U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of INGRID M. JOHNSON and U.S. POSTAL SERVICE,
VALLEJO MAIN POST OFFICE, Vallejo, CA

Docket No.02-842; Submitted on the Record;
Issued June 20, 2003

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to zero effective March 13, 2001 under section 8113(b) on the grounds that she refused to comply with vocational rehabilitation.

The Office accepted that on or before September 21, 1998, appellant, then a 30-year-old mailhandler, sustained bilateral de Quervain's tendinitis.[1] The Office later accepted a cervical strain, disc protrusions at C5-6 and C6-7 and disc herniation at C5-6, C6-7.[2] Appellant received compensation for work absences from October 1998 through July 1999. Following a return to duty in mid 1999, appellant again stopped work on July 27, 2000 and received wage-loss compensation from July 31, 2000 to March 12, 2001.

In a December 15, 2000 report, Dr. Thomas D. Schmitz, a Board-certified orthopedic surgeon and second opinion physician, diagnosed C5-6 and C6-7 disc protrusions attributable to repetitive heavy lifting at work. Dr. Schmitz opined that although appellant had residual symptoms, she was fit for restricted duty if allowed to wear a cervical collar. Dr. Schmitz

[1] In support of her claim, appellant submitted reports from Dr. Marian Teselle, an attending physician Board-certified in occupational medicine. He released appellant to full duty as of February 3, 1999, with a diagnosis of myofascial pain at maximum medical improvement. On August 2, 1999 appellant was evaluated by Dr. John LaVorgna, a Board-certified orthopedic surgeon and second opinion physician, who diagnosed tendinitis of the right upper extremity, a "small central disc protrusion at C6-7 and degenerative disc disease at C6-7. He released appellant to full duty. Appellant also submitted reports from June to December 2000 from Dr. John J. Walter, an attending chiropractor, diagnosing brachial neuritis, displacement of cervical disc demonstrable by x-ray and cervicobrachial syndrome attributable to repetitive heavy lifting at work. He held appellant off work through December 2000. In a December 22, 2000 letter, the Office advised appellant that it would only reimburse Dr. Walter's "manual manipulation of the spine to correct a spinal subluxation demonstrated by x-ray to be present."

[2] The Office appears to have doubled appellant's claims for cervical strain and disc pathologies under Claim No. 94533-13-2010345.

limited appellant to 20 pounds pulling or pushing and 10 pounds lifting, with twisting of the neck curtailed to four hours a day.

On January 2, 2001 the employing establishment offered appellant a temporary, retained pay position as a modified clerk processing "return to sender" mail, within the limitations set forth by Dr. Schmitz. The position required "[s]tanding, walking, light lifting, carrying, bending, repetitive hand motion, simple grasping, reaching." Appellant would be able to wear a cervical collar and was not required to twist her neck for more than 4 hours, push or pull more than 20 pounds or lift more than 10 pounds." Appellant was directed to report for duty at 8:00 a.m. on January 4, 2001, but did not do so.

In a January 9, 2001 letter, the Office advised appellant that the modified clerk position remained available and was within her medical restrictions and afforded her 30 days in which to either accept the offer or provide valid reasons for refusal. The Office advised appellant of the penalty provisions under section 8106(c)(2) of the Act for refusing suitable work, including termination of her wage-loss compensation benefits.

Dr. John J. Walter, an attending chiropractor, submitted slips holding appellant off work from January 10 to 14, 2001, releasing her to "usual work on January 15, 2001 then holding her off work again beginning on January 17, 2001.

On January 15, 2001 appellant refused the offered modified clerk position. In support of her refusal, appellant submitted a January 17, 2001 letter from Dr. Walter, stating that she was unable to grasp or reach repetitively and could not work more than four hours a day. Dr. Walter held appellant off work through February 26, 2001.

In a February 9, 2001 letter, the Office stated that appellant's refusal of the modified-clerk position constituted a refusal "to participate in an [Office]-approved job placement program," designed to "assist [her] in returning to gainful employment consistent with [her] skills and abilities. The weight of the medical evidence … demonstrate[d] that [she was] able to perform the duties of the modified" clerk position. The Office afforded appellant 30 days in which to submit evidence and argument showing good cause for refusing the offered position or "the rehabilitation effort" would be terminated her compensation reduced to reflect her "wage-earning capacity in a job which [her] rehabilitation counselor ha[d] found to be within [her] restrictions and abilities." The Office then advised appellant of the penalty provisions under section 8113(b) of the Act for refusing to undergo vocational rehabilitation."

In response, appellant submitted a February 23, 2001 slip from Dr. Walter, holding her off work through March 12, 2001 due to unspecified causes.

By decision dated March 13, 2001, the Office reduced appellant's compensation to zero effective that date under section 8113(b) of the Federal Employees' Compensation Act and section 10.519 of the Act's implementing regulations on the grounds that she did not comply with a "vocational rehabilitation job offer. The evidence of record show[e]d that our office afforded [her] the opportunity to participate in a vocational rehabilitation job offer to return [her] to employment based on [her] medical restrictions, education, experience and other factors and that [appellant] declined to participate." The Office found that appellant had not shown good

cause for failure to accept the offered modified clerk position, as the medical evidence did not establish that a hand or arm condition would prevent her from performing the offered modified clerk position. The Office explained that Dr. Walter's opinion on appellant's hand and arm conditions carried "no medical weight" as he was a chiropractor. The Office concluded that it was assumed that appellant would have returned to work at the same or higher wages had she participated in vocational rehabilitation and that the reduction of compensation would continue until she "in good faith under[went] the directed vocational testing or show good cause for … not complying."

In a May 29, 2001 letter, appellant requested reconsideration and submitted additional evidence from Dr. Walter.[3]

By decision dated June 27, 2001, the Office denied modification of the March 13, 2001 decision on the grounds that the evidence submitted was insufficient to show good cause for refusing the modified "vocational rehabilitation job offer." The Office found that the weight of the medical evidence continued to rest with Dr. Schmitz, a Board-certified orthopedic surgeon, as Dr. Walter, a chiropractor, had no authority under the Act to diagnose or treat a condition other than a subluxation of the spine demonstrable by x-ray.

Appellant filed her appeal with the Board on February 14, 2002.

The Board finds that the Office improperly reduced appellant's wage-loss compensation to zero under section 8113 of the Act on the grounds that she refused to comply with vocational rehabilitation.

Section 8104(a) of the Act[4] provides that the "Secretary of Labor may direct a permanently disabled individual whose disability is compensable under this subchapter to undergo vocational rehabilitation." The fundamental goal of vocational rehabilitation is to enable an employee who has been found to be permanently disabled from performing his or her former occupation to reenter the work force by providing appropriate assessment, education, training and placement assistance. Vocational rehabilitation is thus distinct from a reemployment effort designed merely to return the injured worker to his or her date-of-injury position or a similar position, without any skills assessment or retraining. The Office's procedures set forth a detailed description of the vocational rehabilitation services provided.[5]

[3] In a March 16, 2001 telefacsimile, Dr. Walter stated that appellant refused the job offer as she required further evaluation of her arm pain. Dr. Walter released appellant to light duty for 4 hours a day as of March 26, 2001, with lifting up to 10 pounds, repetitive lifting up to 5 times an hour up to 5 pounds, no overhead lifting and other previously prescribed restrictions. On April 6, 2001 Dr. Walter obtained x-rays showing "[m]oderate degenerative joint disease," "[f]oraminal encroachment at C7 and T1 and hypomobility cervical spine." Dr. Walter diagnosed "cervicobrachial syndrome," "displacement of cervical disc," "brachial neuritis/radiculitis" and "displacement of thoracic." Appellant also submitted slips noting a May 1, 2001 appointment with Dr. Marco A. Zolezzi, a physiatrist for electromyography (EMG) testing and a June 13, 2001 appointment with Dr. Spencer H. Wang, a rehabilitation specialist.

[4] 5 U.S.C. § 8104(a).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.6 (FECA Tr. No. 97-03, November 1996).

The provisions of vocational rehabilitation services by the Secretary, as described in the Office's procedures, emphasize returning the disabled worker to suitable employment and/or determining any loss of wage-earning capacity.[6]

Section 8113(b) of the Act[7] provides that, if an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104,[8] the Secretary, on review under section 8128[9] and 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. Such reduction continues until the individual has complied in good faith with the direction of the Secretary.[10]

In this case, by March 13, 2001 decision, as affirmed by June 27, 2001 decision, the Office reduced appellant's compensation benefits to zero on the grounds that her refusal of the employing establishment's light-duty job offer constituted a refusal to undergo vocational rehabilitation without good cause. However, this was an improper sanction on two grounds.

First, the Board finds that a claimant's refusal of the light-duty job offer did not constitute a refusal to undergo vocational rehabilitation such that the Office may then reduce appellant's compensation under section 8113(b) of the Act. In its March 13, 2001 decision, the Office found that appellant's refusal of the employing establishment's January 2, 2001 job offer constituted a "refusal to undergo vocational rehabilitation," justifying reduction of her monetary compensation benefits under section 10.519(c) of the Office's regulations. The Board notes, however, that while refusal of a light-duty job offer may result in sanctions under section 8106 of the Act,[11] it does not constitute a failure or refusal with the early or necessary stages of vocational rehabilitation under section 8113 of the Act and its implementing regulations.[12]

The Board notes that initially, in a January 9, 2001 letter, the Office advised appellant that refusal of suitable work could result in termination of her wage-loss compensation benefits under section 8106(c)(2) of the Act. As set forth above, this was the correct legal theory. Yet, in its February 9, 2001 letter and March 13, 2001 decision, the Office changed its legal reasoning without explanation, stating that appellant's refusal of the modified clerk position constituted a refusal "to participate in an [Office]-approved job placement program" constituting vocational

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[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.2 (FECA Tr. No. 95-31, August 1995).

[7] 5 U.S.C. § 8113(b).

[8] 5 U.S.C. § 8104.

[9] 5 U.S.C. § 8128.

[10] 20 C.F.R. § 10.519 (2002); *Gregory Apicos*, 51 ECAB 272 (2000).

[11] 5 U.S.C. § 8106.

[12] *Rebecca L. Eckert*, 54 ECAB ___ (Docket No. 01-2026, issued November 7, 2002).

rehabilitation under section 8113 of the Act. However, the Office's use of section 8113 to reduce appellant's monetary compensation to zero was in error, as the appropriate sanction for refusing an offer of suitable work without good cause is termination of wage-loss compensation under section 8106(c) of the Act.

Second, the Office's March 13, 2001 decision presumes that the employing establishment's January 2, 2001 light-duty job offer constituted a vocational rehabilitation effort. The Board finds, however, that the case record does not indicate that the Office conducted any vocational rehabilitation. There was no assignment of an Office rehabilitation specialist, referral to a rehabilitation counselor or formulation of a vocational rehabilitation plan. The January 2, 2001 modified job offer was made by the employing establishment, utterly independent of the Office. Vocational rehabilitation is in the purview of the Office, not the employing establishment. Therefore, an employing establishment job offer must be the product of some effort by the Office to implement a vocational rehabilitation plan in order to constitute vocational rehabilitation.[13] Nevertheless, in a February 9, 2001 letter, the Office mischaracterized the January 2, 2001 job offer as an "[Office]-approved job placement program" equivalent to vocational rehabilitation. The Office repeated this error in its March 13 and June 27, 2001 decisions, calling the January 2, 2001 offer a "vocational rehabilitation job offer."

In its February 9, 2001 letter, the Office also stated that appellant had a "rehabilitation counselor" who found the modified clerk position to be "within [her] restrictions and abilities." However, there is no indication of record that the Office had assigned a vocational rehabilitation counselor to appellant's case. The Office committed similar error in its March 13, 2001 decision, reducing appellant's compensation to zero under section 8113(b) of the Act in part because she refused to undergo "directed vocational testing." The record does not indicate that the Office directed appellant to undergo vocational testing of any kind. Thus, the Office's finding that appellant refused vocational testing is erroneous.

Therefore, the Office failed to meet its burden of proof in reducing appellant's compensation to zero under section 8113(b) of the Act, as the Office conducted no vocational rehabilitation in this case.

The case is returned to the Office for payment of all compensation due and owing to appellant from March 13, 2001 onward and reinstatement of any appropriate wage-loss compensation.

[13] *Id.*

The decisions of the Office of Workers' Compensation Programs dated June 27 and March 13, 2001 are hereby reversed.

Dated, Washington, DC
June 20, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member