United States Department of Labor
Employees' Compensation Appeals Board

A.J., Appellant	)	
and	)	**Docket No. 07-1876**
	)	**Issued: June 12, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Grand Rapids, MI, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 10, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated April 20, 2007 reducing her compensation pursuant to 5 U.S.C. § 8113(b). 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 compensation to zero pursuant to 5 U.S.C. § 8113(b) for failure to undergo vocational rehabilitation.

FACTUAL HISTORY

The Office accepted that appellant sustained a right ankle contusion, right heel spur syndrome, right plantar fasciitis, right tarsal tunnel syndrome and reflex sympathetic dystrophy in the performance of duty on October 16, 1991. Appellant's employment as a casual clerk was terminated on March 31, 1992. She returned to part-time work as a mark-up clerk in December 1994 and stopped working on February 5, 2001. A second opinion osteopath,

Dr. A. Ronald Rook, stated in a July 8, 2003 report that appellant was capable of working in a sedentary job.

By letter dated January 5, 2005, the Office referred the case to a vocational rehabilitation counselor, Mr. Riley. In a report dated March 8, 2005, Mr. Riley reviewed the evidence and indicated there was a January 18, 2005 home visit for an initial vocational assessment. He placed three telephone calls to appellant on February 4, 2005 to discuss an indication by the employing establishment that she had been terminated for failure to provide adequate medical evidence on disability. Mr. Riley reported that appellant did not answer her telephone, and he left messages on February 5 and 8, 2005, but she did not respond. The rehabilitation counselor stated that appellant was not cooperating with vocational rehabilitation services, and he noted that she had sent a letter withdrawing her consent to release medical records.[1]

The Office advised appellant by letter dated May 11, 2005 that the rehabilitation specialist had indicated that she was not cooperating with rehabilitation services. Appellant was advised of the provisions of 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 regarding her failure to undergo vocational rehabilitation when so directed.

In a report dated May 27, 2005, Mr. Riley indicated that he had attempted to contact appellant by telephone on May 20 and 23, 2005. He advised that he had not been able to speak to appellant, but her mother had become abusive and accused him of trying to take appellant's medications away. By letter to appellant dated May 27, 2005, Mr. Riley advised her of a scheduled meeting on June 3, 2005 at a restaurant close to her residence. He also noted that he had no authority to take any medications away as only a physician could make such a determination. By report dated June 21, 2005, Mr. Riley indicated that appellant did not appear for the June 3, 2005 meeting. He stated that she had not cooperated with vocational rehabilitation services and the file was placed on hold.

By letter dated July 12, 2005, the Office again advised appellant of the consequences of failure to undergo vocational rehabilitation when directed. It stated that she should contact the Office and the rehabilitation counselor within 30 days, or provide reasons for not participating. On September 12, 2005 the Office received a September 1, 2005 letter from appellant regarding a request for a lump-sum payment of compensation. Appellant did not discuss the vocational rehabilitation efforts.

By decision dated September 30, 2005, the Office reduced appellant's compensation to zero for failure to undergo vocational rehabilitation when directed. Appellant requested a review of the written record. She alleged that Mr. Riley had told her she would have to agree to stop receiving nerve blocks and medication, and that she needed no further medical treatment.

In a decision dated March 24, 2006, the Office hearing representative affirmed the September 30, 2005 decision. By letter dated March 10, 2007, appellant requested

[1] The record contains a January 19, 2005 letter from appellant withdrawing consent to release medical records to Mr. Riley because he requested a new report about her work restrictions. She stated that she would be submitting a new medical report and there was no reason to review the entire medical record, as Mr. Riley was not a physician.

reconsideration of her claim. She argued there was "clear evidence of error" in the reduction of her compensation as vocational efforts were unnecessary and improper.

By decision dated April 20, 2007, the Office reviewed the case on its merits and denied modification. It found that appellant did not cooperate with vocational rehabilitation services.

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act, the Secretary of Labor may direct a permanently disabled individual whose disability is compensable to undergo vocational rehabilitation.[2] The Act further 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."[3]

Section 10.519 of the implementing regulations of 5 U.S.C. § 8113(b), provides in pertinent part:

> "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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> * * *
>
> "(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 [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 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

[2] 5 U.S.C. § 8104(a).

[3] 5 U.S.C. § 8113(b).

until such time as the employee acts in good faith to comply with the direction of [the Office]."[4]

ANALYSIS

The Office in this case directed appellant to undergo vocational rehabilitation pursuant to 5 U.S.C. § 8104. The purpose of rehabilitation services is to assist injured workers in a return to work.[5] Appellant did not participate in the vocational rehabilitation effort. According to the rehabilitation counselor, there was an initial assessment on January 18, 2005, but she failed to respond to repeated telephone messages after that date. Appellant also failed to appear for a June 3, 2005 meeting with the rehabilitation counselor, and failed to contact the counselor when directed by the Office. The Office's procedure manual provides that specific instances of noncooperation with rehabilitation efforts include failure to appear for counseling sessions or interviews conducted by the rehabilitation counselor.[6]

The Office provided appellant with an opportunity to either take steps to participate in vocational rehabilitation or provide reasons for nonparticipation. Appellant offered no valid reasons for her failure to participate in vocational rehabilitation. She alleged that Mr. Riley told her she would have to stop nerve blocks and medication, but there is no evidence to support this contention. As Mr. Riley explained in his May 27, 2005 letter to appellant, only a physician can make a determination regarding medication or treatment. Appellant also appeared to object to a review of her medical records by withdrawing her consent to release medical information. A vocational rehabilitation counselor must have accurate medical information to properly assess appellant's ability to work. If appellant had concerns regarding medical records, she could have discussed this with the counselor. She provided no appropriate reasons for her failure to participate in vocational rehabilitation.

The Board accordingly finds that appellant without good cause failed to undergo vocational rehabilitation when so directed under 5 U.S.C. § 8104. Pursuant to 5 U.S.C. § 8113(b), the Office may reduce appellant's compensation in accordance with what would probably have been her wage-earning capacity in the absence of the failure, until appellant in good faith complies with the direction of the Secretary.

In this case a suitable job had not been identified, as the failure to participate occurred in the early but necessary stages of the rehabilitation effort. As noted, there had only been one initial assessment and no further interviews, conversations or counseling. Under 20 C.F.R. § 10.519, in the absence of contrary evidence the Office will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning

[4] 20 C.F.R. § 10.519.

[5] Federal (FECA) Procedure Manual, Part 3 -- Rehabilitation, *Services*, Chapter 3.200.1(November 1990).

[6] *See Sam S. Wright*, 56 ECAB 358, 361 (2005); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.813.11(a) (November 1996).

capacity, and will reduce compensation to zero. Based on the evidence of record the Board finds that the Office properly reduced appellant's compensation to zero.[7]

CONCLUSION

The Office properly reduced appellant's compensation to zero for failure to participate in vocational rehabilitation efforts.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 20, 2007 is affirmed.

Issued: June 12, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[7] The Board notes that appellant's March 10, 2007 application for reconsideration used the term "clear evidence of error." This is a standard of review for applications for reconsideration that are untimely filed, a standard that is not applicable in this case. *See Alberta Dukes*, 56 ECAB 247 (2005).