United States Department of Labor
Employees' Compensation Appeals Board

CORA EALEY, Appellant	)	
and	)	**Docket No. 03-2264**
	)	**Issued: December 29, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Houston, TX, Employer	)	

Appearances:
Cora Ealey, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 12, 2003 appellant filed a timely appeal from the decisions of the Office of Workers' Compensation Programs. Specifically, appellant appeals the Office's decision of January 24, 2003, wherein the Office reduced appellant's compensation under 5 U.S.C. § 8113(b) and the decision dated June 13, 2003 denying appellant's request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case, as well as the nonmerit hearing denial.

ISSUES

The issues are: (1) whether the Office properly reduced appellant's compensation under 5 U.S.C. § 8113(b) because of her failure to cooperate in vocational rehabilitation; and (2) whether the Office properly denied appellant's request for an oral hearing pursuant to 5 U.S.C. § 8124(b).

FACTUAL HISTORY

On May 18, 2000 appellant filed a traumatic injury claim alleging that on May 15, 2000 she injured her left shoulder, neck and mid back when pulling and loading mail. By letter dated July 13, 2000, appellant's claim was accepted for left shoulder strain and cervical strain. Compensation benefits were paid. Appellant underwent surgery on July 31, 2000 and May 8, 2001. On October 19, 2000 the Office assigned a field nurse to provide medical management services to facilitate appellant's recovery and return to full-duty employment. On August 21, 2001 appellant underwent an anterior cervical decompression and fusion, C4-5, with iliac crest bone bank fusion and exploration of spinal fusion, C5-6, and microdissection. The Office authorized the surgeries. After appellant's most recent surgery, she did not return to work and accordingly was paid temporary total disability.

On January 8, 2002 Dr. Helen M. Schilling a Board-certified physiatrist, indicated that appellant could return to work sedentary duty three hours a day five days a week, with no lifting over five pounds.

In an office note dated January 17, 2002, Dr. Ajay K. Bindal, appellant's Board-certified treating neurosurgeon, indicated that appellant continued to experience muscle spasms and discomfort in her neck and shoulders and decreased range of motion. He further indicated that appellant was given a return to work release "but cannot return to work and seems emotionally distraught and anxious." Dr. Bindal noted that appellant's examination showed decreased range of motion in her neck and shoulders and otherwise normal examination with good wound healing. He further indicated that appellant needed to consult an industrial medicine physician.

On January 18, 2002 the employing establishment made a limited-duty job offer as a modified distribution clerk five days a week from 10:00 p.m. to 1:00 a.m., and noted that the offer was available for up to eight hours per day when appellant was medically released to increase work hours. The employing establishment noted that the position involved limited standing, sitting and walking and lifting up to five pounds.

Appellant declined this offer. In support thereof, appellant submitted a January 22, 2002 report wherein Dr. Bindal indicated that appellant had been under his care since September 2000 and that appellant was unable to perform job duties at this time.

On January 22, 2002 appellant also filed a claim for a schedule award.

In an office note dated February 21, 2002, Dr. Bindal indicated that appellant "remains quite debilitated." In an addendum, he noted that he talked to appellant's case manager and told her that he had no objection to appellant returning to work as soon as she is comfortable to do so, but that, due to her current level of pain, it appears that it would not be the case at this time.

In a February 25, 2002 report, Dr. Hector J. Ortiz, a family practitioner, indicated that appellant was status post anterior cervical laminectomy with fusion, status post evacuation of a hematoma from cervical spine, chronic pain syndrome and severe deconditioning. He recommended that appellant be submitted to an intensive course of physical therapy to be

followed with three to four weeks of work conditioning. Dr. Ortiz noted that at this time appellant was unable to work.

On March 19, 2002 Dr. Bindal indicated that appellant would be able to return to light-duty work from 1:00 p.m. to 5:00 p.m. on March 22, 2002 with limitations of no lifting over 10 pounds, no lifting above shoulder and no pushing or pulling.

In a PS Form 2573, request for claim status, the employing establishment indicated that appellant returned to work on March 21, 2002 at 10:00 pm, worked two hours and then signed out stating that she could not do the job due to pain.

By letter to appellant dated March 25, 2002, the Office noted that appellant refused without good cause to accept the work assignment and refused to work with the registered nurse's efforts to return to gainful employment "and by association, the vocational rehabilitation efforts" of the Office. This letter noted that 5 U.S.C. § 8113(b) of the Federal Employees' Compensation Act states that a claimant must undergo vocational rehabilitation as directed "including nurse services" and found that appellant's wage-earning capacity would have increased a great deal if appellant had cooperated with the "nurse intervention." Appellant was given 30 days to make a good faith effort to participate in the nurse's efforts or return to gainful employment.

The record reveals that the Office referred appellant to Dr. Robert Levinthal, a Board-certified neurosurgeon. By letter dated March 19, 2002, received by the Office on March 26, 2002, Dr. Levinthal's office advised of a change in appointment to April 15, 2002. In an April 15, 2002 note, Dr. Levinthal stated that appellant does not want any more surgery and agreed that she did not need further surgery. He noted that appellant has severe muscular deconditioning and now spasm, and also has a capsulitis of her left shoulder joint. Dr. Levinthal noted that appellant was in need of therapy and indicated that he had "grave doubts" as to whether appellant would ever be functional again.

On April 22, 2002 appellant signed a form indicating that she elected to receive retirement benefits rather than be entitled to benefits under the Act effective March 24, 2002.[1]

In an office note dated July 3, 2002, Dr. Bindal indicated that appellant has continued trouble with her neck and shoulder and is having difficulty carrying out activities due to these symptoms. He indicated that appellant was unable to return to work and had retired. Dr. Bindal noted that appellant had reached maximum medical improvement and that no further treatment could be offered.

Dr. Bindal referred appellant to Dr. Dean C. Wasson, a chiropractor, for an evaluation. In his report dated August 9, 2002, Dr. Wasson indicated that appellant had poor posture and body mechanics, decreased static strength, decreased hang grip strength, decreased mobility and flexibility for the neck and left shoulder, decreased tolerance for repetitive movements and decreased tolerance for positional work activities.

[1] On March 14, 2002 appellant's application with the Office of Personnel Management for disability retirement was approved.

In a medical report dated August 20, 2002, Dr. Anjali Jain indicated that appellant had a 17 percent whole person impairment.

Appellant continued to seek treatment from Dr. Bindal. In a December 19, 2002 note, Dr. Bindal indicated that appellant still had quite a bit of muscle spasms and stiffness in her neck. He advised appellant to undergo a posterior fossa decompression.

By decision dated January 24, 2003, the Office, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, reduced appellant's compensation to zero as a result of her refusal to participate in connection with the registered nurse "as part of vocational rehabilitation" in this case. The Office also notified appellant that her abandonment of suitable employment after having worked 1.5 hours "and then left work stating you had been approved for OPM [Office of Personnel Management] retirement and that you were going to take OPM benefits rather than work," was viewed as a refusal of suitable employment. Appellant was notified that this reduction would continue until she in good faith underwent the directed registered nurse's program to return to gainful employment or show cause for not complying.

By letter dated March 27, 2003, the Office advised appellant that the request for a schedule award had been "coded out" as appellant was not entitled to any further monetary benefits while the sanction imposed in the January 24, 2003 decision was in effect.

In an undated letter postmarked April 15, 2003, appellant requested an oral hearing.

By decision dated June 13, 2003, the Office denied appellant's request for a hearing as untimely filed. The Office further considered appellant's request under its discretionary authority and denied it for the reason that the issue could equally well be addressed by requesting reconsideration from the Office and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

Section 8113(b) of the Act provides:

> "If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed, 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 his wage-earning capacity in the absence of the failure, until the individual in good faith complies.[2]

[2] 5 U.S.C. § 8113(b).

The regulation implementing the Act also provides in pertinent part:

> "If any 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."[3]

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.[4] 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.[5] The Office's 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.[6] The Office 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.[7]

ANALYSIS -- ISSUE 1

In this case, the Office's January 24, 2003 decision reduced appellant's compensation to zero on the grounds that her refusal to participate in connection with the registered nurse was a refusal to undergo vocational rehabilitation. The Board finds, however, that the Office improperly reduced appellant's monetary compensation to zero under the facts of this case.

While refusal of a light-duty job offer may result in sanctions under section 8106 of the Act,[8] it does not constitute a failure or refusal with the early or necessary stages of vocational

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[3] 20 C.F.R. § 10.519 (1999).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.6(b) (December 1993).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.5(c)(1) (November 1996).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.5(c)(3)(a) (November 1996) (claimant's can be referred for an occupational rehabilitation place formulated by an Office rehabilitation specialist when "[i]ntervention by the field nurse has ended, but the claimant as moderate to severe physical limitations or decondition or has not had an assessment of physical limitations and has not returned to work.)

[7] 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 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.

[8] 5 U.S.C. § 8106.

rehabilitation under section 8113 of the Act or the implementing regulations."[9] In the instant case, the Office found that appellant's refusal to continue working the position offered by the employing establishment constituted a "refusal to undergo vocational rehabilitation justifying suspension of her monetary compensation under section 10.519(c) of the Office regulation." However, section 10.519(c) of the Office regulation is based on the presumption that the limited-duty job offer made available by the employing establishment constituted part of its rehabilitation efforts. In the instant case, the job offer by the employing establishment was made independent of any activities of the Office which could be characterized as vocational rehabilitation in this record.[10] The Office did not specifically order appellant to undergo vocational rehabilitation. The Board further notes that there is no evidence that appellant failed to or refused to undergo any testing, interviews or counseling or was uncooperative in the early and necessary stages of vocational rehabilitation under section 8113(b). Also there is no evidence that the job offer was the result of the field nurse's efforts. The Board notes that the Office field nurse's activities were limited to the role of facilitating appellant's recovery and return to full-duty employment, not as part of vocational rehabilitation. The nurse's efforts did not provide appellant with any additional skills or training needed to reenter the labor market. Thus, this case can therefore be distinguished from those in which the claimant was referred to a vocational rehabilitation specialist and where the Board found that there was a vocational rehabilitation plan in effect.[11] Therefore, the Board finds that the Office did not meet its burden of proof to reduce appellant's compensation benefits.

CONCLUSION

The Board finds that the Office improperly reduced appellant's compensation due to her failure without good cause to cooperate with rehabilitation efforts.[12]

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

[10] *Id.*

[11] *See Ruth E. Leavy*, 55 ECAB ___ (Docket No. 03-1197, issued January 27, 2004).

[12] In light of the disposition of this issue, the second issue with regard to whether the Office properly denied appellant's request for an oral hearing, is moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 24, 2003 is reversed.

Issued: December 29, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member