

# CHAPTER 13

## VOCATIONAL REHABILITATION AND REEMPLOYMENT

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The ultimate goal of any workers' compensation program is to return injured employees to work. OWCP undertakes extensive efforts to achieve this goal in the form of vocational rehabilitation. The benefits of successful vocational rehabilitation are many: the employee is returned to gainful employment, making the most of his or her skills and abilities while the Office, the employing agency, and ultimately the taxpayer, are not compensating an individual to be idle.

Vocational rehabilitation most often comes into play with partially disabled employees. Many partial disabilities restrict employees from returning to their pre-injury jobs, or at least the full scope of pre-injury work. The employee is still capable of being productive in the workplace, but efforts to identify appropriate positions and, in some cases, significant re-training, must occur before the employee can succeed in a new vocation. One of the Office's primary functions is to assist employees in these efforts.

Partially disabled employees who are able to work in some capacity are required to seek employment with the help of the employing agency and the Office. The Office's regulations, at 20 CFR § 10.500(b), provide:

Each disabled employee is obligated to perform such work as he or she can, and OWCP's goal is to return each disabled employee to suitable work as soon as he or she is medically able. In determining what constitutes "suitable work" for a particular disabled employee, OWCP 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.

All efforts will be made to return to the employee to work with the agency where the injury occurred. If the agency does not have work available within the employee's restrictions, the Office will help the employee find a suitable position outside of the agency, and will provide training for the employee to acquire new skills, if necessary. *FECA PM*, Ch. 2-0813.3.

### A. STATUTORY PROVISION

The FECA, at 5 USC § 8104, provides for rehabilitation for employees with permanent disabilities:

(a) 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. In providing for these services, the Secretary, insofar as practicable, shall use the services or facilities of State agencies and corresponding agencies which cooperate with the Secretary of Health, Education, and Welfare in carrying out the purposes of chapter 4 of title 29, except to the extent that the Secretary of Labor provides for furnishing these services under section 8103 of this title. The cost of providing these services to individuals undergoing vocational rehabilitation under this section shall be paid from the Employees' Compensation Fund. However, in reimbursing a State or corresponding agency under an arrangement pursuant to this section the cost to the agency reimbursable in full under section 32(b)(1) of title 29 is excluded.

(b) Notwithstanding section 8106, individuals directed to undergo vocational rehabilitation by the Secretary shall, while undergoing such rehabilitation, receive compensation at the rate provided in sections 8105 and 8110 of this title, less the amount of any earnings received from remunerative employment, other than employment undertaken pursuant to such rehabilitation.

The rate of compensation referred to in § 8104(b) is the total disability rate. The *FECA PM*, Ch. 2-0813.8 provides further description of the rate of pay, and sets forth the options for employees who also receive annuities from the Office of Personnel Management (OPM):

## Compensation Entitlement During Vocational Rehabilitation.

a. Section 8104(b) of the FECA provides that an individual undergoing an OWCP-approved rehabilitation program is entitled to receive compensation at the rate for total disability, less any earnings received from employment which is not undertaken as a specific part of the rehabilitation program. The RS will advise the CE via Form OWCP-3 of the dates when the claimant is actually enrolled in a vocational rehabilitation program and thus entitled to compensation at the rate for total disability.

b. If the claimant is receiving a schedule award, such payments should continue unless the claimant is also receiving an annuity from the Office of Personnel Management (OPM), in which case the claimant should be advised that he or she cannot be provided with vocational rehabilitation services while receiving an annuity from OPM (see FECA PM 2-808.7a(5) and FECA PM 2-1000.6c). The claimant should be offered an election, and if he or she elects OWCP benefits, the schedule award payments should be converted to payments for temporary total wage loss until completion of the rehabilitation effort. If the claimant elects OPM benefits, the schedule award benefits should continue and medical and factual development should be undertaken to determine claimant's LWEC at the end of the schedule award, but vocational rehabilitation efforts should be terminated.

### 1. STANDARD OF REVIEW

The Board reviews the Office's decisions for abuse of discretion under § 8104. This means that the Board will not disturb a decision unless it is clearly in error. *See Ronald L. Green, 98-1267 (2000).*

### B. EMPLOYING AGENCY RESPONSIBILITIES

Even though the OWCP process is non-adversarial, the employing agency is involved in many aspects of a workers' compensation claim. The agency initially determines whether or not to controvert the claim, monitors an employee's medical progress, and then, in the optimal scenario, returns the employee to his or her pre-injury position. The ultimate goal of returning an employee to work is not always easy, however. Because of the complexities often attendant to post-injury reemployment, the agency is perhaps more involved in vocational rehabilitation efforts than any other phase of the OWCP process.

The Office views the employing agency as having initial responsibility for attempting to return a partially disabled employee to work. This makes sense, as the employing agency typically will have an understanding of the employee's skills and abilities. Moreover, the employing agency will certainly have a more thorough knowledge of potential vacancies or its potential to restructure job functions to meet the limitations of a partially disabled employee. Finally, employing agencies have a financial incentive to return employees to work. The Department of Labor makes the compensation payments to beneficiaries under the Act, but the Department, in turns, seeks reimbursement from the agencies for these payments. *See 5 USC § 8147(b).* Agencies have a vested financial interest in keeping their reimbursement of workers' compensation payments to a minimum.

Some agencies provide limited duty assignments to employees who are injured on the job. These assignments are not regular positions, in that they would not exist but for the need to return an injured employee to work. Other attempts for the agency to return an employee to work can include providing accommodations to existing jobs that meet with the employee's restrictions.

Some employees with work related injuries may also be entitled to reasonable accommodation under the Americans with Disabilities Act (ADA). The difference between the duty to accommodate under the ADA and providing a limited duty or modified assignment for an employee injured on the job is discussed below under "[ADA Disability Accommodations.](#)"

### 1. ADVISING THE CLAIMANT

The agency's initial responsibility, which attaches immediately after it authorizes medical care, is to advise the employee of the requirement to return to work, if at all feasible. The Office's regulations, at 20 CFR § 10.505, address the agency's responsibilities to return an employee to work:

Upon authorizing medical care, the employer should advise the employee in writing as soon as possible of his

or her obligation to return to work under Sec. 10.210 and as defined in this subpart. 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.

The regulations, at section 10.505, provide that the supervisor is to advise the claimant of the requirement to return to work under section 10.210, which is a provision regarding continuation of pay. Section 10.210 provides, in pertinent part, that the employee must:

- (a) Complete and submit Form CA-1 to the employing agency as soon as possible, but no later than 30 days from the date the traumatic injury occurred.
- (b) Ensure that medical evidence supporting disability resulting from the claimed traumatic injury, including a statement as to when the employee can return to his or her date of injury job, is provided to the employer within 10 calendar days after filing the claim for COP.
- (c) Ensure that relevant medical evidence is submitted to OWCP, and cooperate with OWCP in developing the claim.
- (d) Ensure that the treating physician specifies work limitations and provides them to the employer and/or representatives of OWCP.
- (e) Provide to the treating physician a description of any specific alternative positions offered the employee, and ensure that the treating physician responds promptly to the employer and/or OWCP, with an opinion as to whether and how soon the employee could perform that or any other specific position.

20 CFR § 10.505 provides:

- (a) Where the employer has specific alternative positions available for partially disabled employees, the employer should advise the employee in writing of the specific duties and physical requirements of those positions.
- (b) Where the employer has no specific alternative positions available for an employee who can perform restricted or limited duties, the employer should advise the employee of any accommodations the agency can make to accommodate the employee’s limitations due to the injury

Where the agency is notified that the attending physician has found the employee to be partially disabled and able to perform a specific alternative position or to perform restricted or limited duty, the agency should furnish the employee with a written description of the specific duties and physical requirements of a specific alternative position. In the alternative, the agency should determine whether duties suitable to the employee’s limitations are available and, if so, advise the employee in writing of these duties, their physical requirements, and availability. *See Charmyn J. Jernigan*, 43 ECAB 207 (1991); *Randall A. Edinger*, 43 ECAB 1116 (1992). The agency should, in addition to any specific alternative positions, advise the employee if it is willing to accommodate the limitations and restrictions imposed.

## **2. REEMPLOYMENT OPTIONS**

The agency’s initial reemployment attempts should be to place the claimant in a position that is the same or equivalent to the pre-injury position. *Injury Compensation for Federal Employees*, Ch. 8-4D, provides the options, in order of preference, for reemployment:

If the residuals of the injury will prohibit the employee from returning to the position held at the time of injury, and the employee has received compensation for more than one year, the agency should consider reemployment in the following order of preference:

- (1) Return to the position held at the time of injury with modifications to accommodate the employee’s limitations;
- (2) Employment in another position at the same salary as the position held at the time of injury; or
- (3) Employment in another position at a lower salary than the position held at the time of injury.

This provision's reference to employees who have received compensation for more than one year relates to the agency's obligations to reinstate employees who are able to return to their full pre-injury position within a year. Reinstatement rights are discussed in the section on "[Restoration Rights](#)," below. The guidance above applies to employees without reinstatement rights.

### **3. MAKING OFFER OF EMPLOYMENT**

The Office's regulations, at 20 CFR § 10.507, set forth the manner in which an agency should make an offer of suitable employment:

Where the attending physician or OWCP notifies the employer in writing that the employee is partially disabled (that is, the employee can perform some work but not return to the position held at date of injury), the employer should act as follows:

- (a) If the employee can perform in a specific alternative position available in the agency, and the employer has advised the employee in writing of the specific duties and physical requirements, the employer shall notify the employee in writing immediately of the date of availability.
- (b) If the employee can perform restricted or limited duties, the employer should determine whether such duties are available or whether an existing job can be modified. If so, the employer shall advise the employee in writing of the duties, their physical requirements and availability.
- (c) The employer must make any job offer in writing. However, the employer may make a job offer verbally as long as it provides the job offer to the employee in writing within two business days of the verbal job offer.
- (d) The offer must include a description of the duties of the position, the physical requirements of those duties, and the date by which the employee is either to return to work or notify the employer of his or her decision to accept or refuse the job offer. The employer must send a complete copy of any job offer to OWCP when it is sent to the employee.

### **4. AMERICANS WITH DISABILITIES ACT DISABILITY ACCOMMODATIONS**

The agency's requirements to provide reasonable accommodation for a disabled employee under the Rehabilitation Act and Americans with Disabilities Act (ADA) are distinct from the return-to-work provisions of the FECA. There is overlap in some cases where a work-related injury results in a disabling condition, as defined by the ADA, but the intersection is by no means complete. The topic of reasonable accommodation for disabilities is extraordinarily complex, and beyond the scope of this book. The reader is referred to *A Guide to Federal Sector Disability Discrimination*, by Ernest C. Hadley ([Dewey Publications](#) 2006), for a comprehensive discussion of this issue. This section highlights some of the similarities and differences between reasonable accommodation and return to work.

The primary differentiating factor between the requirement to accommodate an individual with an ADA-covered disability and the return-to-work provisions under the FECA is the definition of disability under each statute. Under the ADA, a condition is not considered disabling unless it "substantially limits one of more major life activity." The terms "substantially limits" and "major life activity" each have highly specific definitions, which are still being fine-tuned by the Equal Employment Opportunity Commission and the courts. Under the FECA, the definition of disability is economic, and pertains to the claimant's ability to earn pre-injury wages.

The other major definitional distinction concerns duration. The majority of work-related injuries covered by the FECA are not permanent. Conversely, to be considered disabling under the ADA, an impairment must be, among other criteria, permanent or long-term in nature. In this regard, the agency's duty under FECA is broader, because it must take efforts to re-employ any employee who is injured on the job, regardless of whether that employee meets the ADA's definition of disability.

On the other hand, the agency's duty to attempt to accommodate disabled employees under the ADA is absolute. If a "qualified individual with a disability," as defined by the ADA, can perform the essential functions of his or her position or a position he or she desires, with a reasonable accommodation in place, the agency must provide that accommodation unless doing so would pose an undue hardship on the agency's operations. The duty to accommodate an employee who

is injured on the job, but not disabled as defined by the ADA, is not as stringent. The agency may choose to restructure components of an injured employee's time of injury job to enable performance, but it is not required to do so. In this sense, the agency's obligation to accommodate an employee with an ADA covered disability is greater.

Because this book is intended to cover the federal sector workers' compensation, this chapter's focus is on return to work efforts as part of the Office's vocational rehabilitation program. In cases where an employee's work related injury results in an ADA-covered disability, however, the employee and agency should take care to ensure that reemployment efforts under the FECA also comport with the agency's obligations under the ADA.

## **5. MONITORING MEDICAL PROGRESS**

The regulations provide that the employer may monitor an employee's medical progress in an effort to return the employee to work. 20 CFR § 10.506 states:

The employer may monitor the employee's medical progress and duty status by obtaining periodic medical reports. Form CA-17 is usually adequate for this purpose. To aid in returning an injured employee to suitable employment, the employer may also contact the employee's physician in writing concerning the work limitations imposed by the effects of the injury and possible job assignments. (However, the employer shall not contact the physician by telephone or through personal visit.) When such contact is made, the employer shall send a copy of any such correspondence to OWCP and the employee, as well as a copy of the physician's response when received. The employer may also contact the employee at reasonable intervals to request periodic medical reports addressing his or her ability to return to work.

*See also Bruce Chameroy, 42 ECAB 121 (1990).*

## **6. ADVISING THE OFFICE**

A complete copy of any job offer, including physical requirements, made to the employee should be sent to the Office at the time it is made to the employee. *See Bruce Chameroy, supra.* The agency should notify the Office immediately upon the return of a disabled employee to work or termination of a disability.

## **C. EMPLOYEE'S RESPONSIBILITIES**

Put most simply, an injured employee is required to try to return to work as soon as medically possible. The regulations, at 20 CFR § 10.515, describe the employee's responsibilities with respect to returning to work:

- (a) If an employee can resume regular Federal employment, he or she must do so. No further compensation for wage loss is payable once the employee has recovered from the work-related injury to the extent that he or she can perform the duties of the position held at the time of injury, or earn equivalent wages.
- (b) If an employee cannot return to the job held at the time of injury due to partial disability from the effects of the work-related injury, but has recovered enough to perform some type of work, he or she must seek work. In the alternative, the employee must accept suitable work offered to him or her. (See Sec. 10.500 for a definition of "suitable work.") This work may be with the original employer or through job placement efforts made by or on behalf of OWCP.
- (c) If the employer has advised an employee in writing that specific alternative positions exist within the agency, the employee shall provide the description and physical requirements of such alternate positions to the attending physician and ask whether and when he or she will be able to perform such duties.
- (d) If the employer has advised an employee that it is willing to accommodate his or her work limitations, the employee shall so advise the attending physician and ask him or her to specify the limitations imposed by the injury. The employee is responsible for advising the employer immediately of these limitations.
- (e) From time to time, OWCP may require the employee to report his or her efforts to obtain suitable employment, whether with the Federal Government, State and local Governments, or in the private sector.