

fibrocartilage complex tear and authorized surgery, performed on December 5, 2002. The Office paid compensation for intermittent time loss for the period October 19 to November 29, 2002 and placed appellant on the periodic rolls.¹

On February 27, 2003 the Office assigned appellant a case management nurse for medical management services. The Office stated that the nurse had been assigned to assist her in her recovery from her work-related injury, to coordinate the medical aspects of her case and to facilitate the flow of medical information concerning her claim. In a February 27, 2003 letter to the nurse, the Office emphasized that her function was to provide medical management services as part of the nurse intervention program.

On March 6, 2003 the field nurse called appellant's home and an unidentified person informed her that appellant would not be calling her back because of the long distance charges. The nurse noted that there was no answer at appellant's home on March 10, 2003. She subsequently tried three more times to reach appellant.

The Office informed appellant in a letter dated March 20, 2003 that her refusal without good cause to cooperate with nurse intervention services was equivalent to refusing to cooperate with vocational rehabilitation services and her compensation could be reduced to zero. Appellant was advised to either contact the field nurse or provide reasons for her refusal to cooperate within 30 days. The record indicates that she contacted the field nurse and they met on March 31, 2003.

In separate decisions dated May 14, 2003, the Office denied appellant's claim for an injury-related bilateral patellofemoral syndrome and attendant services.

In a letter dated May 28, 2003, the Office advised appellant that the evidence supported a finding that she was refusing to cooperate with the nurse intervention and the vocational rehabilitation efforts of the Office. Appellant was advised that, under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, her compensation would be reduced to zero unless she produced evidence contrary to the assumption that the provision of nurse services would have resulted in a return to work with no loss of wage-earning capacity. The Office noted that, during a May 22, 2003 conversation with the field nurse, appellant refused to provide information regarding her next follow-up medical appointment and would not tell the field nurse when she would call her back with the relevant information.

In a May 31, 2003 letter, appellant contended that the field nurse assigned to her had harassed her. She complained about the nurse's behavior at the March 31, 2003 meeting and alleged that the nurse was lying with respect to the nature and amount of telephone calls as she had recorded the conversations. Appellant asserted that the nurse did not need to know the exact

¹ The record reflects that, on February 4, 2003, Dr. Thomas E. Trumble, a Board-certified orthopedic surgeon, released appellant to work eight hours per day in a limited-duty capacity. The employing establishment offered appellant a rehabilitation position. Dr. Trumble subsequently rescinded the release for work without an explanation as to how appellant's condition changed. In the meantime, the Office found the job offer suitable and advised appellant of its finding, as well as the sanctions involved should she refuse to accept suitable employment. The Office requested that Dr. Trumble provide an explanation for his change of opinion and on March 29, 2003 accepted the physician's explanation that appellant was released back to work in error.

time of her medical appointments as she did not give her permission to attend such appointments. In a March 29, 2003 letter Laura McAfee, appellant's mother, complained about the nurse's behavior at the March 31, 2003 meeting and the telephone calls received on her home telephone.

In a June 6, 2003 letter, the Office advised that appellant needed to make herself available to the field nurse. It noted that she did not provide a good reason why the field nurse could not call her home telephone. The Office advised that the field nurse had a right to know the dates and times of doctor appointments to conduct follow-up work even if she did not attend the appointments. It noted that appellant had not returned the field nurse's call of May 27, 2003 or informed the field nurse of the time and date of any scheduled medical appointments.

In a June 12, 2003 letter, appellant advised that the field nurse could no longer contact her on her mother's cell phone as her mother discontinued the service. She reiterated that she could not contact the field nurse from her home telephone as it was a long distance call. Appellant suggested that the field nurse contact her through her employer.

In a June 16, 2003 response, the Office found that appellant's contentions were not valid reasons for not receiving telephone calls at home from her field nurse and that her long distance telephone calls to her field nurse were reimbursable. Appellant was given until June 28, 2003 to comply with nursing services.

In a June 22, 2003 letter, appellant advised that she had contacted the field nurse on June 16, 2003. She reiterated that she did not have a telephone for the field nurse's use and that the nurse could contact her through her employer. In a June 22, 2003 letter, appellant's mother advised that appellant lived in her home and "as a rule we do not make long distance telephone calls."

On June 24, 2006 the Office requested that appellant provide a description of her June 16, 2003 contact with the field nurse. The Office found that contact through appellant's employer was not a reasonable method for communication as she had not worked for several months. Appellant was reminded of her responsibility to make herself available to her field nurse so that rehabilitation services could be conducted. She was reminded that she had until June 28, 2003 to either contact her field nurse or explain why she would not receive or initiate calls to her field nurse when long distance charges would be reimbursed. Appellant did not contact the field nurse or respond to the Office as directed. In several letters, however, she contended that she had received no vocational rehabilitation and her experience with the field nurse was one of harassment.

By decision dated July 1, 2003, the Office reduced appellant's compensation benefits to zero effective July 1, 2003 under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 on the grounds that she refused to cooperate with rehabilitation services.

Appellant requested an oral hearing, which took place on October 28, 2004.² By decision dated December 12, 2005, an Office hearing representative affirmed the July 1, 2003 Office decision.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden to support that the disability has ceased or lessened before it may terminate or modify compensation benefits.³

Section 8104(a) of the Federal Employees' Compensation 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

Section 8113(b) of the 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

² The record reflects that appellant also requested reconsideration of the July 1, 2003 decision on April 28, 2004. In a May 12, 2004 letter, the Office advised appellant that she needed to choose the type of appeal desired as there could not be a hearing and a reconsideration decision issued on the same issue simultaneously. Appellant was advised that, if no response was received within 30 days, her original request for an oral hearing would proceed. She did not respond to the Office's May 12, 2004 letter.

³ See *Kevin M. Fatzner*, 51 ECAB 407 (2000).

⁴ 5 U.S.C. § 8104(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, Reemployment: *Vocational Rehabilitation Services*, Chapter 2.813 (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 employees demonstrated commuting area, the employees qualifications to perform such work and other relevant factors. 20 C.F.R. § 10.500(b).

⁷ See *supra* note 3. Chapter 2.813.3 (August 1995). The Office's regulation provides: 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 *supra* note 5 at Chapter 2.813.3.

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 Secretary.⁹

The Office's regulations address failure to undergo vocational rehabilitation, stating:

"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 [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 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]."¹⁰

ANALYSIS

The Office accepted appellant's claim for the conditions of right wrist contusion, a right wrist triangular fibrocartilage complex tear, right shoulder strain, bilateral knee contusions, right foot strain, bilateral wrist strains and back strain. By letter dated February 27, 2003, the Office advised her that she had been assigned a case management nurse. The nurse was assigned to monitor appellant's medical status and progress, assist in coordinating the medical aspects of her

⁹ 5 U.S.C. § 8113(b).

¹⁰ 20 C.F.R. § 10.519.

care and facilitating the flow of information concerning her medical treatment. The Office's July 1, 2003 decision reduced appellant's compensation to zero on the grounds that her refusal to cooperate with field nurse services constituted a refusal to undergo vocational rehabilitation without good cause.

The Office's decision is premised on the February 27, 2003 referral for nurse intervention. The Board finds, however, that the record does not establish that the Office's field nurse was involved in a vocational rehabilitation effort. As the Board noted in *Ozine J. Hagan*,¹¹ the regulations do not equate the assignment of an Office nurse with vocational rehabilitation. While the regulations state that the vocational rehabilitation planning process may include meetings with a nurse,¹² a meeting with a nurse could concern matters unrelated to vocational rehabilitation, such as medical management. When there is no evidence of vocational rehabilitation services, such as referral to a rehabilitation counselor, discussion of a rehabilitation plan, assessment of vocational skills, retraining or assistance in finding work, then it is improper for the Office to reduce appellant's compensation under 5 U.S.C. § 8113(b).¹³

The February 27, 2003 letter was not a referral for vocational rehabilitation; rather, it was a referral for nurse intervention to work with appellant on medical management to facilitate her return to work. By letters dated March 20 and May 28, 2003, the Office advised that appellant's refusal to cooperate with the field nurse was seen as a refusal to undergo vocational rehabilitation. However, there is no evidence to support a finding that the referral to nurse management was pursuant to a vocational rehabilitation plan. In the February 27, 2003 letter to the nurse, the Office emphasized that her function was to provide medical management services. There is no mention of any plan to assess appellant's vocational skills, retrain her for a different position and assist her in finding work.

The Board finds that the field nurse's activities were limited to the role set forth in the Office's procedures, *i.e.*, of attempting to return appellant to work at the employing establishment and providing medical management services, a preliminary reemployment effort which does not constitute vocational rehabilitation as contemplated under the Act, the implementing regulations or the Office's procedures.¹⁴ Appellant's refusal to cooperate with the nurse intervention program does not constitute a failure or refusal to cooperate with the early or necessary stages of vocational rehabilitation under section 8113 of the Act. The Office's application of section 8113 to reduce appellant's monetary compensation to zero was in error. Consequently, it did not meet its burden of proof in reducing appellant's monetary compensation benefits.

¹¹ 55 ECAB 681 (2004).

¹² See 20 C.F.R. § 10.519(b).

¹³ *Ozine J. Hagan*, *supra* note 11.

¹⁴ See *Marilou Carmichael*, 56 ECAB ____ (Docket No. 04-2068, issued April 15, 2005); *Ruth E. Leavy*, 55 ECAB 294 (2004).

CONCLUSION

The Board finds that the Office failed to meet its burden of proof in reducing appellant's monetary compensation to zero on the grounds that she did not cooperate with vocational rehabilitation.

ORDER

IT IS HEREBY ORDERED THAT the December 12, 2005 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 5, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board