United States Department of Labor
Employees' Compensation Appeals Board

ROGELIO A. BERNAL, Appellant	)	
and	)	**Docket No. 05-1363**
	)	**Issued: September 30, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Canoga Park, CA, Employer	)	

Appearances:
Sally F. LaMacchia, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 9, 2005 appellant, through his attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated March 1, 2005 which reduced his compensation to zero on the grounds that he did not cooperate with the initial steps of a vocational rehabilitation plan by refusing a light-duty position. Pursuant to 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 wage-loss compensation benefits to zero under 5 U.S.C. § 8113 on the grounds that he refused to cooperate with the preliminary stages of vocational rehabilitation by refusing an offered light-duty position.

FACTUAL HISTORY

On May 15, 2002 appellant, then a 51-year-old custodial laborer, filed a traumatic injury claim alleging that on December 13, 2001 he injured his lower left back sustaining a ruptured disc and bulging disc.

By decision dated September 27, 2002, the Office denied appellant's claim for continuation of pay as his claim was not filed within 30 days. In a separate decision of the same date, the Office accepted appellant's claim for herniated disc with sciatica.

The employing establishment offered appellant a limited-duty position on October 17, 2002. The Office referred appellant's claim to nurse intervention on October 25, 2002. In a letter dated October 29, 2002, the Office informed appellant that a registered nurse would assist him in his recovery from his work-related injury. The Office stated that the nurse would assist in coordinating the medical aspects of appellant's care and facilitating the flow of information as well as working with the employing establishment to enable appellant to return to full duty when medically appropriate.

In a letter dated November 1, 2002, the Office informed appellant that the employing establishment stated that limited duty within his restrictions was available and that he was expected to return to work.

On November 6, 2002 the nurse noted that appellant requested spine surgery. She met with appellant for the first time on November 19, 2002 and noted that he was awaiting approval for surgery. The Office authorized surgery on December 2, 2002. Appellant underwent lumbar discectomy of L4 and L5 on December 6, 2002.

In reports dated January 1 and February 1, 2003, the nurse noted that appellant was totally disabled following his surgery and undergoing physical therapy.

The Office entered appellant on the periodic rolls on March 13, 2003. On April 7, 2003 appellant's attending physician, Dr. John C. Chiu, a Board-certified neurosurgeon, diagnosed a recurrent disc herniation at L4-5 and a disc protrusion at L5-S1. He recommended additional surgery. Appellant underwent additional surgery on January 7, 2004.

On December 23, 2004 the Office again referred appellant for nurse intervention services. By letter dated December 30, 2004, the Office informed appellant that a registered nurse had been assigned to assist him and to work with his employer to enable him to return to full duty when medically appropriate.

On December 31, 2004 Dr. Chiu indicated that appellant could return to limited-duty work sitting for 4 hours, walking for 3 hours, standing for 4 hours, reaching for 2 hours, twisting, bending, squatting, and kneeling for 1 hour each and lifting 20 pounds for 3 hours. Appellant could push and pull 20 pounds for ½ hour each and climb for 1½ hours. He required 15-minute breaks every 2 hours.

On January 5, 2005 the employing establishment offered appellant a limited-duty position as a modified laborer custodian.

In an initial evaluation report dated December 30, 2004 through January 31, 2005, the medical management nurse reported appellant's employment and medical history and noted that appellant stated that he would refuse the offered temporary limited-duty position. She indicated that she only conducted an initial interview with appellant in person and that her planned goals were to call appellant monthly for a progress report, to attend appellant's next doctor's

appointment, to notify the parties of the medical findings and to mail the medical evidence to the Office.

In a letter dated January 26, 2005, the Office stated that appellant had refused the temporary limited-duty assignment within his physical restrictions. The Office stated, "This is considered a refusal to participate in the rehabilitation efforts of this Office." The Office cited to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519. The Office allowed appellant 30 days for a response prior to reducing his compensation benefits under these provisions.

Appellant's attorney responded on January 29, 2005 and stated that the job offer was not sufficiently detailed regarding the description of the tasks to be performed.

By decision dated March 1, 2005, the Office reduced appellant's compensation benefits to zero as of March 1, 2005 as a result of his refusal to participate in connection with vocational rehabilitation under the provisions of 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519. The Office stated that this reduction would continue until appellant cooperated with the vocational rehabilitation effort by returning to the light-duty assignment or showed good cause for not complying.

LEGAL PRECEDENT

Section 8104(a) of the Federal Employees' Compensation Act[1] provides that the "Secretary of Labor may direct a permanently disabled individual whose disability is compensable under this subchapter to undergo vocational rehabilitation." The Office's procedures emphasize returning the disabled worker to suitable employment and determining any loss of wage-earning capacity.[2] 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 in returning the employee to suitable employment.[3] Where reemployment at the employing establishment is not possible, the Office will assist the claimant in finding work with a new employer and sponsor necessary vocational training.[4]

Section 8113(b) of the Act[5] provides that, if an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104, the Secretary, on review under section 8128 and after finding that in the absence of the failure the

[1] 5 U.S.C. §§ 8101-8193, 8104(a).

[2] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813 (April 1995).

[3] *Id.* The Office's regulations provide: "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).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11(b) (December 1993).

[5] 5 U.S.C. § 8113(b).

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 or her wage-earning capacity in the absence of the failure. Such reduction continues until the individual has complied in good faith with the direction of the Secretary. Under section 8104 of the Act, the employee's failure to willingly cooperate with vocational rehabilitation may form the basis for terminating the rehabilitation program and the reduction of monetary compensation.[6] In this regard, the Office's implementing regulations state:

> "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:"
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> * * *
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> "(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 circumstance 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). The reduction will remain in effect until such time as the employee acts in good faith to comply with the directions of [the Office]."[7]

ANALYSIS

In the March 1, 2005 decision, the Office found that appellant's refusal of the employing establishment's January 5, 2005 job offer constituted a "refusal to undergo vocational rehabilitation," justifying suspension of his monetary compensation under section 10.519(c) of the Office's regulations. The Board has held, however, that, while refusal of a light-duty job offer may result in sanctions under section 8106 of the Act,[8] it does not constitute a failure or refusal with the early or necessary stages of vocational rehabilitation under section 8113 of the

[6] *See Wayne E. Boyd,* 49 ECAB 202 (1997) (the Board found that the Office properly reduced the claimant's wage-loss compensation benefits as he failed to cooperate with the early and necessary stages of developing an appropriate training program).

[7] 20 C.F.R. § 10.519.

[8] 5 U.S.C. § 8106.

Act or the implementing regulations.[9] The Office's application of section 8113 to reduce appellant's monetary compensation to zero was in error.

The Office's March 1, 2005 decision presumed that the employing establishment's light-duty job offer constituted a vocational rehabilitation effort.[10] The Board finds, however, that the record does not demonstrate that the Office was involved in a vocational rehabilitation effort. The offer was made by the employing establishment, independent of any activities of the Office which could be characterized as vocational rehabilitation in this record. The January 5, 2005 job offer was the product of the employing establishment. This distinction is critical as vocational rehabilitation is a function of the Office not the employing establishment.[11] The Board has held that a light-duty job offer from the employing establishment, made in the absence of vocational rehabilitation by the Office, does not constitute vocational rehabilitation.[12]

The Board further finds that the activities of the Office medical management nurse, do not constitute vocational rehabilitation. The primary role of the Office 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.[13] The Office's procedures contemplate that such activities do not constitute vocational rehabilitation but may result in a referral to a vocational rehabilitation specialist for a formal vocational rehabilitation plan.[14] The Office's regulations state that meetings with an Office field nurse may constitute planning for vocational rehabilitation or be part of the "early but necessary stages of a vocational rehabilitation effort."[15] However, in this case, appellant only underwent an initial interview in person with the nurse. She listed her planned goals were to call appellant monthly for a progress report, to attend appellant's next doctor's appointment, to notify the parties of the medical findings and to mail the medical evidence to the Office. These goals suggest an interest in medical management and do not constitute vocational rehabilitation.[16]

The nurse did not perform any of the activities set forth at 20 C.F.R. § 10.518(a) which constitute vocational rehabilitation, such as "visit[ing] the work site, ensur[ing] that the duties of the position do not exceed the medical limitations … and address[ing] any problems the

[9] *Marilou Carmichael*, 56 ECAB ___ (Docket No. 04-2068, issued April 15, 2005).

[10] *Id.*

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

[12] *Id.*

[13] Federal (FECA) Procedure Manual Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813 (April 1995). *See also Carmichael, supra* note 9.

[14] *Id.* at 2.813.5.c(3)(a) (claimants can be referred for an occupation rehabilitation plan (ORP) 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....") (FECA Tr. No. 97-03, November 1996).

[15] *Ruth E. Leavy*, 55 ECAB ___ (Docket No. 03-1197, issued January 27, 2004).

[16] *Carmichael, supra* note 9; *Leavy, supra* note 15.

employee may have in adjusting to the work setting." Her activities were only part of an attempt to return appellant to limited duty at the employing establishment, with the long-term goal of a return to full duty.[17] The nurse was directed only to provide medical management to return appellant to work at the employing establishment. The Office articulated this objective in its December 30, 2004 letter, stating that the nurse was to coordinate appellant's medical management and assist him in returning to full-time limited-duty work and eventually to full duty at the employing establishment. There was no mention of any plan to assess appellant's vocational skills, retrain him for a different occupation and assist him in finding work. There is no evidence that the offered position was made available to appellant through the effort of the nurse assigned in this case.

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 March 1, 2005 decision will be reversed.

CONCLUSION

The Board finds that the Office improperly reduced appellant's compensation benefits to zero on the grounds that he did not cooperate with vocational rehabilitation, as the record demonstrates that neither the activities of the medical management nurse nor the January 5, 2005 job offer constituted vocational rehabilitation. On return of the case record, appellant's compensation benefits should be reinstated.

[17] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the March 1, 2005 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 30, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board