in good faith complies" with the direction of the Office.[12] Under this section of the Act, an employee's failure to willingly cooperate with vocational rehabilitation may form the basis for termination of the rehabilitation program and the reduction of monetary compensation.[13] In this regard, the Office's implementing federal regulations states:

> "I[f] 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 meeting 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 by necessary stages of a vocational

[9] *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).

[10] *Id.* at Chapter 2.813.3. The Office's regulations provide: "The term 'return to work' as use 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.

[11] *Id.*

[12] 5 U.S.C. § 8113(b).

[13] *See Wayne E. Boyd*, 49 ECAB 202 (1997) (the employee failed to cooperate with the early and necessary stage of developing a training program).

> 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]."[14]

The Office's reduction of appellant's compensation to zero under section 10.519(c) is based on the presumption that the limited-duty job offer made available by the employing establishment constituted part of its rehabilitation efforts. The record in this case, however, does not support such interpretation. There is no evidence of record that, upon receipt of medical evidence from appellant's attending physicians documenting his disability for employment, the Office developed a rehabilitation plan. The employing establishment made its limited-duty offer on May 19, 2000 and the Office made a referral for field nurse intervention on May 26, 2000. The job offer developed by the employing establishment stands independent of any vocational rehabilitation effort by the Office or the field nurse services.

On May 26, 2000 the Office advised appellant and his physician that a nurse, Ms. Foglia, was assigned to facilitate his recovery and return to work. There is insufficient evidence to establish that appellant failed to cooperate with the nurse assigned to his claim. The record does not contain evidence showing that Ms. Foglia began her nurse services in any meaningful way. There is no evidence that the offered position was made available to appellant through the efforts of the field nurse assigned in this case. Although the Office advised appellant that it found that job to be suitable to his medical restrictions, the Office claims examiner did not clearly state upon what medical evidence she based such determination. For example, the Office failed to address the reports of Dr. Guzzi, an attending osteopath, which indicated that appellant could only work very light duty in a sedentary position. The facts of this case do not establish that appellant refused or failed to undergo any testing, interviews, counseling or was uncooperative in the early or necessary stages of vocational rehabilitation, a prerequisite for invoking the penalty provision of section 10.519(c). Appellant's actions do not constitute either a failure to cooperate with the field nurse or a refusal in the early stages of vocational rehabilitation.

In its August 14, 2000 decision, the Office stated: "Your noncompliance with [the Office's] nurse intervention services by failing to accept the limited-duty assignment offered to you by the [employing establishment] constitutes a refusal to cooperate with the vocational rehabilitation efforts of the [Office]." In this regard, the Office characterized appellant's refusal of the employing establishment's limited-duty job offer as a refusal to cooperate with the nurse intervention and, by association, as a refusal to cooperate with vocational rehabilitation under

[14] 20 C.F.R. § 10.519.

section 8113(b). This is not consistent with the Office's implementing federal regulations. Appellant's failure to report to work was not a failure to cooperate with vocational rehabilitation or the field nurse services. While the failure to accept an offered limited-duty work assignment may result in sanctions under section 8106 of the Act, it does not constitute a failure or refusal with the early or necessary stages of vocational rehabilitation under section 8113 of the Act and implementing regulations. For these reasons, the Office failed to meet its burden of proof to reduce appellant's monetary compensation to zero.

The August 14, 2000 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
November 8, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member