



Dr. Nishitkumar Patel, an attending Board-certified orthopedic surgeon, restricted her to working four hours a day with limited keyboarding. Appellant underwent left median nerve release in September 2000 and a right median nerve release in December 2000, authorized by the Office. She stopped work in September 2000 and did not return.<sup>1</sup> Appellant received compensation on the daily rolls beginning in December 2000, then on the periodic rolls.<sup>2</sup>

In an April 22, 2004 report, Dr. Bozena Scigacz, an attending Board-certified internist, noted treating appellant since July 2002 for hypertension, depression and anxiety. Appellant underwent a gastric bypass in 2003 to address morbid obesity. Dr. Scigacz recommended that appellant work near her home, as she could not drive long distances.

On February 15, 2006 the Office obtained a second opinion from Dr. Leonard R. Smith, a Board-certified orthopedic surgeon, who noted that appellant weighed 318 pounds and was under treatment for hypertension and depression. Dr. Smith found no upper extremity abnormalities on examination. He found that appellant was capable of performing full-time limited-duty work with limited keyboarding.

In April 2006, appellant took custody of her minor niece.

In a February 12, 2007 letter, the Office requested that appellant submit an updated medical report from her treating physician, addressing her accepted CTS and nonoccupational sleep apnea, depression, panic attacks, agoraphobia and gastric bypass. On February 28, 2007 it referred her for vocational rehabilitation services, including a skills assessment, vocational testing and a placement plan within Dr. Smith's restrictions.

In a March 30, 2007 report, a vocational rehabilitation counselor reviewed appellant's educational and medical history. Appellant completed three years of college and had more than three years of clerical work experience.

In an April 16, 2007 note, Dr. Frank C. Madda, an attending Board-certified plastic surgeon, restricted appellant to light activity for four weeks due to unspecified surgery. The Office suspended the vocational rehabilitation program during her recovery.

In April 2007, the vocational counselor developed a placement plan and designed an instructional program in application and interview skills. On May 7, 2007 appellant signed an agreement to participate in the vocational rehabilitation program, with the goal of obtaining private sector employment as a public relations assistant (U.S. Department of Labor's, *Dictionary of Occupational Titles* # 165.167-014). The position was described as sedentary and did not require repetitive upper extremity movements. Vocational preparation required two to

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<sup>1</sup> In October 2002, the employing establishment offered appellant a light-duty assignment. Appellant rejected the offer asserting that she remained totally disabled for work.

<sup>2</sup> Dr. Martin J. Greenberg, a Board-certified orthopedic surgeon and second opinion physician, opined on November 26, 2002 that appellant was able to perform full-time limited duty. The Office then found a conflict of medical opinion between Dr. Patel and Dr. Greenberg, and selected Dr. S.I. Yen, a Board-certified orthopedic surgeon, as impartial medical examiner. Dr. Yen submitted a January 26, 2004 report finding that appellant was able to perform full-time limited duty with restrictions against repetitive upper extremity movements.

four years of education or work experience, commensurate with appellant's past clerical duties and three years of college. However, through July 2007, appellant missed training sessions with her counselor, refused to submit required job contact sheets and did not return the counselor's telephone messages.

In a July 9, 2007 report, Dr. Scigacz explained that appellant's anxiety worsened after she recently took in two minors during a family crisis. Appellant also had hypertension and depression. Dr. Scigacz opined that appellant was "not capable of returning to work due to the reasons ... stated above."

In a July 11, 2007 letter, the Office instructed appellant to immediately contact her claims examiner, as she was not in compliance with the vocational rehabilitation plan. When appellant did not respond, the Office issued a warning letter on August 13, 2007, advising that her compensation would be reduced under 5 U.S.C. § 8113(b) if she did not fully cooperate with vocational rehabilitation within 30 days. She called the Office on September 11, 2007, stating that she had been on a cruise to Spain and Italy from August 31 to September 8, 2007. Appellant affirmed her desire to fully participate in vocational rehabilitation.

The vocational counselor submitted reports from September 2007 through February 2008 describing appellant's ongoing noncompliance. Appellant did not return telephone calls, submit required job contact sheets, complete assigned tasks or provide requested medical evidence regarding her work restrictions. A January 2008 labor market survey showed that entry level public relations assistant positions were readily available in her commuting area with starting wages of \$600.00 a week.

In a March 26, 2008 letter, the Office advised appellant that, if she did not resume a good faith effort to comply with vocational rehabilitation within 30 days, the Office would reduce her wage-loss compensation to reflect her projected earnings had she cooperated with job placement.

Appellant called the vocational rehabilitation counselor on April 23, 2008. She explained that she worked briefly as a cashier but stopped because of a court order mandating that she be at home in the evening with the three minor children in her custody.<sup>3</sup> Appellant also asserted that she was medically unable to work. The vocational counselor again instructed her to submit current medical restrictions and job contact sheets as she agreed on May 7, 2007. Appellant did not submit the requested information.

In a May 28, 2008 letter, the Office notified appellant that she was not in compliance with the Office-approved rehabilitation program. If appellant did not contact the Office or her vocational rehabilitation counselor within 30 days and resume a good faith effort, the Office would terminate the rehabilitation program and reduce her wage-loss compensation to reflect her wage-earning capacity as a public relations assistant. In a second May 28, 2008 letter, the Office asked her to submit current medical restrictions from her physician. It also asked appellant to explain how she was capable to care for three children and perform activities of daily living if she were totally disabled.

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<sup>3</sup> From February 6 to 12, 2008, appellant worked 24.8 hours a week as a cashier at a private sector automobile dealership.

Appellant did not complete any plan requirements through July 2008. The Office placed the vocational rehabilitation effort in interrupted status as of July 31, 2008.

By decision dated August 22, 2008 and reissued August 29, 2008, the Office reduced appellant's compensation to reflect what would have been her wage-earning capacity had she cooperated with vocational rehabilitation efforts. It found that she failed, without good cause, to undergo vocational rehabilitation as directed.

### **LEGAL PRECEDENT**

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>4</sup> "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.<sup>5</sup> Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.<sup>6</sup>

The Office may direct a permanently disabled employee to undergo vocational rehabilitation.<sup>7</sup> If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed, the Office, on review under 5 U.S.C. § 8128 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 or her wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Office.<sup>8</sup>

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. It will determine that 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.<sup>9</sup>

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<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> 20 C.F.R. § 10.5(f) (1999).

<sup>6</sup> *S.F.*, 59 ECAB \_\_\_\_ (Docket No. 08-426, issued July 16, 2008); *J.E.*, 59 ECAB \_\_\_\_ (Docket No. 07-1577, issued July 3, 2008); *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

<sup>7</sup> 5 U.S.C. § 8104(a).

<sup>8</sup> *Id.* at § 8113(b).

<sup>9</sup> 20 C.F.R. § 10.519(a).

## ANALYSIS

The Office accepted that appellant sustained bilateral CTS with bilateral median nerve releases. On February 25, 2006 Dr. Smith, a Board-certified orthopedic surgeon and second opinion physician, found that appellant was capable to perform full-time restricted duty with limited keyboarding. Upon receiving medical evidence that appellant was capable of working eight hours a day with restrictions, the Office properly referred her to vocational rehabilitation services. On May 5, 2007 appellant agreed to participate in a vocational rehabilitation plan, including instruction in interview skills and filling out applications, followed by job placement.

Appellant, however, exhibited a pattern of refusal. From May 2007 through July 2008, she missed training sessions with her vocational rehabilitation counselor, did not return telephone calls, failed to submit required job contact sheets and would not provide current work restrictions. Dr. Scigacz, an attending Board-certified internist, stated on July 9, 2007 that appellant was unable to work due to hypertension, depression and anxiety aggravated by caring for two children during a family crisis; however, Dr. Scigacz did not address the selected position of public relations assistant or address any reason that appellant was unable to cooperate with vocational rehabilitation. Appellant did not submit medical evidence explaining how she was capable to take a cruise in September 2007 or care for small children and remain totally disabled for work. The Office specifically requested such evidence on May 28, 2008. Appellant did not respond.

Appellant has not met her burden to show good cause for failing to cooperate with vocational rehabilitation efforts. The Office advised her in August 13, 2007, March 26 and May 28, 2008 letters, that she was not in compliance with the approved program and gave her another opportunity to cooperate without penalty. It directed her to cooperate with vocational rehabilitation efforts within 30 days. When appellant did not cooperate, the Office properly reduced her compensation prospectively under 5 U.S.C. § 8113(b) by what would probably have been her wage-earning capacity had she completed the instruction and placement program. The Office based its reduction on the labor market survey and wage information provided by the rehabilitation counselor.

The Board finds that the Office met its burden of proof to reduce appellant's compensation.

On appeal, appellant asserts that she could not work outside her home due to medical and psychiatric conditions. As stated, she did not provide updated work restrictions as instructed by the Office and the vocational rehabilitation counselor. In the absence of such evidence, appellant has not established that she was totally disabled for work due to a medical or psychiatric condition.

## CONCLUSION

The Board finds that the Office properly reduced appellant's compensation for failing to cooperate with vocational rehabilitation.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 29, 2008 is affirmed.

Issued: March 24, 2010  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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