United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 07-73**
	)	**Issued: June 18, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Rosemead, 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:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 10, 2006 appellant, through her attorney, filed a timely appeal from the decision of the Office of Workers' Compensations Programs' hearing representative dated April 13, 2006, affirming the reduction of her compensation for failure to participate in vocational rehabilitation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the reduction of compensation.

ISSUE

The issue is whether the Office properly reduced appellant's compensation by half under 5 U.S.C. § 8113 for failure to participate in vocational rehabilitation. On appeal, appellant argued that the Office improperly equated refusal of a light-duty job offer with failure to participate in vocational rehabilitation.

FACTUAL HISTORY

On January 3, 2003 appellant, then a 57-year-old distribution clerk, filed an occupational disease claim, alleging that her various mail distribution duties caused osteoarthritis to both of

her knees. Dr. Richard Diehl, a Board-certified orthopedic surgeon, reported that she had total left knee replacement surgery on November 14, 2002. Appellant did not work from October 11, 2002 until March 15, 2003, when she returned to a light-duty position. On April 11, 2003 the Office accepted her claim for temporary aggravation of degenerative arthritis in both knees.

Appellant stopped work again on February 6, 2004 prior to a total right knee replacement surgery on March 23, 2004. In a report dated September 1, 2004, Dr. Diehl released appellant to work on October 1, 2004 with the instructions that she could perform only sedentary work, lift no more than 10 pounds and stand and walk for no more than 10 minutes an hour. He stated that she should work only four hours per day for the first six weeks. Dr. Diehl noted that appellant had developed tendinitis in her right ankle.

On September 27, 2004 the employing establishment offered appellant a position working four hours per day as a limited-duty clerk, starting on October 1, 2004. The position entailed answering telephones for up to four hours per day, filling out second notices for certified mail up to one hour per day, sorting "nixie" mail for up to one hour per day and assisting the lobby director, throwing mail and other miscellaneous activities for up to 10 minutes each hour. The physical requirements were listed as the ability to sit for up to four hours, stand for up to 10 minutes per hour, walk for up to 10 minutes per hour and lift up to 10 pounds. Appellant returned the offer with the notation that she could neither accept nor reject the offer because she had other limitations to be considered.[1] She requested that the Office provide a suitability determination. The employing establishment forwarded the light-duty job offer to the Office on October 12, 2004.

At the request of the Office, on October 5, 2004, appellant underwent a second opinion examination by Dr. William C. Boeck, a Board-certified orthopedic surgeon, who had examined her following her first surgery. He noted some limitations of motion in both knees and swelling in the right knee, along with subjective complaints of pain and fatigue. Dr. Boeck found that she was currently totally disabled because of the right knee swelling and that she should be reexamined within two to three months to determine the potential for vocational rehabilitation.

On October 18, 2004 Dr. Diehl reiterated his opinion that appellant could perform four hours per day of sedentary work. On October 19, 2004 the Office provided Dr. Diehl a copy of the light-duty job offer for a determination of whether appellant would be able to perform the job. Dr. Diehl did not respond.

On October 20, 2004 the Office provided Dr. Boeck a copy of Dr. Diehl's September 1, 2004 report and the light-duty job offer and requested a supplemental report addressing appellant's work capacity. Dr. Boeck responded on October 29, 2004 that his opinion as to appellant's disability had not changed. He stated that appellant should not return to work until the subacute phase of postoperative recovery, as evidenced by her continued pain and swelling, had been completed. Dr. Boeck found that appellant would not be able to perform the light-duty job offered.

[1] The Board notes that appellant's claim was accepted for back strain and bilateral shoulder strain on February 7, 2000. Her physical limitations for that claim are listed as no reaching above the shoulder and intermittent pushing, pulling and lifting of no more than 20 pounds.

In a report dated November 17, 2004, Dr. Diehl reported that appellant's knees were stable, but that the right knee was tender. He stated that she was capable of working four hours per day in a sedentary position where she could stand and sit at her own discretion, doing desk work.

By letter dated December 22, 2004, the Office informed appellant that the light-duty position offered by the employing establishment was suitable under the limitations provided by Dr. Diehl and that it was still available. It stated that it was appellant's responsibility to contact the employing establishment to make arrangements for return to work, as her physician had indicated that she was medically able to perform this type of light-duty work. On December 22, 2004 appellant was referred for nurse intervention.[2]

On January 7, 2005 appellant was referred for vocational rehabilitation services. The Office informed her that she would be contacted by a counselor who would assist her in returning to work. It stated that she was expected to fully cooperate with the counselor. Appellant was also sent a copy of the letter provided to the counselor, Marla Bluestone, which stated that appellant's cooperation and participation in vocational rehabilitation was compulsory under 5 U.S.C. § 8113(b). The Office informed Ms. Bluestone that the job offer from the employing establishment had been found to be suitable and that she was to work with appellant to facilitate a return to work.

In a letter dated January 11, 2005, appellant, by counsel, requested that the Office reconsider its determination that the light-duty job offer was suitable. She stated that the medical evidence did not support this determination, as Dr. Boeck had found total disability. Appellant argued that the Office had not considered all of her medical conditions, including left knee degenerative arthritis, bilateral shoulder strains, lumbar strain, bilateral carpal tunnel syndrome, and right ankle edema, which is a requirement when evaluating the suitability of a position. She also noted that she had permanent work limitations from a previous work injury.

In a January 17, 2005 report, Dr. Diehl stated that, if appellant returned to work, she should be limited to 4 hours per day of sedentary work, with the ability to sit and stand at her own discretion and no walking or standing for more than 10 minutes per hour.

On January 25, 2005 Ms. Bluestone submitted her first vocational rehabilitation report, covering three interactions with appellant. She informed appellant that refusal of the offered light-duty position would likely lead to reduction or termination of her wage-loss compensation. Ms. Bluestone also informed her that she would work with the employing establishment to make sure that the offered position met her work restrictions. Appellant told Ms. Bluestone about her other work restrictions and Dr. Boeck's report. Ms. Bluestone did not state that appellant behaved in an obstructive manner on any occasion and did not describe any obstructive or uncooperative behavior on appellant's part. She stated that the Office had instructed her to disregard the report of Dr. Boeck because it had determined that the weight of the medical evidence rested on Dr. Diehl's medical findings, under which the offered position was medically suitable.

[2] The record contains no evidence that a nurse was ever assigned to this case.

By letter dated February 23, 2005, the Office informed appellant that it considered her refusal to accept the temporary light-duty assignment offered by the employing establishment as a refusal to participate in rehabilitation efforts. It stated that the offered position, which was within the physical limitations established by her treating physician, was made as an interim measure before she reached a level of recovery sufficient to determine a wage-earning capacity rating. The Office advised appellant that, if she failed to accept the position without good cause within 30 days, her wage-loss benefits would be reduced in accordance with 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 for refusal to participate in the essential preparatory efforts of vocational rehabilitation. The Office addressed FECA Bulletin No. 99-28 (August 30, 1999) which states:

> "Where an employee is undergoing [Office]-directed vocational rehabilitation efforts, either with a registered nurse or a vocational rehabilitation counselor, an employer may offer the employee a temporary assignment pending further recovery from work-related injury. [The Office] will consider an employee who refused to accept such an assignment as failing or refusing to undergo a vocational rehabilitation effort when so directed."[3]

On March 7, 2005 the Office informed appellant that a suitability determination did not need to be made for the temporary light-duty position in question. It stated that an injured employee is responsible for returning to work when an offered light-duty job meets established work restrictions and that the offer need not follow the formalities of a 30-day suitability letter and a 15-day warning letter prior to termination.

On March 23, 2005 appellant responded to the Office's letters with a request for a conference call including the employing establishment and the vocational rehabilitation counselor to work out details for a "realistic" return to work plan. She contended that the Office had not made a final suitability determination that took all considerations into account. Appellant argued that the counselor had not identified any noncooperative behavior and that the Office was using the vocational rehabilitation provisions to bypass the requirements of finding her a suitable permanent position. She also argued that the light-duty job offer that the Office had determined was suitable was incomplete and did not include a salary, period of duration or consideration of all her physical limitations.

On March 24, 2005 Ms. Bluestone stated in her second and final vocational rehabilitation report that appellant was interested in returning to work but, based on her experience following her first surgery, had expressed concerns about whether the employing establishment would respect her physical limitations. She noted that her attempts to reassure appellant that her restrictions would be honored had been largely unsuccessful. Ms. Bluestone stated that in her professional opinion appellant's worries about potential response by the employing establishment were not a good reason for not at least attempting to return to work.

On April 4, 2005 Dr. Diehl reported that appellant could perform only sedentary work and should be limited to hours per day, with the ability to stand or sit at her discretion. In his

[3] This bulletin was issued on August 30, 1999 and expired August 29, 2000. There is no evidence that it was subsequently incorporated into the Office's procedure manual.

physical examination he noted that she had mild tenderness over the patellae on her knees, but no redness or swelling.

By decision dated April 20, 2005, the Office reduced appellant's compensation by half for failure to participate in good faith in the rehabilitation process. The Office found that the suitability determination of December 22, 2004 was erroneously issued, as the light-duty position offered was temporary and therefore not eligible for such a designation. It stated that appellant's insistence on waiting for a suitability determination after she had been informed that it was not necessary was an invalid reason for failing to accept the offered employment. The Office found that appellant was expected to work as soon as a light-duty position accommodating her work restrictions was offered to her, regardless of the form it took. It also found that her refusal to return to the employing establishment under the oversight of the rehabilitation counselor was not good faith participation in the vocational rehabilitation process. It stated that, because of her refusal to cooperate in this early but necessary state of the process, her compensation would be reduced under the provisions of 20 C.F.R. § 10.519. The Office assumed that the vocational rehabilitation effort would have resulted in a return to work at 50 percent of her former wages if she had cooperated fully.

On May 9, 2005 appellant requested an oral hearing. On September 22, 2005 Dr. Diehl completed a work capacity evaluation indicating that appellant could do only sedentary work for 4 hours per day, with no walking or standing for more than 10 minutes per hour and no lifting, pushing or pulling. He stated that maximum medical improvement had not been reached, but that in six months she might be able to achieve an eight-hour workday.

At the oral hearing held on December 14, 2005, appellant described the physical requirements of the tasks listed on the light-duty position offered by the employing establishment. She explained why, based on her previous experiences with those tasks, they would violate her working restrictions from Dr. Diehl and those from the physician treating her shoulder and back injuries, including reaching above her shoulders and bending.

On January 13, 2006 the employing establishment responded to appellant's testimony contending that the offered position was well within her medical limitations. It countered her description of many of the duties and stated that she would receive assistance with those tasks that were outside of her work restrictions. On January 25, 2006 appellant challenged the employing establishment's characterization of the work.

By decision dated April 13, 2006, the Office hearing representative affirmed the Office's April 20, 2005 decision on the grounds that appellant had refused an offer of suitable work. The hearing representative found that the Office had followed procedural requirements by advising appellant that a light-duty position was available and providing her with the opportunity to accept it or submit reasons for rejecting it. She noted that the Office sent a letter advising her of the consequences of refusing available and suitable employment. The hearing representative also found that the job offer was within the work restrictions outlined by Dr. Diehl because answering the telephone and processing and writing up mail while seated were sedentary activities. In responding to appellant's given reasons for refusing the position, she noted that an employee's ability to perform a given position must be determined primarily by medical evidence, not her own opinions on the matter. The Office hearing representative found that

Dr. Diehl's medical opinions represented the weight of the medical evidence and he stated that appellant could work four hours a day with some walking.[4] She found that appellant's concern about how the light-duty position would impact her health was not a valid basis for refusing it, because fear of future injury, without evidence of current disability, is not compensable. The Office hearing representative found that appellant's compensation was properly reduced under 20 C.F.R. § 10.519 for her failure to participate in a rehabilitation program by refusing the light-duty work. She stated that, under section 10.519, the Office had found that appellant's participation in vocational rehabilitation would have resulted in a return to work with no loss of wage-earning capacity. The hearing representative found that her four-hour workday would have been half that of her previous position, and that she thus would have received half of her previous salary had she returned to the light-duty position. She found that the Office correctly reduced appellant's compensation by half to reflect her wage-earning capacity.

LEGAL PRECEDENT

Section 8104(a) of the Federal Employees' Compensation Act 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."[5] Under this section of the Act, the Office has developed procedures that emphasize returning partially disabled employees to suitable employment and determining their wage-earning capacity.[6] 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.[7] Such efforts will be initially directed at returning the partially disabled employee to work with the employing establishment.[8] 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.[9]

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[4] The Office hearing representative also referred to medical reports from appellant's other workers' compensation claim. As theses records are not in this records, they will not be considered by the Board.

[5] 5 U.S.C. § 8104(a).

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

[7] *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).

[8] *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.

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

Section 8113(b) of 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.[10] 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 reduction of monetary compensation.[11] 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]."[12]

[10] 5 U.S.C. § 8113(b).

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

[12] 20 C.F.R. § 10.519.

ANALYSIS

The Board finds that appellant's refusal of the offered light-duty job did not constitute a refusal to participate in vocational rehabilitation such that the Office did not properly reduce her compensation under section 8113(b) of the Act. In an April 14, 2006 decision, the Office found that appellant's refusal of the employing establishment's September 27, 2004 light-duty job offer constituted a refusal to participate in vocational rehabilitation, justifying reduction of her monetary compensation by 50 percent under 20 C.F.R. § 10.519. The Board has held that, while refusal of a light-duty job offer may result in sanctions under section 8106 of the Act,[13] it does not constitute a failure or refusal with the early or necessary stages of vocational rehabilitation under section 8113 of the Act and its implementing regulation.[14] The Office's application of section 8113 to reduce appellant's monetary compensation was in error.

The Board has held that a light-duty job offer from the employing establishment, made in absence of vocational rehabilitation by the Office, does not constitute vocational rehabilitation.[15] Appellant's case differs from others recently decided by the Board, including *Rebecca L. Eckert*,[16] *Ozine J. Hagan*,[17] and *Marilou Carmichael*,[18] in that she received a limited referral to a vocational rehabilitation counselor, rather than a field nurse, to assist her in returning to a light-duty position already offered by the employing establishment. However, the same principles apply here.[19]

On September 27, 2004 the employing establishment offered appellant a light-duty position based on the restrictions set by Dr. Diehl, her treating physician and a Board-certified orthopedic surgeon. Appellant did not accept the position. She was referred to vocational rehabilitation counselor Ms. Bluestone on January 7, 2005 with the purpose of returning her to that light-duty position. Ms. Bluestone's duties were limited to returning appellant to a predetermined position and following her progress for 60 days. It does not appear that she had the authority to assess appellant's vocational skills, retrain her for a different occupation, or assist her in finding work, all of which form the essential core of vocational rehabilitation. As she also had no role in formulating the position, which did not change from the time it was initially offered, the position was not the result of the rehabilitation process. Ms. Bluestone's activities were limited to a preliminary reemployment effort, which does not constitute vocational rehabilitation as contemplated by the Act, the implementing regulations or the

[13] 5 U.S.C. § 8106.

[14] *Marilou Carmichael*, 56 ECAB ___ (Docket No. 04-2068, issued April 15, 2005); *Rebecca L. Eckert*, 54 ECAB 183 (2002).

[15] *Id.*

[16] *Rebecca L. Eckert*, *supra* note 14.

[17] *Ozine J. Hagan*, 55 ECAB 681 (2004).

[18] *Marilou Carmichael*, *supra* note 14.

[19] *See Carmella M. Larffarello*, Docket No. 04-1639 (issued December 23, 2004).

Office's procedures.[20] The Board finds that Ms. Bluestone's assigned task of returning appellant to the light-duty job offered by the employing establishment did not constitute vocational rehabilitation or its early and necessary stages.

The Office erred in its determination that appellant failed to participate in the vocational rehabilitation process. The facts of this case do not establish that she refused or failed to undergo any testing, interviews or counseling or that she was uncooperative in the early or necessary stages of vocational rehabilitation, a prerequisite for invoking the penalty provision of section 10.519(c). As found above, her limited referral to vocational rehabilitation services was not for the purposes of vocational rehabilitation and, therefore, her actions could not impede this process. Furthermore, the record establishes that appellant was cooperative with her vocational rehabilitation counselor: she responded to Ms. Bluestone's telephone calls, participated fully in the initial interview and discussed her case openly. Her only failure was in not accepting the light-duty position and, as seen above, this does not constitute failure to participate in the vocational rehabilitation process because the job offer was itself not part of that process.

In an April 13, 2006 decision, the Office hearing representative affirmed the Office's sanction under 20 C.F.R. § 10.519(b) on the grounds that appellant had failed to accept suitable work. The Board notes that the process for terminating compensation for failure to accept suitable work is a discrete process and is governed by specific rules and regulations that differ from those governing failure to participate in vocational rehabilitation.[21] The record establishes that the Office reduced appellant's benefits under the regulations related to vocational rehabilitation, not those related to rejection of suitable employment. It notified appellant that its December 22, 2004 suitability determination had been issued in error and that it had reduced her benefits on the grounds that she failed to participate in the vocational rehabilitation process. The Board finds that the Office hearing representative erred in attempting to analyze the partial reduction of appellant's benefits as if it were failure to accept suitable employment.

CONCLUSION

The Board finds that the Office did not properly reduced appellant's compensation by half under 5 U.S.C. § 8113(b) for failure to participate in vocational rehabilitation.

[20] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Case Management*, Chapter 2.600.7 (September 1997) ("a limited referral [to vocational rehabilitation services] may be made for placement services with the previous employer when the claimant can work for at least four hours per day and the previous employer may be able to offer a modified job").

[21] *See Maggie Moore*, 41 ECAB 334 (1989).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 13, 2006 is reversed.

Issued: June 18, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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