U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SILAS PERKINS and U.S. POSTAL SERVICE,
POST OFFICE, New Orleans, LA

Docket No. 03-380; Submitted on the Record;
Issued June 27, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly suspended appellant's compensation benefits effective October 6, 2002 on the grounds that he refused to participate in vocational rehabilitation efforts; and (2) whether the Office properly denied appellant's claim for a schedule award.

The Office accepted that on July 31, 2000 appellant, then a 37-year-old distribution bundle sorter clerk, sustained a left shoulder strain while grasping a heavy bundle of mail to key.[1] Following the injury, appellant was assigned to light duty, placing magazines from one container into another. After intermittent work absences, appellant stopped work on June 13, 2002 and did not return. He received wage-loss compensation benefits from May 21 to September 7, 2002.

Appellant sought medical treatment in August 2000 from Dr. Sofjan Lamid, an attending Board-certified physiatrist. In an October 3, 2001 report, Dr. Lamid diagnosed multilevel disc protrusion from C2-7 with cervical spondylolisthesis and radiculopathy caused by the July 31, 2000 injury.[2] Dr. Lamid found appellant permanently disabled. He prescribed work restrictions through June 4, 2002 limited lifting to 20 pounds, no climbing, kneeling, bending, stooping or

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[1] The record indicates that appellant filed two other claims, one relating to a lumbar injury, and the other regarding an emotional condition. On March 4, 2002 appellant filed an occupational disease claim for a back condition under Claim No. 16-2033745, denied by decision dated May 30, 2002. These claims are not before the Board on the present appeal.

[2] The Office did not accept cervical radiculopathy, cervical spondylolisthesis or bulging cervical discs as causally related to the July 31, 2000 injury or other factors of appellant's federal employment.

twisting, frequent breaks, premedication snack breaks and a chair with back support. Dr. Lamid released appellant to work for four hours per day effective June 15, 2002.[3]

At a June 15, 2002 meeting, the employing establishment offered appellant a modified position, requiring him to move letters or flats weighing less than 10 pounds from one container into another, remove "straps or wrappings from bundles/trays," and perform other unspecified duties within his restrictions. The proposed schedule was from 6:00 p.m. to 2:30 a.m., with delayed reporting allowed if appellant was drowsy from medication. Also, appellant was required not to take medication while at work. In response to the offer, appellant crossed out the duties of removing straps or wrappings, the unspecified duties clause and the agreement not to take any medication while at work. He checked a box indicating that he accepted the job offer, and would report for duty on June 16, 2002.[4]

In a June 21, 2002 report, Dr. Lamid reviewed the June 15, 2002 job offer and opined that appellant could not "remove straps or wrappings for bundle trays intermittently." He continued to submit reports diagnosing cervical radiculopathy.

In a July 3, 2002 letter, the employing establishment acknowledged that, as appellant submitted evidence of increased restrictions, his duty shift would be changed to begin at 9:00 a.m. In a July 11, 2002 note, the employing establishment stated that the "increased medical restrictions warrant[ed] a new job offer for [appellant]."[5]

In a July 23, 2002 Office field nurse intervention referral sheet, the Office noted that the desired nurse action was to pursue full release or permanent restrictions, as appellant was not at full duty.

In a July 25, 2002 letter, the Office authorized Charlotte Seidenberg, a registered nurse, to provide medical management services, including coordinating medical treatment and ascertaining appellant's date-of-injury duties and current work restrictions. The Office's intention was to aid in medical recovery and ensure appellant's prompt return to full-duty regular employment. By letter that date, the Office advised appellant that it had assigned Ms. Seidenberg to facilitate his recovery and return to full regular duty employment. The Office noted that Ms. Seidenberg would "assist in coordinating the medical aspects of [his] care and insuring the flow of information between" appellant, Dr. Lamid, the employing establishment and the Office.

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[3] In a January 29, 2002 rating decision, the Department of Veterans Affairs found that appellant's 40 percent impairment rating for a herniated nucleus pulposus at L5-S1 should be continued unchanged. The Board notes that the determinations of other federal agencies of percentages of disability are not relevant under the Federal Employees' Compensation Act, as different criteria are used and the relationship to factors of federal employment is often not at issue. *Daniel Deparini,* 44 ECAB 657 (1993).

[4] In an August 16, 2002 letter, the employing establishment noted that appellant reported for work on June 15, 2002, "stated that he could not work the 6:00 p.m. shift so management changed his reporting time to 9:00 a.m. to 5:30 p.m." Appellant then altered the offer before accepting it, and was escorted from the premises.

[5] A July 14, 2002 form states that appellant's Step 1 grievance had been denied, as "[m]anagement contends that [he] failed to follow instruction by failing to accept the modified duty assignment offer."

Ms. Seidenberg interviewed appellant for two hours on August 6, 2002, obtaining information regarding his personal, medical and employment history. Appellant also reported for an August 7, 2002 fitness-for-duty examination.

In an August 19, 2002 note, Dr. Lamid indicated that appellant could not perform the offered position. In several August 19, 2002 messages, appellant declined the offered position, which had been changed to a 9:00 a.m. start time to accommodate his medication schedule, but still contained the duties of cutting bands and wrappings, and the unspecified duties clause.

In an August 26, 2002 letter, the Office advised appellant that his failure to sign an unaltered copy of the June 15, 2002 job offer was a refusal "to cooperate with nurse intervention, and by association, the vocational rehabilitation efforts of the Office. The Office found that the offered position was within the restrictions provided by Dr. Lamid effective June 12, 2002. The Office advised appellant that, under section 8113(b) of the FECA, a claimant must undergo vocational rehabilitation when the Office so directs, unless there is a good reason not to do so. Therefore, if appellant did not undergo vocational rehabilitation as directed, including nurse services and it determined that his wage-earning capacity would likely have increased his compensation would be reduced based on his projected earnings had he undergone nurse intervention and/or vocational rehabilitation. The Office stated that, unless appellant presented good cause for refusing the June 15, 2002 job offer, it would assume that nurse intervention would have resulted in return to work with no loss of wage-earning capacity and would reduce his compensation to zero. The Office afforded appellant 30 days in which to make a good faith effort to participate with Ms. Seidenberg or his compensation benefits would be suspended until he complied with nurse services.

In a September 4, 2002 letter, Ms. Seidenberg related appellant's assertion that cutting, wrapping and strapping plastics was beyond his physical restrictions. She stated that the modified job offer was within Dr. Lamid's prescribed restrictions effective June 12, 2002 and that his subsequent reports did not justify a change in those restrictions.

In a September 27, 2002 duty status report, Dr. Lamid proscribed cutting, wrapping, writing or removing plastic bands. He limited lifting to 10 pounds and restricted sitting, standing, walking and fine manipulation to 4 hours per day with a 30-minute break.

By decision dated October 4, 2002, the Office suspended appellant's compensation benefits effective October 6, 2002 under section 8123(d) of the Act, and sections 10.518 and 10.519 of the implementing federal regulations, on the grounds that he refused to undergo vocational rehabilitation without good cause. The Office explained that in connection with the field nurse, an assignment with his employer had been secured which was within his medical restrictions. The purpose of the assignment was to assist appellant in his recovery and eventual return to full duty. The Office found that appellant's refusal of the modified job offer was a "refusal to undergo vocational rehabilitation." The Office noted that the job offer complied with Dr. Lamid's restrictions for the work-related condition of left shoulder sprain, which was the only work-related condition accepted for this claim. The Office noted appellant's failure to respond to the August 26, 2002 letter, that he did not submit any new medical evidence

indicating that he was medically incapable of performing the offered position due to residuals of the accepted left shoulder sprain, and that the offered position remained available.[6]

Regarding the first issue, the Board finds that the Office improperly suspended appellant's compensation benefits.

Section 8104(a) of the Act[7] 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 their former occupation to reenter the workforce 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 without any skills assessment or retraining. The Office's procedures set forth a detailed description of the vocational rehabilitation services provided.[8] The provision of vocational rehabilitation services by the Secretary is described in the Office's procedures, with an emphasis on returning the disabled worker to suitable employment and/or determining any loss of wage-earning capacity.[9]

Section 8113(b) of the Act[10] provides that, if an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104,[11] the Secretary, on review under section 8128[12] 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.[13]

In this case, the Office's October 4, 2002 decision suspended appellant's compensation benefits on the grounds that his refusal of the employing establishment's light-duty job offer,

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[6] Following issuance of the Office's October 4, 2002 decision, appellant submitted additional medical and factual evidence. The Board may not consider new evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

[7] 5 U.S.C. § 8104(a).

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

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

[10] 5 U.S.C. § 8113(b).

[11] 5 U.S.C. § 8104.

[12] 5 U.S.C. § 8128.

[13] 20 C.F.R. § 10.519 (2002); *Gregory Apicos*, 51 ECAB 272 (2000).

made in connection with field nurse services, constituted a refused to undergo vocational rehabilitation without good cause.

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 could then reduce his compensation under section 8113(b) of the Act. The Office found that appellant's refusal of the employing establishment's June 15, 2002 job offer constituted a "refusal to undergo vocational rehabilitation," justifying suspension of his monetary compensation 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,[14] it does not constitute a failure or refusal with the early or necessary stages of vocational rehabilitation under section 8113 of the Act or the implementing regulations.[15] The Office's application of section 8113 to reduce appellant's monetary compensation to zero was in error.

The Office's October 4, 2002 decision presumed that the employing establishment's June 15, 2002 light-duty job offer constituted a vocational rehabilitation effort as it was made in connection with field nurse services. The Board finds, however, that the record does not demonstrate that the Office field nurse was involved in a vocational rehabilitation effort. The June 15 and August 19, 2002 offers were made by the employing establishment, independent of any activities of the Office which could be characterized as vocational rehabilitation in this record.[16]

The primary role of the Office field nurse, as described in the Office's procedures, is to attempt to identify light or limited duty for the claimant at the employing establishment, with the goal of reemployment in the previous position.[17] This preliminary reemployment effort often occurs prior to the Office's determination of permanent disability, which would then allow for formal vocational rehabilitation. Such an effort does not provide the disabled worker any additional skills or training needed to reenter the labor market in a new position. The Office's procedures recognize this lack of vocational rehabilitation by stating that if the Office field nurse's attempts to return the disabled worker to limited duty at the employing establishment fail, the claimant may then be referred to a vocational rehabilitation counselor for services such as vocational testing including medical rehabilitation, work evaluations, vocational training, counseling, placement and follow-up services.[18] The Office's procedures note that "at the *end*" of nurse services, the nurse may recommend a "limited referral" to a vocational rehabilitation specialist for placement services with the previous employer.[19] (Emphasis added.) The Office's

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[14] 5 U.S.C. § 8106.

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

[16] *Id.*

[17] Federal (FECA) Procedure Manual, Part 2 -- *Claims*, Part 2 -- Claims, *Reemployment Vocational Rehabilitation Services,* Chapter 2.813.6(b), "Placement with Previous Employer" (FECA Tr. No. 94-5, December 1993).

[18] *Id.* at Chapter 2.813.6(c)-(g) (FECA Tr. No. 94-5, December 1993).

[19] *Id.* at Chapter 2.813.5(c) (1) (FECA Tr. No. 97-03, November 1996).

procedures appear to contemplate that field nurse intervention ends prior to referring the claimant to a vocational rehabilitation specialist for a formal vocational rehabilitation plan.[20]

The Office's regulations characterize the field nurse as part of the early vocational rehabilitation process, but do not equate the mere assignment of the Office field nurse with vocational rehabilitation. At 20 C.F.R. § 10.519(b), the Office's regulations state that meetings with the Office field nurse are one of the "early but necessary stages of a vocational rehabilitation effort." Similarly, under 20 C.F.R. § 10.519(a), the regulations state that the "vocational rehabilitation planning process" includes meetings with the Office field nurse. However, as in this case, meetings with the Office field nurse could concern matters unrelated to vocational rehabilitation, such as medical management. Therefore, meetings with the Office field nurse do not automatically constitute vocational rehabilitation.

At 20 C.F.R. § 10.518(a), the Office's regulations state that "vocational rehabilitation services … include assistance from" an Office field nurse, such as visiting the worksite, ensuring that the duties of the position do not exceed the medical limitations and addressing any problems the employee may have in adjusting to the work setting. However, the regulations do not specify when in the process such visits and investigations are to occur. In this case, Ms. Seidenberg's activities were only part of an attempt to identify light or limited duty at the employing establishment.[21] Ms. Seidenberg was directed only to provide medical management to return appellant to full duty at the employing establishment. The Office articulated this objective in the July 23, 2002 letter, stating that the "desired nurse action" was to "pursue full release or permanent restrictions. In July 25, 2002 letters, the Office emphasized that the field nurse's function was to provide medical management toward appellant's "prompt return to full regular duty employment…." There is no mention of any plan to assess appellant's vocational skills, retrain him for a different occupation, and assist him in finding work.

For these reasons, the Board finds that the Office field nurse's activities were limited to the role set forth in the Office's procedures, *i.e.,* of attempting to return appellant to full duty at the employing establishment, a preliminary reemployment effort which does not constitute vocational rehabilitation. The Office did not to meet its burden of proof to suspend appellant's monetary compensation benefits. Therefore, the October 4, 2002 decision will be reversed.

The Board finds that the case is not in posture for decision on appellant's claim for a schedule award.

On March 20, 2002 the Office requested that Dr. Lamid, an attending Board-certified physiatrist, perform a schedule award evaluation. In a March 28, 2002 report, Dr. Lamid stated that appellant had reached maximum medical improvement on January 2, 2002. Referring to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth

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[20] *Id.* at Chapter 2.813.5(c) (3)(a) (claimants can be referred for an occupational rehabilitation plan (ORP) formulated by an Office rehabilitation specialist when "[i]ntervention by the FN [field nurse] has ended but the claimant has moderate to severe physical limitations or deconditioning, or has not had an assessment of physical limitations and has not returned to work….") (FECA Tr. No. 97-03, November 1996).

[21] *Id.* at Chapter 2.813.6(b), "Placement with Previous Employer" (FECA Tr. No. 94-5, December 1993).

edition), Dr. Lamid noted left shoulder flexion at 90 degrees and extension of 35 degrees, representing a 15 percent impairment of the upper extremity according to Figure 38, page 475, entitled "Shoulder Flexion and Extension," and Table 16-3, page 439, entitled "Conversion of Impairment of the Upper Extremity to Impairment of the Whole Person." Dr. Lamid also added a 10 percent impairment of the upper extremity for sensory impairment in the C5-6 and C7 dermatomes. Using the Combined Values Chart, Dr. Lamid found a 25 percent impairment of the whole person.

In a June 25, 2002 report, an Office medical adviser noted reviewing Dr. Lamid's March 28, 2002 report. The medical adviser found that the 25 percent whole person impairment was not probative, as the Office did not accept cervical radiculopathy condition as work related. Also, Dr. Lamid did not completely assess appellant's left shoulder range of motion, as he provided measurements only for flexion and extension. The medial adviser directed that appellant be referred for a second opinion evaluation. However, there is no evidence of record that such an evaluation was performed.

By decision dated September 4, 2002, the Office denied appellant's claim for a schedule award on the grounds that the medical evidence of record did "not demonstrate any impairment to a scheduled member…." The Office found that Dr. Lamid's March 28, 2002 report finding a 25 percent impairment of the whole person was based on cervical radiculopathy, which was not an accepted condition. "There was no impairment of the scheduled member or function of the left shoulder."

The schedule award provisions of the Act[22] and its implementing regulation[23] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify how the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables and guidelines so that there are uniform standards applicable to all claimants. The Office has adopted the A.M.A., *Guides* as the appropriate standard for evaluating scheduled losses. As of February 21, 2001, the Office uses the fifth edition of the A.M.A., *Guides* to calculate claims for a schedule award.[24]

The standards for evaluation the permanent impairment of an extremity under the A.M.A., *Guides* are based on loss of range of motion, together with all factors that prevent a limb from functioning normally, such as pain, sensory deficit and loss of strength. All of the factors should be considered together in evaluating the degree of permanent impairment.[25] Chapter 16 of the fifth edition of the A.M.A., *Guides* provides a detailed grading scheme and procedure for

[22] 5 U.S.C. § 8107.

[23] 20 C.F.R. § 10.404 (2002).

[24] *See* FECA Bulletin 01-05 (issued January 29, 2001).

[25] *See Paul A. Toms*, 28 ECAB 403 (1987).

determining impairments of the upper extremities due to pain, discomfort, loss of sensation, or loss of strength.[26]

In this case, appellant provided medical evidence regarding the claimed schedule award from Dr. Lamid, an attending Board-certified physiatrist. In his March 20, 2002 schedule award evaluation, Dr. Lamid noted impairments caused by cervical radiculopathy, a condition not accepted by the Office. Therefore, this portion of the impairment rating is not relevant to appellant's claim. Also, Dr. Lamid provided an impairment estimate for whole body impairment. However, the Act does not provide for impairments of the whole person.[27]

Regarding permanent impairment of the left shoulder, Dr. Lamid provided measurements for flexion and extension, but did not perform a complete upper extremity rating according to the A.M.A., *Guides*. In this March 20, 2002 report Dr. Lamid referred to Figure 38,[28] page 475, entitled "Shoulder Flexion and Extension," in determining that shoulder flexion at 90 degrees and extension at 35 degrees equaled a 15 percent impairment of the left upper extremity. However, Dr. Lamid did not provide any additional percentages of impairment for pain, weakness or sensory loss, although he mentioned pain and weakness in his periodic reports.

The Board has held that the attending physician's description of the claimed impairment must be in sufficient detail so that the claims examiner and others reviewing the record are able to clearly visualize the impairment and the resulting limitations.[29] Dr. Lamid's description does not meet this standard.

The Office recognized that Dr. Lamid's report was insufficiently descriptive to allow a schedule award determination. In his June 25, 2002 report, the Office medical adviser recommended that a second opinion report be obtained as Dr. Lamid's report was incomplete. However, there is no evidence of record that the Office obtained a second opinion evaluation.

The Board finds that the Office failed to obtain the second opinion examination as recommended by the Office medical adviser. According to the Office's procedures, the Office first refers the attending physician's report to the Office medical adviser, who makes findings regarding the appropriate percentage of permanent impairment. If the claims examiner "believes that the impairment has not been correctly described or that the percentage is not reasonable, a new or supplemental evaluation should be obtained."[30] This was not done in appellant's case.

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[26] A.M.A., *Guides*, Chapter 16, "The Upper Extremities," pp. 433-521 (5th ed. 2001).

[27] *Jay K. Tomikoyo*, 51 ECAB 361 (2000).

[28] Figure 38 does not provide this information. Page 475 of the A.M.A., *Guides* notes that range of shoulder motion accounts for only 30 percent of upper extremity function. The A.M.A., *Guides* provides that the examiner should first measure active shoulder flexion, then extension according to Figure 16-40 at page 476, "Pie Chart of Upper Extremity Motion Impairments Due to Lack of Flexion and Extension of Shoulder." The two figures are then added to obtain the percentage of impairment." Using this formula, 90 degrees of flexion equals a 6 percent impairment and 35 degrees extension equals a 2 percent impairment, for a total of 8 percent.

[29] *Renee M. Straubinger*, 51 ECAB 667 (2000).

[30] Federal (FECA) Procedure Manual, Part 2 -- *Claims*, Chapter 2.808.6(2), Evaluation of Schedule Awards (FECA Tr. 95-14, March 1995).

The Board notes that Dr. Lamid's March 20, 2002 report indicated ratable losses of flexion and extension, but that no further medical development of these findings took place.

The case will be returned to the Office for further medical development. On remand of the case, the Office should refer appellant, the medical record and an updated statement of accepted facts to an appropriate Board-certified specialist to obtain a schedule award evaluation in accordance with the A.M.A., *Guides*. Following this and any other development deemed necessary, the Office shall issue an appropriate decision in the case.

The decision of the Office of Workers' Compensation Programs dated October 4, 2002 is hereby reversed. The decision dated September 4, 2002 is hereby set aside and the case remanded for further development consistent with this decision and order.

Dated, Washington, DC
June 27, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member