U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUTH E. LEAVY and U.S. POSTAL SERVICE,
POST OFFICE, Los Angeles, CA

Docket No. 03-1197; Submitted on the Record;
Issued January 27, 2004

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in reducing appellant's compensation to zero based on her failure to undergo vocational rehabilitation.

On October 13, 1999 appellant, then a 48-year-old letter carrier, filed a traumatic injury claim (Form CA-1), alleging that on that same date she was pushing tubs of mail and felt a burning sensation in her lower stomach.[1] The Office accepted appellant's claim for ventral epigastric hernia and obstructive incisional hernia and she underwent surgery to repair the hernia on November 2, 1999. She stopped work on November 2, 1999 and returned on May 18, 2000.

In support of her claim, appellant submitted various reports from Dr. Irina Gaal, Board-certified in emergency medicine, dated October 22, 1999 to July 3, 2000; and Dr. Robert Zane, a Board-certified surgeon, dated November 2 to 9, 1999. Dr. Gaal noted treating appellant for a ventral hernia which occurred when she was pulling bins of mail at work. She noted a history of appellant's hernia injuries, indicating that appellant sustained a previous hernia injury in February 1999 which was repaired and currently experienced a recurrent ventral hernia which required surgery. Appellant underwent surgery for repair of the hernias and continued to experience constant left-sided abdominal pain. Dr. Gaal advised that appellant was temporarily totally disabled until March 2000, when she could return to light-duty work subject to various work restrictions. On June 12, 2000 Dr. Gaal indicated that appellant had returned to work light duty; however, she still experienced frequent episodes of pain in the right lower side of the

[1] Appellant filed a claim for an injury occurring on January 5, 1998, claim number 13-1152386, which was accepted for ventral hernia and surgical repair. Her hernia claims were consolidated and the current claim number 13-1200840 is the master file.

abdomen. Dr. Gaal's report dated July 3, 2000 advised that appellant had reached maximum medical improvement and diagnosed multiple ventral hernias, postsurgical repair.[2]

On December 5, 2000 appellant filed a Form CA-2a, notice of recurrence of disability. She indicated a recurrence of pain due to employment-related injuries sustained in October 1999. Appellant was on light duty when she filed this claim and stopped work on December 5, 2002. She indicated that her recurrence of symptoms began on November 24, 2002.

In a decision dated April 10, 2001, the Office denied appellant's claim for a recurrence of disability on the grounds that she did not submit sufficient medical evidence to establish that she sustained a recurrence of disability on or after November 24, 2000 causally related to the October 13, 1999 employment injury.

On September 19, 2002 appellant filed a Form CA-2a, notice of recurrence of disability. She indicated a recurrence of pain due to employment-related injuries sustained in October 1999. Appellant was on light duty when she filed this claim and stopped work on September 5, 2002 and did not return. She indicated that her recurrence of symptoms began on September 5, 2002. On December 23, 2002 the Office accepted appellant's claim for a recurrence of disability. She was paid compensation from September 5 to December 27, 2002.

On December 31, 2002 appellant filed a Form CA-7, claim for compensation for the period December 20, 2002 to January 17, 2003. The Office noted that compensation would be paid from the date of the recurrence of disability of September 5 to December 27, 2002.

In letters dated January 16 and 17, 2003, the Office referred appellant for nurse intervention. The Office specifically requested that the nurse work with the treating physician on a physical rehabilitation plan and medical management plan for her to return to work.

On January 27, 2002 the staff nurse consultant filed a report of noncompliance with the mandatory program for appellant. The nurse indicated that from the period January 17 to 27, 2003 appellant spoke with the nurse by telephone and the nurse requested that appellant sign a consent form for release of medical information and she agreed to sign such form. The same day, appellant telephoned the nurse, indicating that she could not attend the scheduled nurse visit and rescheduled the visit for another day. She also advised that she would not sign the consent form for release of medical information on the advice of her attorney. The nurse noted that she contacted the attorney with regard to appellant signing the consent to the release of medical information and explained the nurse intervention program. The attorney would not work with the assigned nurse and indicated that he advised his client not to sign anything unless it went through his office.

By letter dated February 13, 2003, the Office notified appellant that it proposed to reduce her compensation to zero because she failed to cooperate with the assigned nurse in the early stages of the rehabilitation process. The Office noted appellant's refusal to sign the consent form

[2] On July 13, 2000 appellant filed a claim for a schedule award. In a decision dated August 24, 2000, the Office denied appellant's claim for a schedule award noting that the medical evidence failed to establish that appellant sustained a permanent impairment to a scheduled member.

for release of medical records on the advice of her attorney; her attorney's refusal to cooperate with the assigned nurse and only speak with the claims examiner; and the attorney's advice not to permit appellant to sign anything that did not go through his office. The Office provided appellant 30 days within which she must "undergo the approved training program;" or "show good cause for not undergoing the training program;" or the rehabilitation effort would be terminated and action would be initiated to reduce appellant's compensation to zero until she complied in good faith with the Office's directions concerning nurse services.

In an addendum to the noncompliance report of January 27, 2003, the nurse noted that appellant had not initiated any contact with her.

By letter dated February 19, 2003, appellant, through her attorney, requested all medical records and noted that she was not permanent and stationary and needed surgery and, therefore, would not be participating in vocational rehabilitation. She also requested a change in treating physicians.

Appellant submitted a computerized tomography (CT) scan of her abdomen and pelvis. The CT scan revealed a large focal area of decreased attenuation along the anterior abdominal wall with some interval decrease in size; abscess formation could not be excluded. She also submitted a hospital admission note dated September 5, 2002, which noted that appellant was treated for an infected fluid collection below her incision.

In the assigned nurse's closing report dated March 21, 2003, the nurse noted that the claims examiner had spoken with appellant's attorney, who indicated that appellant would be advised to contact her assigned nurse. The claims examiner noted that he gave appellant additional time to respond. The assigned nurse confirmed that she had neither received a call from appellant nor her attorney and was instructed by the claims examiner to close the case.

By decision dated April 1, 2003, the Office reduced appellant's compensation to zero effective April 1, 2003 as a result of her refusal to cooperate in connection with vocational rehabilitation.

The Board finds that the Office improperly reduced appellant's compensation benefits to zero.

Section 8104(a) of the Federal Employees' Compensation Act[3] 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…." 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

[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).

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 to work 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 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 regulation states:

> "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].

[5] *Id*. The Office's regulation provides: "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.

[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).

> (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]

In letters dated January 16 and 17, 2003, appellant was referred to a nurse consultant in an effort to develop a physical rehabilitation plan and medical management plan for her to return to work. The Office's April 1, 2003 decision reduced appellant's compensation to zero on the grounds that she refused to cooperate with field nurse services, which constituted a refusal to undergo vocational rehabilitation without good cause.

The Board finds that appellant's refusal to cooperate in the physical rehabilitation plan and medical management plan of the nurse did not constitute a refusal to undergo vocational rehabilitation such that the Office could then reduce her compensation under section 8113(b) of the Act. The Office found that appellant's refusal to cooperate in the physical rehabilitation plan and medical management plan constituted a "refusal to undergo vocational rehabilitation," justifying suspension of her monetary compensation under section 10.519(c) of the Office's regulations.[11] The Board notes, however, that refusal to cooperate in the physical rehabilitation plan and medical management plan did 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.[12] The Office's application of section 8113 to reduce appellant's monetary compensation to zero was in error.

The Office's decision is premised on the January 17, 2003 referral for nurse intervention to work with appellant's treating physician on a physical rehabilitation and medical management plan in order to return to work. The Office decision finds that the nurse services constituted a vocational rehabilitation effort. The Board finds, however, that the record does not demonstrate that the Office field nurse was involved in a vocational rehabilitation effort.[13]

[10] 20 C.F.R. § 10.519.

[11] *See Silas Perkins,* Docket No. 03-380 (issued June 27, 2003).

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

[13] *Id.*

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.[14] 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.[15] 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.[16] The Office's procedures contemplate that field nurse intervention ends prior to referring the claimant to a vocational rehabilitation specialist for a formal vocational rehabilitation plan.[17] However, in this case, there was never a referral for vocational rehabilitation; rather there was a referral for nurse intervention to work with appellant's treating physician on physical rehabilitation and medical management plans in which appellant would return to work. The first mention of vocational rehabilitation is the February 13, 2003 letter in which the Office stated that appellant's refusal to cooperate with the staff nurse was seen as a refusal to undergo vocational rehabilitation. Additionally, the January 27, 2002 noncompliance report from the staff nurse makes no reference to vocational rehabilitation.

The Office's regulations characterize the field nurse as part of the early vocational rehabilitation process, but do not equate the 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

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.6(b), "Placement with Previous Employer" (issued December 1993).

[15] *Id*. at Chapter 2.813.6(c)-(g) (issued December 1993).

[16] *Id.* at Chapter 2.813.5(c)(1) (issued November 1996).

[17] *Id.* at Chapter 2.813.5(c) (3)(a) (issued November 1996) (claimants can be referred for an occupational rehabilitation plan 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").

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.[18] In this case, the nurse was directed to work with the treating physician on a physical rehabilitation plan for return to work and also to provide a medical management plan. The Office articulated this objective in the January 16, 2003 letter, requesting that the nurse "work with the treating physician on a rehabilitation plan for a return to work." In a January 17, 2003 letter, the Office emphasized that the nurse's function was to provide a "medical management plan." There is no mention of any plan to assess appellant's vocational skills, retrain her for a different occupation, and assist her in finding work. Additionally, there is no evidence that the nurse had identified appellant's case as one that might benefit from vocational rehabilitation services and there is no evidence that she ever communicated such a recommendation to the claims examiner.

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 and medical management services, a preliminary reemployment effort which does not constitute vocational rehabilitation. Thus, this case can therefore be distinguished from those in which the claimant was referred to a vocational rehabilitation specialist[19] and where the Board found that there was a vocational rehabilitation plan in effect.[20] The Office did not meet its burden of proof to reduce appellant's monetary compensation benefits.

The April 1, 2003 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
January 27, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[18] *Id*. at Chapter 2.813.6(b), "Placement with Previous Employer" (issued December 1993).

[19] *Terrence E. Moore*, Docket No. 03-769 (issued August 26, 2003).

[20] *Thomas C. Gilbert*, Docket No. 01-2125 (issued February 21, 2003).