

Office accepted that a recurrence of disability occurred on October 23, 2002, six days after her return to work and appellant was placed on the periodic compensation rolls.

Dr. Mary Lee Sole, a Board-certified orthopedic surgeon, treated appellant for right thoracic outlet syndrome, acromioclavicular joint arthritis and impingement syndrome following the work-related injury. On February 19, 2003 the Office referred appellant to Barbara Foglia, a registered staff nurse, to assist with returning her to gainful employment within her capabilities once she reached maximum recovery.

In a medical form dated June 4, 2003, Dr. Sole noted that appellant had reached maximum medical improvement with her right shoulder condition. She reported that appellant could return to work for one to two hours per day, five days per week with no reaching, pushing or pulling with the right arm at all and only light manipulation with the right hand, as long as the hand was in front of her body. Dr. Sole indicated that appellant was capable of returning to nonrepetitive type work involving her right shoulder, elbow or hand with limitations on pushing, pulling or lifting.

The record reflects that the employing establishment offered appellant a temporary assignment of light clerical duties for two hours each day based on Dr. Sole's restrictions effective June 13, 2003. In a letter dated June 23, 2003, the Office advised appellant that the temporary light-duty assignment provided to her was an appropriate assignment consistent with her medical restrictions. The Office advised appellant that her refusal to accept the position would be seen as her refusal to cooperate with Office vocational rehabilitation efforts and result in a reduction of compensation benefits. The Office provided appellant 30 days to make a good faith effort to participate in vocational rehabilitation efforts to return her to gainful employment by accepting the offered work assignment or give good reason for not participating in this effort.

On July 11, 2003 appellant submitted a brief statement which indicated that she did not report for the job because the position offered required the use of her right arm, which would aggravate her shoulder and arm condition. She alleged that she could not assist in setting up an office or do filing without aggravating her condition. Appellant noted that she and her husband had relocated to Florida.

In a letter dated July 14, 2003, the Office advised appellant again that her refusal to accept the limited-duty assignment offered by the employing establishment that the Office found suitable was found to be a refusal to cooperate with Office vocational rehabilitation efforts. It advised that unless appellant provided good reason for refusing suitable work the Office would assume that vocational rehabilitation would have resulted in her return to work with no loss of wage-earning capacity and would reduce her compensation to zero. She did not respond to the job assignment.

The Office received a subsequent medical form from Dr. Sole dated August 7, 2003, which indicated that appellant was permanently disabled from work as a result of her right shoulder condition and noted further that she could not use her right arm at all. She indicated that appellant might benefit from further physical therapy or surgery.

By decision dated October 1, 2003, the Office reduced appellant's compensation. The Office determined that appellant had, without good cause, declined to participate in vocational rehabilitation to return her to employment within the specified medical restrictions as directed. Her compensation was reduced to zero until she accepted the temporary work assignment in good faith or showed good cause for not complying, at which time the reduction of compensation would cease. The Office noted that it received a medical form on August 7, 2003 from Dr. Sole disabling appellant from work, however, it noted that the form did not provide any medical rationale of why or how appellant's condition had changed in the past two months to the point of disabling her from any type of work.

LEGAL PRECEDENT

Section 8113(b) of the Federal Employees' Compensation 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.”¹

The regulation implementing the Act also provide in pertinent part:

“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.”²

ANALYSIS

In this case, the Office's October 1, 2003 decision suspended appellant's compensation benefits on the grounds that her refusal of the employing establishment's light-duty job offer, made in connection with field nurse services, constituted a refusal 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 her compensation under section 8113(b) of the Act. The Office found that appellant's refusal of the

¹ 5 U.S.C. § 8113(b).

² 20 C.F.R. § 10.519 (1999).

employing establishment's June 13, 2003 job offer constituted a "refusal to undergo vocational rehabilitation," justifying suspension of her monetary compensation under section 10.519(c) of the Office's regulation. 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. The Board notes, however, that, while refusal of a light-duty job offer may result in sanctions under section 8106 of the Act,³ 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.⁴ The Office's application of section 8113 to reduce appellant's monetary compensation to zero was in error.

The Office's October 1, 2003 decision presumed that the employing establishment's June 13, 2003 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 13, 2003 offer was made by the employing establishment, independent of any activities of the Office which could be characterized as vocational rehabilitation in this record.⁵

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.⁶ 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.⁷ 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.⁸ The Office's procedures appear to

³ 5 U.S.C. § 8106.

⁴ *Rebecca L. Eckert*, 54 ECAB ___ (Docket No. 01-2026, issued November 7, 2002).

⁵ *Id.*

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.6(b) (December 1993).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, (Chapter 2.813.6(c)-(g) (December 1993).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, (Chapter 2.813.5(c)(1) (November 1996).

contemplate that field nurse intervention ends prior to referring the claimant to a vocational rehabilitation specialist for a formal vocational rehabilitation plan.⁹

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 regulation 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. Foglia's activities were only part of an attempt to identify light or limited duty at the employing establishment.¹⁰ She was directed only to provide medical management to return appellant to full duty at the employing establishment, not to assess her vocational skills, retrain her for a different occupation and assist her 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 meet its burden of proof to suspend appellant's monetary compensation benefits. Therefore, the October 1, 2003 decision will be reversed.

CONCLUSION

The Board finds that the Office improperly suspended appellant's compensation benefits due to her failure without good cause to cooperate with rehabilitation efforts.

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.5(c)(3)(a) (November 1996) (claimants can be referred for an occupational rehabilitation plan formulated by an Office rehabilitation specialist when "[i]ntervention by the 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).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.5(c)(3)(a) (December 1993).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 1, 2003 is reversed.

Issued: June 2, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member