

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

OZINE J. HAGAN, Appellant

and

**DEPARTMENT OF THE ARMY, ARMY
CORPS OF ENGINEERS, New Orleans, LA,
Employer**

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**Docket No. 04-584
Issued: September 2, 2004**

Appearances:
Daniel Becnel III, Esq., for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On December 29, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated August 22 and December 10, 2003, which reduced his compensation benefits for refusal to cooperate with vocational rehabilitation. Under 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 compensation benefits on the grounds that he refused to cooperate with vocational rehabilitation efforts.

FACTUAL HISTORY

On January 13, 2003 appellant, a 53-year-old civil engineering technician, injured his lower back while moving a chair. He filed a traumatic injury claim for benefits on January 13, 2003 which the Office accepted for displacement of lumbar intervertebral disc. The Office commenced payment of temporary total disability compensation.

On March 13, 2003 the Office advised appellant that he had been assigned a case management nurse. The Office informed appellant that the nurse was empowered to assist him in coordinating the medical aspects of his care and facilitating the flow of information between appellant, his physicians, the employing establishment and the Office.

In her initial evaluation report dated April 10, 2003, the intervention nurse, Charlotte Seidenberg, reviewed appellant's medical history and outlined his future course of treatment. She indicated that she had contacted appellant and Dr. Gary M. Alegre, appellant's attending physician and a Board-certified orthopedic surgeon and had scheduled her initial evaluation of appellant and an examination with Dr. Alegre on April 7, 2003. Ms. Seidenberg further stated that her "field nurse action plan" was to monitor appellant's progress in physical therapy and obtain Dr. Alegre's report from the April 7, 2003 examination, which she would review to ensure that it reflected the medical rationale for the disability decision. Ms. Seidenberg indicated that she planned to review the criteria for continuing disability with Dr. Alegre on May 19, 2003 if he had not released appellant to work by that time.

In his April 7, 2003 report, Dr. Alegre stated that appellant was unable to work at his desk job since his work injury. He related appellant's complaints of being unable to sit for more than 15 minutes with pain occasionally radiating into the leg and down into the back of his foot. Dr. Alegre advised that the majority of appellant's pains were axial low back pain, with a magnetic resonance imaging (MRI) scan demonstrating disc protrusions at L2-3, L3-4, L4-5 and L5-S1. He stated that the majority of appellant's pathology was at the L4-5 and L5-S1 level where he had a possible tear at both levels, particularly the L5 level. Dr. Alegre recommended that appellant undergo a lumbar discogram, which could indicate the need for lumbar fusion surgery. He opined that appellant remained temporarily totally disabled and recommended a formal spine stabilization program.

By letter to appellant dated May 13, 2003, the Office stated that appellant had refused without good cause to meet with his nurse and assist her in efforts toward reemployment such as work evaluations, coordination of medical efforts and facilitation of reemployment efforts with the employing establishment. The Office noted that appellant had demonstrated a refusal to communicate with his field nurse, Ms. Seidenberg, by failing to attend numerous physical therapy sessions. The Office advised appellant that he was required to cooperate with the assigned nurse until completion of the rehabilitation process and that his continued refusal to cooperate would result in his compensation being reduced to zero. The Office allowed appellant 30 days to either cooperate with rehabilitation efforts, which he should manifest by submitting in writing his reasons for failing to cooperate, supported by evidence and argument.

In a letter received by the Office on May 30, 2003, appellant asserted that he had been in contact and cooperated with Ms. Seidenberg since March 27, 2003 and had in fact attended most of the physical therapy sessions for which he had been scheduled. Appellant stated that he had attempted to return Ms. Seidenberg's May 6, 2003 call but had been unsuccessful.

In a report dated June 11, 2003, Dr. Alegre stated that in lieu of surgery appellant could return to work with restrictions of sitting for no more than 15 minutes at a time with frequent

standing, limited standing and walking, no climbing or kneeling, limited bending and stooping to less than two to three times per day, no twisting, pushing or pulling and no operating heavy machinery. By letter dated June 25, 2003, Ms. Seidenberg stated:

“[P]lease find the [Form] CA-17 on which, I believe, Dr. Alegre based the permanent restrictions indicated in his report on June 11, 2003. [Appellant’s] employer told me that if these are the restrictions, they can accommodate him, but require a work release note in order to bring him back to work. I would appreciate having Dr. Alegre hand write and sign a note at the bottom of the form which follows stating that [appellant] is released to work within the above restrictions.... I know [appellant] said he is applying for medical disability, but work is a separate issue, so please let Dr. Alegre know that if he DOES NOT want [appellant] to return to work, continued disability must be on the basis of a functional deficit and per guidelines, ‘pain alone does not constitute a functional deficit.’ There would have to [be] documentation that [appellant’s] pain was, ‘associated with measurable change in joints, muscles or bones, or that pain has placed measurable ... limitations upon [appellant’s] physical activities.’”

Dr. Alegre gave his handwritten assent by signature, dated July 3, 2003, on a Form CA-17 dated January 27, 2003 which contained the restrictions outlined in his June 11, 2003 report and indicated that appellant could work an eight-hour day within those restrictions.

On July 9, 2003 the employing establishment offered appellant a modified job as a civil engineering technician based on the duty status report Dr. Alegre signed on July 3, 2003. The job description indicated the job described as sedentary, involved both sitting and walking and stated that the permanent work restrictions outlined by Dr. Alegre would be accommodated.

In her July 17, 2003 report, Ms. Seidenberg indicated that she had telephoned appellant on July 8, 2003 and told him that the employing establishment had offered him a modified job based on Dr. Alegre’s restrictions. She stated that appellant returned her call and said that he did not feel he could perform the job, even with accommodations.

By letter to appellant dated July 17, 2003, the Office stated that appellant had refused without good cause to meet with his nurse and assist her in efforts toward reemployment such as work evaluations, coordination of medical efforts and facilitation of reemployment efforts with the employing establishment; the Office stated that appellant’s actions constituted a refusal to cooperate with the nurse intervention program and the Office’s vocation rehabilitation efforts. The Office noted that appellant had been offered a limited-duty job by the employing establishment based on Dr. Alegre’s July 3, 2003 approved work restrictions. The Office stated that the employing establishment had notified him that he had until July 15, 2003, to respond to the offer, but that he had thus far failed to respond to the offer. The Office advised appellant that he was required to cooperate with the assigned nurse until completion of the rehabilitation process and that her continued refusal to cooperate would result in her compensation being reduced to zero. The Office allowed appellant 30 days to either cooperate with rehabilitation efforts, which she should manifest by participating in the intervention nurse’s efforts to return

her to gainful employment or submit in writing her reasons for failing to cooperate, supported by evidence and argument. Appellant did not respond to this letter within 30 days.

By decision dated August 22, 2003, the Office reduced appellant's compensation benefits to zero, finding that he failed to cooperate with rehabilitation efforts.

By letter dated September 6, 2003, appellant requested reconsideration.¹ Appellant submitted an August 12, 2003 report from Dr. John J. Watermeier, a Board-certified orthopedic surgeon, who stated that appellant had a mild tenderness to palpation of the lumbar spine with no evidence of muscle spasm. He diagnosed spondylolysis at L5-S1 with degeneration of lumbar or lumbosacral intervertebrae. Dr. Watermeier concluded that appellant's symptom complaints and physical examination findings were consistent with his diagnoses.

By decision dated December 10, 2003, the Office denied reconsideration.

LEGAL PRECEDENT

The Federal Employees' Compensation Act, in 5 U.S.C. § 8113(b) states:

“If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of this title, the [Office], on review under section 8128 of this title and 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].”²

Section 10.519(b) and (c) of the Office's regulation provides that, if a suitable position is not identified because of the failure or refusals to cooperate in the early but necessary stages of a vocational rehabilitation effort, *i.e.*, meeting with nurse, interviews, testing, counseling, functional capacity evaluations or work evaluations, then 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 will reduce compensation 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.³

¹ Appellant contended that he never received the Office's July 17, 2003 letter.

² 5 U.S.C. § 8113(b).

³ 20 C.F.R. § 10.519(b) and (c).

Section 8104(a) of the Act⁴ 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.⁵ 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.⁶ Such efforts will be initially directed at returning the partially disabled employee to work with the employing establishment.⁷ 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.⁸

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.⁹ 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

⁴ 5 U.S.C. § 8104(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.2 (August 1995).

⁶ *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).

⁷ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.3 (August 1995). The Office’s regulation 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.

⁸ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.3 (August 1995).

⁹ 5 U.S.C. § 8113(b).

reduction of monetary compensation.¹⁰ 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].”¹¹

ANALYSIS

The Office accepted a claim for displacement of lumbar intervertebral disc. By letter dated March 13, 2003, the Office advised appellant that he had been assigned a case management nurse. Appellant was initially referred to Ms. Seidenberg, the intervention nurse, who was assigned to monitor appellant's medical status and progress and develop a medical management plan appropriate to the case. The Office's August 22, 2003 decision reduced appellant's compensation to zero on the grounds that he refused to cooperate with field nurse services, which constituted a refusal to undergo vocational rehabilitation without good cause.

¹⁰ See *Wayne E. Boyd*, 49 ECAB 202 (1997) (the employee failed to cooperate with the early and necessary stage of developing a training program).

¹¹ 20 C.F.R. § 10.519.

The Board finds that appellant's refusal to cooperate with the nurse intervention program and medical management plan of the nurse did not constitute a refusal to undergo vocational rehabilitation without good cause such that the Office could then reduce his compensation under section 8113(b) of the Act. The Office found that appellant's refusal to cooperate in the medical management plan constituted a refusal to undergo vocational rehabilitation," justifying suspension of his monetary compensation under section 10.519(c) of the Office's regulations.¹² The Board notes, however, that refusal to cooperate in the 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.¹³ The Office's application of section 8113 to reduce appellant's monetary compensation to zero was therefore in error.

The Office's decision is premised on the March 13, 2003 referral for nurse intervention to work with appellant's treating physician on a 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.¹⁴

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.¹⁵ 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.¹⁶ 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.¹⁷ The Office's procedures contemplate that field nurse intervention ends prior to referring the claimant to a vocational

¹² See *Silas Perkins*, Docket No. 03-380 (issued June 27, 2003).

¹³ *Rebecca L. Eckert*, 54 ECAB ___ (Docket No. 01-2026, issued November 7, 2002).

¹⁴ *Id.*

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.6(b) (December 1993).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.6(c)-(g) (December 1993).

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.5(c)(1) (November 1996).

rehabilitation specialist for a formal vocational rehabilitation plan.¹⁸ 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 May 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.

The Office's regulation 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 regulation 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 regulation states 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 regulation do not specify when in the process such visits and investigations are to occur.¹⁹ 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 March 13, 2003 letters, requesting that the nurse "assist in coordinating the medical aspects of your care and facilitating the flow of information between you, your doctors, your employer and the [Office]." In a March 13, 2003 letter, the Office emphasized that the nurse's function was to provide "medical management services." There is no mention of any plan to assess appellant's vocational skills, retrain him for a different occupation and assist him 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 he 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 specialist²⁰ and where the Board

¹⁸ 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 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)."

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.6(b) (December 1993).

²⁰ *Terrence E. Moore*, Docket No. 03-769 (issued August 26, 2003).

found that there was a vocational rehabilitation plan in effect.²¹ The Office did not meet its burden of proof to reduce appellant's monetary compensation benefits.²²

CONCLUSION

The Board finds that the Office did not meet its burden of proof to reduce appellant's monetary compensation to zero.

ORDER

IT IS HEREBY ORDERED THAT the December 10 and August 22, 2003 decisions of the Office of Workers' Compensation Programs is reversed.

Issued: September 2, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

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

²² In light of the Board's reversal of the Office's July 18, 2003 decision reducing compensation to zero, the Board need not consider the issues of whether the Office properly denied merit review and an oral hearing.