

appear to be capable of benefiting from vocational rehabilitation, noting an apparent lack of transferable skills and English language comprehension problems.

The Office referred appellant for vocational rehabilitation services with a rehabilitation counselor in 2003. In a report dated April 14, 2003, the rehabilitation counselor indicated that a meeting was held with appellant and her husband on March 20, 2003. The counselor reported that appellant felt she could not return to work; the short-term goal was to complete vocational testing and the long-term goal to develop a rehabilitation plan.

In a report dated May 16, 2003, the rehabilitation counselor indicated that appellant underwent vocational testing on May 5, 2003. The counselor reported that appellant viewed herself as unemployable. In a note dated June 4, 2003, the rehabilitation counselor indicated that she met with appellant on June 4, 2003 to review the vocational testing results. The counselor reported that appellant stated “she did not want vocational rehabilitation” because she cannot drive more than two miles, had a fear of machines and a fear of being asked to read or write.

By letter dated June 9, 2003, the Office stated that it had been advised by the rehabilitation counselor that appellant declined to participate in vocational rehabilitation. The Office stated that the reasons given were unacceptable and advised her of the sanctions for failure to undergo vocational rehabilitation. Appellant was advised to contact the Office and the rehabilitation counselor within 30 days.

In a letter to the Office dated June 17, 2003, appellant’s spouse stated that the report of the rehabilitation counselor was in error, as appellant did not refuse to participate in vocational rehabilitation. He stated that appellant had informed the rehabilitation counselor that she was willing to learn to do something consistent with her disabilities, but noted that she could not drive over a couple of miles without numbness in her legs, had little use of her left hand, was afraid of machinery and being asked to read or write in English, which was not her native language. By letter dated June 24, 2003 to the rehabilitation counselor, appellant stated that she would in good faith participate in vocational training as she previously indicated. Appellant stated that, since her attending physician had not been contacted to obtain a release for participation in training, she would arrange for an evaluation to obtain such a release. She indicated that she was providing a copy of this letter to the Office as proof of her good faith efforts to participate in vocational rehabilitation.

The record contains a June 30, 2003 note from an Office vocational rehabilitation specialist, who stated that appellant’s promise of participation included a “page of stipulations” and did not constitute a sufficient commitment to participate in good faith. By decision dated July 10, 2003, the Office reduced appellant’s compensation to zero, effective July 12, 2003, on the grounds that she failed to continue participation in vocational rehabilitation.

In a letter received on March 8, 2003, appellant requested reconsideration of the suspension decision. By decision dated April 26, 2004, the Office denied modification of the July 10, 2003 decision. The Office found that appellant had declined to participate in the vocational testing session and her statement that she did not want a rehabilitation plan was a refusal to cooperate with vocational rehabilitation.

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 under section 8104 of this title, the Secretary, 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 Secretary.”

The Office's procedure manual states in pertinent part:

“Specific instances of noncooperation include a failure to appear for the initial interview, counseling sessions, a functional capacity evaluation, other interviews conducted by the RC [rehabilitation counselor], vocational testing sessions, and work evaluations, as well as lack of response or inappropriate response to directions in a testing session after several attempts at instruction. They also include failure to begin or continue prevocational training such as English lessons for those who lack command of the language, or classes for a General Equivalency Diploma (GED) for those without a high school education.”¹

ANALYSIS

In this case, the evidence does not support the Office's finding that appellant failed to apply for and undergo vocational rehabilitation when so directed. Appellant met with the rehabilitation counselor on March 20 and June 4, 2003, and underwent vocational testing on May 5, 2003. The rehabilitation counselor's June 9, 2003 note stated that appellant did not want vocational rehabilitation, because she could not drive more than two miles, had a fear of machines and a fear of being asked to read or write. The issue is not whether an employee wants vocational rehabilitation, but whether the employee has, without good cause, failed to apply and undergo vocational rehabilitation when so directed. The June 17, 2003 letter from appellant's spouse and her June 24, 2003 letter both stated that she was willing to continue participation in vocational rehabilitation. The July 10, 2003 Office decision refers to an “array of preconditions” for continued participation, but the Office did not identify such preconditions. The June 24, 2003 letter indicated that appellant intended to schedule an examination with an attending physician, without stating that it was a precondition to further participation.

The record does not establish appellant's nonparticipation in vocational rehabilitation. There is no indication that she failed to appear for a scheduled interview or appointment. Although the April 26, 2004 Office decision appeared to find that appellant declined vocational

¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11(a) (November 1996).

testing, the record reveals that she did undergo vocational testing. The evidence does not document a specific instance of noncooperation or nonparticipation in vocational rehabilitation. The June 9, 2003 Office letter directed appellant to contact the Office and the rehabilitation counselor within 30 days, and appellant complied with this direction. The Board finds no probative evidence to support the Office's finding that appellant failed to continue participation in vocational rehabilitation. In the absence of probative evidence, the Board finds that the Office improperly reduced appellant's compensation under section 8113(b).

CONCLUSION

The Office did not establish that appellant failed to apply and undergo vocational rehabilitation when so directed under 5 U.S.C. § 8104. Therefore the Office may not reduce appellant's compensation pursuant to 5 U.S.C. § 8113(b).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 26, 2004 is reversed.

Issued: February 18, 2005
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member