



## **FACTUAL HISTORY**

On September 19, 1987 appellant, then a 37-year-old clerk, sustained an injury to his back when an employee pulled a chair out from under him and he landed on the floor.<sup>1</sup> The Office accepted appellant's claim for low back sprain and contusion to the back, chronic pain, and lumbar radiculopathy and chronic pain syndrome. Appellant last worked for the employing establishment on March 16, 1991 and appropriate compensation benefits were paid.

In an October 11, 1991 report, Dr. Stephen Kamin, a Board-certified neurologist, opined that appellant was disabled from performing his usual employment and advised that appellant be retrained. The Office continued to develop the claim, and appellant was referred for second opinion evaluations with Dr. Mathew DeLuca, a Board-certified neurologist on August 2, 2000 and Dr. Solomon Miskin, a Board-certified psychiatrist on August 2, 2000.

In an August 22, 2000 report, Dr. DeLuca opined that appellant was suffering from a psychological disturbance as opposed to a neurological defect and had reached maximum medical improvement. In an August 23, 2000 report, Dr. Miskin diagnosed depressive disorder due to reported pain and limited mobility, chronic, mild to moderate severity; and moderate chronic pain syndrome. He indicated that appellant had a mild partial psychiatric disability and opined that he could work an eight-hour day at light duty.

By letter dated December 7, 2000, the Office referred appellant for vocational rehabilitation services, based upon the opinions of Drs. DeLuca and Miskin.

In a report covering the period December 8, 2000 to January 31, 2001, the rehabilitation counselor, Roy Hirschfeld, covered the period December 8, 2000 to January 31, 2001 and indicated that he had sent several certified letters and left several telephone messages for appellant, who had not returned his calls. The counselor advised that he finally reached appellant on January 4, 2001, who stated that it was too late in the evening and hung up on him. The counselor indicated that he was not able to proceed with rehabilitation efforts.

By letter dated February 15, 2001, the Office advised appellant that he was refusing to cooperate with vocational rehabilitation efforts, noting that he did not cooperate with the rehabilitation counselor assigned to his case and did not meet with him or respond to his letters. Appellant was advised that his compensation would be suspended pursuant to section 8113(b) of the Federal Employees' Compensation Act if he failed to fully cooperate with the vocational rehabilitation efforts. He was given 30 days to comply. Appellant did not respond to the February 15, 2001 letter.

In a March 1, 2001 report, Dr. Torbjoern Nygaard, Board-certified in psychiatry and neurology, advised that appellant was totally disabled by his neurological condition and his disability was not expected to change.

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<sup>1</sup> In a statement dated November 16, 1987, appellant indicated that he had previous back injuries in 1975 and 1980, which were not work related.

In a March 16, 2001 rehabilitation action report, the counselor advised that appellant had not responded to four voice-mail messages and three certified letters.

By decision dated May 14, 2001, the Office reduced appellant's compensation to zero effective May 20, 2001 based on his refusal to participate in vocational rehabilitation. The Office indicated that appellant did not respond by telephone or correspondence to the rehabilitation counselor.

On June 13, 2001 appellant requested a hearing, which was held on December 5, 2001. During the hearing, appellant testified that he was assaulted on December 31, 2000. He indicated that he was already working with the rehabilitation counselor when the assault occurred and was in the process of trying to get the doctors to see if he needed paperwork. He alleged that he tried to respond the best he could under the circumstances.

By decision dated February 25, 2002, the May 14, 2001 decision was affirmed by the Office hearing representative. The Office hearing representative found that appellant was not entitled to reinstatement of his compensation benefits until he took steps to cooperate with the Office's vocational rehabilitation efforts.

By letter dated June 6, 2002, appellant through his representative<sup>2</sup> requested reconsideration and enclosed additional evidence including a May 30, 2002 statement in which appellant indicated that he would cooperate with vocational rehabilitation efforts. His attorney alleged that appellant had three surgeries to his ankle with the first commencing on January 10, 2001, a revision on March 20, 2001 and another surgery on September 4, 2001 to remove the hardware. In support of the good cause argument, he submitted a December 31, 2000 report, which appears to have been signed by a nurse whose signature is illegible. Appellant indicated that he was assaulted. He was diagnosed with a left ankle fracture. In a September 4, 2001 report, Dr. Shyam Kishan, a Board-certified orthopedic surgeon, confirmed that on January 10, 2001 appellant underwent surgery to the left ankle on January 10, 2001, with a revision on March 20, 2001 and hardware removal on September 4, 2001. Additionally unsigned progress notes regarding the arthroscopy dated February 26 and March 20, 2001 were included from Drs. Usha Mani and Rajesh Arakal, Board-certified orthopedic surgeons.<sup>3</sup>

In a June 21, 2002 decision, the Office denied modification of the prior decision dated February 25, 2002. The Office noted the surgeries and assault identified by appellant, including the time it would take to recover, and determined that the period of time appellant failed to cooperate was so extensive as to be unreasonable. Further, the Office noted that appellant did not maintain any written or oral communication with his vocational rehabilitation counselor and all calls or letters from his counselor were ignored. The Office noted that appellant had agreed to cooperate and they were referring his case to the rehabilitation unit.

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<sup>2</sup> Appellant appointed Mr. Uliase as his representative on April 30, 2002.

<sup>3</sup> Appellant also submitted a duplicate of Dr. Nygaard's March 1, 2001 report indicating that appellant was totally disabled, Dr. Kamin's March 4, 1993 report in which he indicated that appellant was totally disabled and a February 23, 1990 report from Dr. Steven Brown, a neurologist, indicating that appellant had chronic low back pain.

Appellant thereafter complied with vocational rehabilitation, and his compensation benefits were reinstated effective July 11, 2002.

By letter dated October 7, 2002, appellant through his representative requested reconsideration.<sup>4</sup>

In an October 11, 2002 report, Dr. Nygaard opined that appellant had chronic back spasms since his 1987 employment injury. The physician opined that appellant was disabled; however, he could not define a neurological process. He indicated that appellant was previously diagnosed with major depression, personality disorder and adjustment disorder with a prior diagnosis of psychogenic pain disorder. Dr. Nygaard opined that, although appellant's body was capable of work, it appeared that his mind would not allow it.

By decision dated December 24, 2002, the Office vacated the May 14, 2001 decision. The Office determined that appellant was entitled to wage-loss benefits for the period May 30 to July 10, 2002 and the period beginning September 8, 2002 which had not been previously paid. The Office determined that the effective date of reinstatement should have been the date appellant indicated in writing that he intended to comply. Appellant thereafter received compensation for the period May 30 to July 10, 2002.

By letter dated January 6, 2003, appellant, through his attorney, requested a hearing, which was held on July 29, 2003. Appellant testified that he was the victim of an assault on December 31, 2000 and sustained multiple injuries including a broken ankle, which worsened his work injuries and that he was in a cast and unable to get around due to the broken ankle. He also stated that he tried to contact the Office but could not get through. He advised that his life was complicated and with his medical problems and communication difficulties it just took time. Appellant's attorney again argued that appellant had good cause for not cooperating due to the serious injuries sustained in the physical assault and should be entitled to benefits.

By decision dated November 13, 2003, the Office hearing representative affirmed the December 24, 2002 decision finding that appellant's benefits were appropriately reinstated retroactively to May 30, 2002, the date appellant provided a signed statement indicating his willingness to cooperate demonstrated by his meeting with a vocational rehabilitation counselor. The Office hearing representative noted that the issue of appellant's noncooperation or "good cause" had previously been considered and adjudicated.

### **LEGAL PRECEDENT**

Section 8104(a) of the Act<sup>5</sup> pertains to vocational rehabilitation and provides: "The Secretary of Labor may direct a permanently disabled individual whose disability is compensable

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<sup>4</sup> The Office subsequently received an illegible copy of a June 14, 2002 magnetic resonance imaging (MRI) scan of the lumbar spine without contrast and an August 1, 2002 MRI scan of the lumbar spine which demonstrated that appellant had a normal spine.

<sup>5</sup> 5 U.S.C. § 8104(a).

under this subchapter to undergo vocational rehabilitation.<sup>6</sup> 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.<sup>7</sup> If it is determined that the injured employee is prevented from returning to the date-of-injury job, vocational rehabilitation services may be provided to assist returning the employee to suitable employment.<sup>8</sup> Such efforts will be initially directed at returning the partially disabled employee to work with the employing establishment.<sup>9</sup> Where reemployment at the employing establishment is not possible, the Office will assist appellant to find work with a new employer and sponsor necessary vocational training.<sup>10</sup>

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 [his] wage-earning capacity in the absence of the failure, until the individual in good faith complies” with the direction of the Office.<sup>11</sup> 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

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<sup>6</sup> 5 U.S.C. §§ 8101-8193.

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.2 (December 1993).

<sup>8</sup> *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).

<sup>9</sup> *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.3 (December 1993). 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.

<sup>10</sup> *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.2 (December 1993).

<sup>11</sup> 5 U.S.C. § 8113(b).

reduction of monetary compensation.<sup>12</sup> 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].

(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.

(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].”<sup>13</sup>

### ANALYSIS

In this case, the Office suspended appellant's compensation benefits for the period May 20, 2001 to May 30, 2002 because he failed to cooperate with vocational rehabilitation efforts.

The evidence shows that the Office referred appellant to a vocational rehabilitation counselor to begin rehabilitation services on December 7, 2000. The counselor, Mr. Hirschfeld, tried to contact appellant on several occasions including sending certified letters to appellant. The counselor also advised that several telephone calls were made and messages left, advising

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<sup>12</sup> See *Wayne E. Boyd*, 49 ECAB 202 (1997) (the employee failed to cooperate with the early and necessary stage of developing a training program).

<sup>13</sup> 20 C.F.R. § 10.519.

appellant to contact him and meet with him in order to determine placement for appellant. The counselor indicated that he reached appellant one evening, but that appellant told him it was too late and hung up on him. Appellant did not make any attempts to contact the counselor. Appellant therefore failed, without good cause, to participate in preliminary vocational rehabilitation meetings such that he failed to participate in the “early but necessary stages of a vocational rehabilitation effort.”<sup>14</sup>

The Office found that appellant’s refusal to cooperate in the vocational rehabilitation plan constituted a “refusal to undergo vocational rehabilitation,” justifying suspension of his monetary compensation under section 10.519(c) of the Office’s regulations.<sup>15</sup> Although in a February 15, 2001 letter the Office informed appellant that it would reduce his compensation to zero if he did not cooperate with vocational rehabilitation efforts, appellant did not submit evidence to refute such an presumption, and in a decision dated May 15, 2001, appellant’s compensation was reduced to zero. The Board notes that in subsequent hearings appellant alleged that he was unable to participate in vocational rehabilitation because he had been assaulted and had medical consequences; however, he did not provide medical documentation to support that he was unable to participate in vocational rehabilitation services.

In arguing that he had good cause to not participate in vocational rehabilitation efforts, appellant claimed that he was medically unfit to pursue employment. Appellant did not, however, provide evidence in support thereof. The evidence of record, including the March 16, 2001 report in which Dr. Nygaard appellant’s attending psychiatrist advised that appellant was totally disabled. However, he did not indicate that appellant could not participate in vocational rehabilitation. Appellant also submitted the reports of Drs. Kishan, Mani and Arakal, Board-certified orthopedic surgeons. None of these physicians, however, offered any opinion regarding appellant’s ability to participate in vocational rehabilitation. The Office, therefore, had a proper basis to reduce appellant’s disability compensation to zero effective May 30, 2002.

### CONCLUSION

The Board finds that the Office properly reduced appellant’s compensation benefits to zero during the period of noncooperation.

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<sup>14</sup> See 20 C.F.R. § 10.519(b), (c).

<sup>15</sup> See *Silas Perkins*, Docket No. 03-380 (issued June 27, 2003).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 13, 2003 is affirmed.

Issued: November 12, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member