

**United States Department of Labor
Employees' Compensation Appeals Board**

<p>JOSEPHINE PALAFOX, Appellant</p> <p>and</p> <p>DEPARTMENT OF JUSTICE, U.S. MARSHALLS SERVICE, Los Angeles, CA, Employer</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Docket No. 04-95</p> <p>Issued: April 1, 2004</p>
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Appearances:
Louis Brown, Esq., for appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
 COLLEEN DUFFY KIKO, Member
 DAVID S. GERSON, Alternate Member
 WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On October 14, 2003 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated July 17, 2003, in which the Office reduced her monetary compensation to zero. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's monetary compensation to zero, effective October 9, 2002, on the grounds that she failed to participate in vocational rehabilitation efforts without good cause.

FACTUAL HISTORY

On January 5, 1999 appellant, then a 76-year-old administrative support clerk, sustained an injury to her neck, back, knees and elbows when she tripped and fell on a floor rug.¹ On April 16, 1999 the Office accepted appellant's claim for right knee strain, left knee contusion, cervical strain, lumbar strain, right ankle strain, right knee arthroscopy.² She stopped work on December 1, 1999 and the Office paid appropriate benefits.

By letters dated December 8, 1999 and February 11, 2000, the Office informed appellant that a registered nurse had been assigned to assist with her recovery.

In a September 11, 2000 report, Dr. R.L Patrick Rhoten, a Board-certified neurological surgeon, indicated that a magnetic resonance imaging (MRI) scan of the lumbar spine revealed a mild amount of lumbar spondylosis with no evidence of any acute and or chronic traumatic instabilities or dislocations, mild degenerative disc disease and a mild disc bulge at L3-4 and L5-S1, with mild bilateral facet arthropathy at L4-5 and L5-S1. He indicated that appellant would benefit from aggressive physical therapy for her lower back and caudal epidural blocks. On November 8, 2000 Dr. Rhoten performed a lumbar steroid epidural block under fluoroscopic guidance and a lumbar epiduragram.

In a report dated December 13, 2000, Dr. Peter Yeung, Board-certified in physical medicine and rehabilitation, indicated that appellant remained significantly impaired with activities of daily living, ambulation, mobility and other functional issues given the bilateral knee and back issues. He advised that appellant's prognosis remained guarded, that she could not return to her previous job capacity and recommended permanent restrictions of no repetitive bending, climbing, kneeling, pushing, pulling, squatting, standing, walking and no lifting in excess of five pounds. Dr. Yeung indicated that appellant should not engage in any of these activities in excess of 1/3 of any 8-hour workday. He discharged appellant and advised that she should continue with physical therapy to include 8 to 12 sessions yearly and anti-inflammatory or analgesic medications. In a January 15, 2001, report, Dr. Yeung indicated that appellant was permanent and stationary as of December 13, 2000.

By letter dated February 9, 2001, appellant advised the Office that she was unable to perform her position at the employing establishment and there were no other positions for her that would not present a risk to her safety or to others. She requested permanent disability.³ In a February 20, 2002 letter, the employing establishment advised the Office that appellant was terminated as of September 2001.

¹ Appellant stopped work on January 5, 1999 and returned on January 6, 1999. She missed additional time from work and received continuation of pay from January 6 to February 19, 1999. Additionally, appellant received intermittent compensation from February 24, 1999 to January 10, 2000.

² Arthroscopic surgery was requested and appellant underwent right knee arthroscopy, by Dr. William C. Loos, a Board-certified orthopedic surgeon, on December 3, 1999.

³ In a December 20, 2000 letter, appellant also advised that her disability was severe and she would never be able to perform her duties.

In letters dated March 6, 2002, the Office advised appellant and JoAnne Ruchinskas that appellant was being referred to Ms. Ruchinskas for vocational rehabilitation. By letter dated April 3, 2002, Ms. Ruchinskas advised appellant that she was trying to reach appellant by telephone and had left voice messages and a toll free number, all of which were unanswered. She advised appellant that she was scheduling an appointment for April 11, 2002 and requested that she call to confirm. In an April 5, 2002 report, Ms. Ruchinskas indicated that there was a lack of response from appellant. She stated that daily calls placed to appellant had not elicited a response. Ms. Ruchinskas further advised that appellant had been terminated by the employing establishment as they never received any response from her. In an April 15, 2002 letter, the counselor, Ms. Ruchinskas, again advised appellant to contact her to discuss her vocational rehabilitation services.

In an April 17, 2002 letter to appellant, the Office indicated that, based on the reports from her vocational rehabilitation specialist, it understood that she was unwilling to participate in a possible rehabilitation effort and reiterated the sanctions for failing to comply. The Office informed appellant that she had 30 days in which to both contact her rehabilitation specialist and the Office to indicate that she would comply with the rehabilitation effort or provide medical documentation establishing why she could not comply. If appellant failed to comply with these requirements the Office indicated that it would terminate the rehabilitation effort and begin the process to reduce her compensation.

In a May 6, 2002 vocational rehabilitation progress report, Ms. Ruchinskas indicated that appellant did not present as a viable candidate for return to work services. She stated that it appeared that appellant would have transferable skills, but indicated that appellant was not able to work due to her inconsistent physical tolerances and had been terminated from her previous employer. Ms. Ruchinskas explained that, despite not having met with appellant, she did not believe that appellant would benefit from rehabilitation services. In a June 29, 2002 vocational rehabilitation progress report, Ms. Ruchinskas reported that in a follow-up telephone call, appellant advised that she had very limited tolerances for standing and walking, numbness in her legs and feet and constant pain. Appellant stated that pain management was her only focus at the present. Ms. Ruchinskas repeated her opinion that, despite not having met with appellant, she did not present as a viable candidate for vocational rehabilitation services. In reports dated August 8 and September 27, 2002, Ms. Ruchinskas advised that appellant did not present as a viable candidate for return to work services, but did not provide any current reports to substantiate her skills. She indicated that a plan was being prepared using appellant's transferable skills. In the September 27, 2002 report, Ms. Ruchinskas advised that appellant would not meet with her, either in the home or another convenient location.

By decision dated October 9, 2002, the Office reduced appellant's compensation to zero, under 5 U.S.C. § 8113(b) and section 10.519 of Title 20 of the Code of Federal Regulations. The Office advised appellant that she had not responded to its preparatory effort of vocational testing and did not allow the Office to determine what would have been her wage-earning capacity had she, in fact, undergone testing and the rehabilitation effort. The Office determined that appellant had failed, without good cause, to undergo vocational rehabilitation as directed. With respect to her wage-earning capacity, the Office further found that, in the absence of evidence to the

contrary, the vocational rehabilitation effort would have resulted in appellant's return to work at the same or higher wages than for the position appellant held when injured.

By letter dated October 17, 2002, appellant, through her representative, requested a hearing and stated that she did not receive the April 17, 2002 letter.

In a February 7, 2003 vocational rehabilitation progress report, Ms. Ruchinskas indicated that appellant did not present as a viable candidate for return to work services. She stated that from the very first contact, appellant maintained that she was unable to return to any kind of work due to her physical condition and that her status had not changed. Ms. Ruchinskas indicated that appellant would not meet with her and declined to sign the plan for direct placement.

A November 18, 2002 MRI of the right knee read by Dr. Dennis Fred, a physician of unknown specialty, revealed that a medial meniscal tear and the cartilage of the medial condyle was thinned.

In reports dated December 2, 2002 and January 8, 2003, from Dr. William C. Loos, a Board-certified orthopedic surgeon and one of appellant's treating physicians, diagnosed lumbosacral spine strain. He also advised that she undergo arthroscopy and indicated that she was undergoing a gastrointestinal workup.⁴ In reports dated February 27 and March 28, 2003, Dr. Loos indicated that appellant did not get clearance for her right knee arthroscopy. He also indicated that an MRI of the right knee was positive for a tear in the body of the medial meniscus.

In a March 28, 2003 report, the vocational rehabilitation counselor requested closing appellant's file on the grounds that appellant indicated that she was unable to do any kind of work due to her physical condition. Ms. Ruchinskas indicated that the file was on medical hold pending authorization to close. A May 14, 2003 report, from Ms. Ruchinskas, was essentially the same.

Appellant also submitted a duplicate of Dr. Yeung's January 15, 2001 operative report and a January 25, 2001 report from Dr. Uzen Guven, a neurologist, who determined that appellant had mild L5-S1 stenosis with no compression. A March 18, 2002 report, in which Dr. Mario Milch, Board-certified in internal medicine, advised that appellant had significant psychological factors as well as right knee pain. He indicated that she was unwilling to try medications on a regular basis and referred her for a psychiatry examination. Prescriptions dated December 12, 2001, January 15, 2002 and March 27, 2003 for Xanax Entex and Doxepin. Progress notes from January 25, 2001 to March 2002. A February 20, 2003 x-ray of the bilateral hips, which revealed diffuse degenerative changes bilaterally, with sclerosis, eburnation and mild protrusion, along with deformity of the femoral heads.

⁴ The record contains a subsequent surgery scheduling request from Dr. Loos that appears to be dated March 28, 2003. The request diagnosed right knee arthroscopy and right knee internal derangement.

The hearing was held on May 12, 2003. During the hearing, appellant's representative indicated that appellant would cooperate if additional rehabilitation efforts were initiated. Appellant, however, indicated that her pain was intolerable and that she could not envision being able to perform any job on a consistent basis.

By decision dated July 17, 2003, the Office hearing representative, affirmed the Office's October 9, 2002 decision, finding that the Office was correct in reducing appellant's compensation to zero. The Office hearing representative further advised that appellant's compensation benefits should be restored once she agreed to cooperate.

LEGAL PRECEDENT

Section 8104(a) of the Federal Employees' Compensation Act provides that the Secretary of Labor may direct a permanently disabled individual whose disability is compensable under the Act to undergo vocational rehabilitation.⁵ Additionally, the Act and the implementing regulation provide for sanctions if, an employee without good cause fails to apply for and undergo vocational rehabilitation, when so directed.⁶ These sanctions remain in effect until the employee, in good faith complies with the Office's directives.⁷

Section 10.519 of Title 20 of the Code of Federal Regulations details the actions the Office will take when an employee refuses to undergo vocational rehabilitation. The regulation provides in relevant part that, 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:

“(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 [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 absences 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 direction of [the Office].”

⁵ 5 U.S.C. § 8104(a).

⁶ 5 U.S.C. § 8113(b); 20 C.F.R. § 10.519.

⁷ *Id.*

Office regulation provide that, when an employee fails to participate in the early stages of vocational rehabilitation, 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.⁸

ANALYSIS

The evidence shows that the Office referred appellant to a vocational rehabilitation counselor to begin rehabilitation services on March 16, 2002. The counselor, Ms. Ruchinskas, tried to contact appellant on several occasions including sending letters to her dated April 3 and 15, 2002. The counselor also advised that several telephone calls were made and messages left, advising appellant to contact her and meet with her in order to determine placement for appellant. She did not keep her scheduled appointments. The counselor was able to reach appellant telephonically in May and June 2002 and she maintained that she was not able to work. However, appellant did not provide any medical documentation to support her claims. She, therefore, failed, without good cause, to participate in preliminary vocational rehabilitation meetings such that she failed to participate in the "early, but necessary stages of a vocational rehabilitation effort."⁹

The Office informed appellant that it was reducing her compensation to zero and she did not submit evidence to refute such an assumption. Although she offered her opinion to support that she was unable to work, appellant did not provide medical documentation. Further, her attorney alleged that she did not receive the April 17, 2002 letter. 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. The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee.¹⁰ It does not appear that the letter was improperly addressed and; therefore, it is presumed that the letter was duly mailed. The Board finds that the Office, in its October 9, 2002 and July 17, 2003 decisions, had a proper basis to reduce her disability compensation to zero effective October 9, 2002.

In arguing that she had good cause to not participate in vocational rehabilitation efforts, appellant alleged that she was medically unfit to pursue employment. She did not, however, adequately articulate this argument or provide evidence in support thereof. The evidence of

⁸ See *id.* *Jonathan Gibbs* 52 ECAB 91 (2000); Federal (FECA) Procedure Manual, Part 2 -- Claims, Reemployment: *Vocational Rehabilitation Service*, Chapter 2.813.11(a) (November 1996).

⁹ See 20 C.F.R. § 10.519(b), (c).

¹⁰ *Kimberly A. Raffile*, 50 ECAB 243 (1999).

record, including the December 13, 2000 and January 15, 2001 reports of Dr. Yeung, one of appellant's attending physicians, Board-certified in physical medicine and rehabilitation, reveal that appellant was permanently disabled with restrictions. He provided limitations and opined that appellant could not return to her previous position, however, he did not indicate that she was totally disabled such that she could not return to any form of gainful employment.

Although appellant provided copies of her medical file, there was no statement from any of the physicians with regard to her ability to work or to change the limitations as previously presented by Dr. Yeung in January 2001.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation under 5 U.S.C. § 8113(b) to zero on the grounds that she failed to cooperate with vocational rehabilitation efforts without good cause.

ORDER

IT IS HEREBY ORDERED THAT the July 17, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Issued: April 1, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member