U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REBECCA L. ECKERT and U.S. POSTAL SERVICE,
CAMERON POST OFFICE, Cameron, OK

Docket No. 01-2026; Submitted on the Record;
Issued November 7, 2002

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to zero under 5 U.S.C. § 8113(b).

On May 22, 2000 appellant, then a 42-year-old rural carrier, filed an occupational disease claim alleging a posterior disc protrusion, disc abnormality and broad-based posterior spurring resulting from repetitive lifting, pulling and carrying mail. Dr. Gary S. Edwards, an osteopath, initially treated appellant and recommended surgery based on diagnostic testing of June 12, 2000 which demonstrated multiple level disc disease. On June 26, 2000 Dr. Edwards reported that a computerized tomography scan revealed a significant herniated nucleus pulposus with left upper extremity radiculitis at C5-6 and C6-7. He referred appellant to Dr. Joseph W. Queeney, a neurosurgeon, who performed a C5-6 and C6-7 anterior cervical discectomy with interbody fusion on June 28, 2000. The Office accepted appellant's claim for an aggravation of cervical disc displacement and that her surgery was due to the accepted injury.[1]

Dr. Queeney treated appellant following surgery. In a September 28, 2000 report, he noted appellant complained of slight paresthesia in her left hand and he reviewed an EMG (electromyogram) and nerve conduction study that did not support carpal tunnel syndrome. He noted some abnormalities in the biceps suggesting a mild neurologic change. He recommended that appellant increase her physical activity. On October 13, 2000 Dr. Queeney reported numbness around appellant's shoulder and elbow and swelling of her left hand. He referred her for a functional capacity evaluation, which was conducted on October 31, 2000. On November 6, 2000, Dr. Queeney reviewed the results of the functional capacity evaluation which noted that she could function at the light to medium demand levels on an eight-hour day. He

[1] On January 26, 2001 an Office medical adviser noted that appellant's surgery was warranted and necessary due to her work-related condition and that her accepted condition should be upgraded to herniated discs at C5-6 and C6-7.

advised that appellant could return to light duty as of November 7, 2000, indicating that her lifting was restricted to 20 pounds with no driving.

On November 27, 2000 appellant accepted a limited-duty position at the Heavener, Oklahoma Post Office, working 40 hours a week. Appellant was limited to sitting, standing, walking and no lifting over 20 pounds. She continued in this position until February 10, 2001, when she was instructed to return to the employing establishment at Cameron.

On January 29, 2001 Dr. Queeney completed a work tolerance limitations form, noting that appellant could not perform her regular duties unrestricted. He indicated that appellant could work 8 hours a day with the following restrictions: sit 34 to 66 percent of the day intermittently; lift 35 pounds occasionally; 15 pounds frequently; 7 pounds constantly; and use arms as in reaching or working above shoulder occasionally. Dr. Queeney reported that appellant should be allowed to take frequent rest breaks from prolonged sitting or standing.[2]

Dr. Edwards completed a duty status report on January 30, 2001, limiting appellant to lifting 25 pounds intermittently. He placed checks next to each of appellant's regular work activities to indicate that she could perform them intermittently. Dr. Edwards left blank, however, how many hours per day appellant could perform these activities.

On February 2, 2001 the Office authorized a registered nurse to provide medical management services to appellant. The Office notified the nurse that she could contact the treating physician to coordinate medical treatment and the employing establishment to clarify the requirements of appellant's job. The Office advised appellant that it had assigned a registered nurse to facilitate her recovery and return her to full regular duty employment. The Office noted that the nurse would be contacting her shortly to arrange a meeting at a mutually convenient time and place.

Appellant stopped work on February 9, 2001 and subsequently filed a claim for compensation for the period February 12 to 23, 2001. She submitted a February 12, 2001 duty status report from Dr. Edwards which limited the number of hours she could perform certain activities. Dr. Edwards restricted appellant to three hours of sitting and one-half hour of standing per day, two hours of simple grasping per day and driving from three to four hours a day.

By letter dated February 12, 2001, the employing establishment made a limited-duty job offer as a modified rural carrier to appellant at the employing establishment. The offer noted that the postmaster agreed to curtail any packages weighing over 25 pounds as required by her physician. A copy of the job offer was forwarded to the Office. On February 15, 2001 appellant declined the job offer, due to the medical restrictions given by her attending physicians and the new duty status form.

On February 26, 2001 the nurse assigned to the case reported that appellant had residual numbness in her left upper extremity and that Dr. Queeney had advised that there was nothing further he could do for it and that appellant would probably have the numbness for two more years. The nurse listed the following as information still pending: request records from

[2] These limitations appear to have been taken from the functional capacity evaluation dated October 31, 2000.

Dr. Edwards since November 6, 2000 "so that I will know his plan"; request job offer from employing establishment; and request the November 1, 2000 functional capacity evaluation. The nurse stated that, from what she gathered, the employing establishment was pushing for an answer to the job offer. Appellant advised it was her former job; she did not want it and could not medically tolerate it. The nurse noted: "Injured worker happy with light-duty job without complaints for two months. Can [the employing establishment] make this permanent job for her with gradual progression to eight days?"

In a March 2, 2001 letter, the Office advised appellant that the light-duty rural carrier position at the employing establishment was within her medical restrictions and that her refusal without good cause to accept the job offer could be seen as a refusal to undergo vocational rehabilitation. The Office stated: "The following specific circumstances support a finding that your are refusing to cooperate with the nurse intervention, and by association, the vocational rehabilitation efforts of the [Office]." The Office found that appellant had been offered employment within her work tolerance limitations and failed to accept the employment and refused to return to work. The Office noted her refusal was without good reason and advised that, under section 8113(b): "[I]f you do not undergo vocational rehabilitation as directed, including nursing services, and [the Office] finds that your wage-earning capacity would likely have increased a great deal, [the Office] may reduce your compensation. The amount of the reduction will be based on what you probably would have earned had you undergone nurse intervention and/or vocational rehabilitation." The Office advised that it would assume that nurse intervention would have resulted in a return to work with no wage-earning capacity. The Office would then reduce appellant's compensation to zero so long as she failed to comply in good faith with its directions concerning nursing services. The Office instructed appellant to report for the modified work or advise within 30 days as to her reasons for not participating with the nurse's efforts to return her to gainful employment.

On March 5, 2001 the Office advised the nurse to take the limited-duty job offer and the duty status reports to Dr. Queeney "and see if he continues to feel she can do the job with only the 25-pound lifting restrictions he gave her."

On March 12, 2001 appellant replied to the Office's March 2, 2001 letter. She noted that the offered route was a nine-hour route, with three hours standing, casing mail and six hours driving. The only modification was a lifting restriction. Appellant's medical restrictions, however, were based on an eight-hour day and included only occasional use of arms overhead and frequent breaks from prolonged sitting or standing. Appellant stated that these restrictions would turn the offered 9-hour route into a 12- or 14-hour route. She also questioned whether reaching out the window to mailboxes for six hours was "simple grasping." Appellant stated that her goal was to return to her regular job and route when she was physically able to do the job for which she was hired. She stated that she had done her best to help the nurse and the employing establishment return her to some kind of employment. Appellant talked to the Postmaster about an auxiliary route, which was a three- or four-hour route. She wanted to try it to see if she could do it and hopefully work up to the nine-hour route, but her efforts were unsuccessful. Appellant then advised the Office as follows:

> "So I guess it [i]s the nine-hour route or nothing. So if you feel that I [a]m physically able and can perform the job safely, then I leave the decision up to you.

I will be glad to accept the position that was offered to me and try and do a good job."

In a March 15, 2001 letter, the Office noted that it received appellant's claim for compensation for the period of February 12 to 23, 2001, indicating a recurrence of disability. The Office advised her to submit a CA-2a notice and to submit medical evidence in support of her claim. The Office also advised appellant of the penalty provision of section 8106(c)(2).

Dr. Queeney examined appellant on March 29, 2001 and reported that she had some persistent paresthesias on the left thumb and index finger probably due to some residual nerve damage. He stated that this might improve with time, but it was going to be rather slow. Dr. Queeney further reported as follows:

"I am not really sure why [appellant] is here today. I released her about four months ago with some restrictions as outlined by the functional capacity evaluation. Apparently there is some discrepancy in her job duties. She has had releases given by other physicians and all parties involved feel the responsibility falls back on myself. I again concur with recommendations as outlined in the functional capacity evaluation from Healthsouth dated November 2, 2000 per my signature that she can perform at the light to medium demand level."

By decision dated April 10, 2001, the Office invoked 5 U.S.C. § 8113(b) and reduced appellant's compensation to zero as a result of her "refusal to participate in connection with the registered nurse in this case as part of vocational rehabilitation." The Office noted that appellant's correspondence indicated that she would not accept the modified-duty position. The Office also noted that she had not reported for work. The Office advised appellant that her reasons for not cooperating were found to be invalid, stating:

"Since your reasons for not cooperating have been found to be insufficient and since you have not demonstrated a good faith intent to begin to cooperate by reporting for work that has been made available to you with the assistance of your attending physician and the registered nurse in this case, you have not shown good cause for not complying. Your failure to cooperate with the rehabilitation plan and return to work within the work restrictions recommended by your attending physician and made available to you with the cooperation and through coordination of the registered nurse on this case as part of vocational rehabilitation efforts does not permit this office to determine what would have been your wage-earning capacity had you in fact reported for work and shown cooperation with the rehabilitation effort. Therefore, under the provisions of section 10.519 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.

"Under the provisions of 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, your compensation is hereby reduced to $0.00 as of April 10, 2001. This reduction will continue until you in good faith report for work and begin performing the

> limited-duty employment activities made available to you within the restrictions recommended by Dr. Queeney and established in coordination with vocational rehabilitation services, or show good cause for your not complying, at which time the reduction of your compensation will cease."

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 she 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 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."[3] 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.[4] 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.[5] Such efforts will be initially directed at returning the partially disabled employee with the employing establishment.[6] 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.[7]

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

[3] 5 U.S.C. § 8104(a).

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

[5] *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).

[6] *See supra* note 4 at Chapter 2.813.3. 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.

[7] *See supra* note 4 at Chapter 2.813.3.

Office.[8] 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.[9] 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.
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> (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]."[10]

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 Dr. Queeney documenting appellant's partial disability for employment, the Office developed a rehabilitation plan. Rather, appellant initially returned to a limited-duty rural

[8] 5 U.S.C. § 8113(b)

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

[10] 20 C.F.R. § 10.519.

carrier position located at the Heavener Post Office on November 27, 2000 and worked in this capacity until February 9, 2001. Upon instruction to report back to the employing establishment, appellant was provided with another limited-duty job offer on February 12, 2001. The job offer developed by the employing establishment stands independent of any vocational rehabilitation effort of the Office or with the field nurse services.

On February 2, 2001 the Office advised appellant and her physician that a nurse was assigned to facilitate her recovery and return to work. There is insufficient evidence to establish that appellant failed to cooperate with the nurse assigned to her claim. The February 26, 2001 letter from the nurse to the Office reveals that she had yet to obtain the medical reports of Dr. Edwards, a copy of the limited-duty job offer or review a copy of the November 1, 2000 functional capacity evaluation. By the time of the nurse's letter to the Office, appellant had already declined the job offered by the employing establishment on February 15, 2001. 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 subsequently advised appellant that it found that job to be suitable to her medical restrictions, the Office claims examiner did not clearly state upon what medical evidence he based such determination. The Office failed to address the February 12, 2001 duty status report of Dr. Edwards or clarify why the physician imposed additional physical limitations for specified activities after that date. 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). Moreover, while appellant rejected the employing establishment's job offer on February 15, 2001, she subsequently advised the Office that she would accept the position in the March 12, 2001 letter. This does not constitute either a failure to cooperate with the field nurse or a refusal in the early stages of a vocational rehabilitation effort.

The Office claims examiner's March 2, 2001 letter noted that appellant had been offered limited duty and stated that "specific circumstances support a finding that your are refusing to cooperate with the nurse intervention, *and by association, the vocational rehabilitation efforts*" of the Office. (Emphasis added.) In this regard, the claims examiner 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 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 April 10, 2001 decision of the Office of Workers' Compensation Programs is reversed.[11]

Dated, Washington, DC
November 7, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[11] Appellant's appeal was filed with the Board on May 1, 2001. As the Board assumed jurisdiction over the claim, the Office hearing representative's August 20, 2001 decision is null and void. *See Douglas E. Billings*, 41 ECAB 880 (1990).