United States Department of Labor
Employees' Compensation Appeals Board

J.E., Appellant **and** **U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Oakland, CA, Employer**	)))))))))	**Docket No. 09-1407** **Issued: April 7, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 5, 2009 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated October 1, 2008 and a nonmerit decision dated March 3, 2009. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office properly reduced appellant's compensation benefits based on her refusal to cooperate with vocational rehabilitation efforts; and (2) whether the Branch of Hearings and Review properly found that appellant had abandoned her request for a telephonic hearing.

FACTUAL HISTORY

On October 8, 2006 appellant, then a 36-year-old mail handler, filed an occupational disease claim alleging that she developed carpal tunnel syndrome due to factors of her federal

employment. The Office accepted appellant's claim for bilateral carpal tunnel syndrome on January 10, 2007. She worked in a modified position until April 3, 2007. On that date, appellant's attending physician, Dr. Michael Hebrard, Board-certified in physical medicine and rehabilitation, opined that she was totally disabled.

The employing establishment offered appellant a modified-duty assignment on October 31, 2007. Dr. Hebrard referred her to Dr. Kendrick E. Lee, a Board-certified surgeon, who opined on January 7, 2008 that appellant required surgery for carpal tunnel syndrome. Dr. Lee performed her right carpal tunnel release on January 31, 2008. Dr. Hebrard continued to support appellant's total disability. The Office expanded her claim to accept right trigger finger.

The Office referred appellant for a second opinion evaluation with Dr. Khodam-Rad Payman, a Board-certified orthopedic surgeon, on June 5, 2008. In a report dated June 23, 2008, Dr. Payman found that she had intact sensation in the right hand with triggering and tenderness in the right thumb. Appellant's left hand examination was consistent with carpal tunnel syndrome in Dr. Payman's opinion. Dr. Payman diagnosed successful right carpal tunnel surgery, trigger finger of the right thumb and left carpal tunnel syndrome. He opined that she required left carpal tunnel surgery, but that she was currently capable of light-duty work. Dr. Payman completed a work capacity evaluation and opined that appellant could work four hours a day with no repetitive movements of the wrist, two hours each of pushing and pulling up to 20 pounds and lifting up to 10 pounds two hours a day.

In a note dated June 19, 2008, Dr. Hebrard examined appellant and diagnosed bilateral carpal tunnel syndrome and lesion of the ulnar nerve. He stated that she could perform restricted duty with minimal use of the upper extremities for grasping, pinching and fingering. Dr. Lee examined appellant on June 25, 2008 and diagnosed carpal tunnel syndrome, lesion of the ulnar nerve and trigger finger. He noted that she was not working.

The Office referred Dr. Payman's report to Dr. Hebrard on July 7, 2008. In a note dated July 17, 2008, Dr. Hebrard stated that appellant was temporarily totally disabled until August 21, 2008. He completed a report on the same date, diagnosed bilateral carpal tunnel syndrome and right trigger finger. Dr. Hebrard stated that appellant was currently totally disabled.

The employing establishment offered appellant a light-duty job on July 8, 2008 scanning and tagging. The physical requirements were limited to no pulling or pushing more than 20 pounds for 1 and 2 hours a day respectively, no lifting more than 10 pounds for 1 hour and no repetitive movement.

The Office referred appellant for vocational rehabilitation services on August 4, 2008. It stated that she could return to work four hours a day and directed the counselor to start vocational rehabilitation through placement with the previous employer. In a letter dated August 6, 2008, the Office informed appellant that a rehabilitation counselor had been assigned to her and informed her that she should cooperate fully with the counselor.

In a separate letter to the vocational rehabilitation counselor dated August 6, 2008, the Office stated, "The Office of Workers' Compensation Programs (OWCP) is referring this employee to you for *ASSISTANCE IN RETURNING [APPELLANT] TO WORK WITH US POSTAL SERVICE."* (Emphasis in the original.)

The vocational rehabilitation counselor contacted appellant by letter on August 11, 2008 and informed her of a scheduled appointment. She sent a second letter regarding the initial evaluation on August 14, 2008. The vocational rehabilitation counselor reported on August 26, 2008 that appellant did not appear at scheduled meetings and failed to carry out agreed upon actions. She stated that she contacted the employing establishment and arranged for appellant to return to work on August 23, 2008. Appellant informed the vocational rehabilitation counselor that she was not certain if she could return to work on that date as she needed to secure childcare and her physician had not released her to return to work. The vocational rehabilitation counselor contacted the employing establishment on August 23, 2008 and appellant did not report to work.

In a letter dated August 28, 2008, the Office informed appellant that if she failed to cooperate with vocational rehabilitation efforts including appropriate temporary work assignments offered by the employing establishment during her recuperation, the Office could reduce her compensation. It stated that she failed to report to work on August 23, 2008 and that absence of childcare was not sufficient reasoning to fail to report to work. The Office instructed appellant to contact her vocational rehabilitation counselor within 30 days or her compensation would be reduced in accordance with 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.

Dr. Hebrard completed a duty status report on September 7, 2008 and provided more restrictive work abilities than Dr. Payman. The Office authorized left carpal tunnel surgery on September 12, 2008.

Appellant attended a scheduled appointment with the vocational rehabilitation counselor on September 9, 2008. She accepted a light-duty position at the employing establishment on September 9, 2008 and returned to work on September 10, 2008 for less than two hours. On September 19, 2008 the vocational rehabilitation counselor reported that appellant worked four hours as scheduled on September 13, 2008; she worked only two hours on September 14, 2008 and she used sick leave on September 15 and 16, 2008. Appellant did not report to work on September 17, 2008 or request leave.

By decision dated October 1, 2008, the Office reduced appellant's compensation to zero based on her refusal to cooperate with vocational rehabilitation efforts. It stated that she had not regularly worked her full four-hour shift and had been off intermittently without contacting her employer. The Office found that appellant had not provided any valid reasons for not complying with the rehabilitation program. It reduced appellant's compensation benefits to zero until such time as she complied with the rehabilitation program.

Appellant requested a telephonic hearing on October 6, 2008.[1] She provided the Office with her change of address on December 17, 2008. In a letter dated December 29, 2008 and mailed to appellant's new address, the Branch of Hearings and Review informed her that her

[1] Appellant underwent a left carpal tunnel release on October 30, 2008.

telephonic hearing was scheduled for February 9, 2009 at 1:45 p.m. eastern time and provided her with the telephone number and the pass code.

By decision dated March 3, 2009, the Branch of Hearings and Review found that appellant had abandoned her telephonic hearing as she failed to appear and failed to contact the Branch of Hearings and Review to explain her failure.

LEGAL PRECEDENT -- ISSUE 1

Once the Office has accepted a claim, it has the burden of proof to support that the disability has ceased or lessened before it may terminate or modify compensation benefits.[2] 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."[3] 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.[4] 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.[5] 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.[6]

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 have probably been [her] wage-earning capacity in the absence of the failure, until the individual in good faith complies" with the direction of the Office.[7] 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

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[2] *Howard L. Miller*, 56 ECAB 697 (2005).

[3] 5 U.S.C. § 8104(a).

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

[5] *Id.* The Office's regulations 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).

[6] Federal (FECA) Procedure Manual, *supra* note 4, Chapter 2.813.3 (August 1995).

[7] 5 U.S.C. § 8113(b).

reduction of monetary compensation.[8] The Office's implementing regulations provide 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--
>
> > (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…. 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, meeting 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]."[9]

ANALYSIS -- ISSUE 1

The Board finds that appellant's abandonment of the offered light-duty job did not constitute a refusal to participate in vocational rehabilitation and that the Office did not properly reduce her compensation to zero. In the October 1, 2008 decision, the Office found that her abandonment of the employing establishment's July 8, 2008 light-duty job offer constituted a refusal to participate in vocational rehabilitation, justifying reduction of her monetary compensation to zero under 20 C.F.R. § 10.519. The Board has held that, while the refusal or abandonment of a light-duty job offer may result in sanctions under section 8106 of the Act,[10] it does not constitute a failure to refuse or cooperate with the early or necessary stages of

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[8] *M.M.,* 58 ECAB 567, 574 (2007); *see Wayne E. Boyd,* 49 ECAB 202 (1997) (the employee failed to cooperate with the early and necessary stage of developing a training program).

[9] 20 C.F.R. § 10.519(a).

[10] 5 U.S.C. § 8106.

vocational rehabilitation under section 8113 of the Act and its implementing regulations.[11] 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 the absence of vocational rehabilitation by the Office does not constitute vocational rehabilitation.[12] Appellant's case differs from others recently decided by the Board, including *Rebecca L. Eckert*,[13] *Ozine J. Hagan*[14] and *Marilou Carmichael*,[15] 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.[16]

On July 8, 2008 the employing establishment offered appellant a light-duty position based on the restrictions set by Dr. Payman, a Board-certified orthopedic surgeon and Office's second opinion physician. Appellant did not accept the position. She was referred to a vocational rehabilitation counselor on August 6, 2008 with the purpose of returning her to that light-duty position. The vocational rehabilitation counselor's duties were limited to returning appellant to a predetermined position. It does not appear from the August 8, 2008 letter, 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. The vocational rehabilitation counselor'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 Office's procedures.[17] The Board finds that vocational rehabilitation counselor'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

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[11] *M.M., supra* note 8; *Marilou Carmichael*, 56 ECAB 451 (2005); *Rebecca L. Eckert*, 54 ECAB 183 (2002).

[12] *Id.*

[13] *Rebecca L. Eckert, supra* note 11.

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

[15] *Marilou Carmichael, supra* note 11.

[16] *See M.M., supra* note 8, (the Board found that refusal of a light-duty job when the vocational rehabilitation counselor's actions were limited to a preliminary reemployment effort, did not constitute vocational rehabilitation or its early and necessary stages).

[17] *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").

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.

CONCLUSION

The Board finds that the Office did not properly reduce appellant's compensation to zero under 5 U.S.C. § 8113(b) for failure to participate in vocational rehabilitation.[18]

ORDER

IT IS HEREBY ORDERED THAT March 3, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 7, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[18] Due to the Board's disposition of this issue is not necessary to address whether the Branch of Hearings and Review properly found that appellant abandoned her telephonic hearing.