United States Department of Labor
Employees' Compensation Appeals Board

C.C., Appellant	)	
and	)	**Docket No. 09-556**
	)	**Issued: October 1, 2009**
DEPARTMENT OF DEFENSE, MARINE CORPS BASE, Camp Pendleton, CA, 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 December 22, 2008 appellant filed a timely appeal from the October 14, 2008 merit decision of an Office of Workers' Compensation Programs' hearing representative, who affirmed the reduction of appellant's compensation to zero for her failure to cooperate with vocational rehabilitation efforts. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.[1]

ISSUE

The issue is whether the Office properly reduced appellant's compensation to zero for failure to cooperate with vocational rehabilitation efforts.

[1] The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). The Board therefore has no jurisdiction to review the February 8, 2009 Form CA-20 or the April 13, 2009 narrative medical report appellant submitted on appeal.

FACTUAL HISTORY

On December 10, 2003 appellant, then a 47-year-old special assistant, filed an occupational disease claim alleging that her emotional stress, anxiety and depression were causally related to her federal employment. The Office accepted her claim for the condition of major depressive disorder, single episode. It paid compensation for wage loss on the periodic rolls.

The Office referred appellant for vocational rehabilitation services. It learned that she was on an extended trip out of state to visit family and would not return for several months. The Office advised appellant on April 22, 2008 that she was impeding the initial vocational rehabilitation services. It directed her to contact both the Office and the rehabilitation specialist within 30 days to make a good faith effort to participate in the rehabilitation effort. The Office notified appellant of 5 U.S.C. § 8113(b) and the implementing regulations and gave her 30 days to show good cause for not participating in the effort. No response was received.

In a decision dated May 28, 2008, the Office reduced appellant's compensation for wage loss to zero for refusal to participate in vocational rehabilitation.

On June 12, 2008 the Office received a May 5, 2008 note from appellant's psychiatrist, Dr. Margarita M. Alonso, who stated: "At this time I do not recommend my patient to be involved in [v]oc[ational] [r]eh[abilitation] due to returning symptoms of depression and anxiety." Appellant subsequently requested a review of the written record by an Office hearing representative.

On August 19, 2008 the Office received Dr. Alonso's June 30, 2008 report: "At this time I do not recommend my patient be involved in [v]ocational [r]ehabilitation due to returning symptoms of depression and anxiety. The patient will be reevaluated for this purpose on December 31, 2008."

In a decision dated October 14, 2008, an Office hearing representative affirmed the reduction of appellant's wage-loss compensation to zero. The hearing representative found that Dr. Alonso failed to provide any findings on examination or a rationalized medical opinion explaining how appellant's disability for work was causally related to the accepted factors of employment, which occurred before August 11, 2003, and not to some intervening factors, including the personal matters she was attending to on her trip.

LEGAL PRECEDENT

Section 8104(a) of the Federal Employees' Compensation Act provides: "The [Office] 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."[2]

[2] 5 U.S.C. § 8104(a).

Section 8113(b) of the Act 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 have probably 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 provide:

"Under 5 U.S.C. § 8104(a), [the Office] may direct a permanently disabled employee to undergo vocational rehabilitation. To ensure that vocational rehabilitation services are available to all who might be entitled to benefit from them, an injured employee who has a loss of wage-earning capacity shall be presumed to be 'permanently disabled,' for purposes of this section only, unless and until the employee proves that the disability is not permanent. 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 meeting 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.
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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

[3] *Id*. at § 8113(b).

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

Given the variety of reasons which claimants may offer for noncooperation, and the circumstances in which these reasons may be offered, it is impossible to establish a definitive list of acceptable and unacceptable reasons for lack of cooperation. In general, however, a claimant is expected to treat the vocational rehabilitation effort as seriously as employment and reasons for lack of cooperation should be considered in this light. A situation which would be considered a valid reason for absence from work (*e.g.*, an illness) may be considered good cause for failure to cooperate with vocational rehabilitation for a reasonable period of time.[5]

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[6] Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[7]

ANALYSIS

The issue is whether appellant established good cause for her failure to undergo vocational rehabilitation when so directed. The Office found that Dr. Alonso, appellant's psychiatrist, failed to provide findings on examination and a rationalized medical opinion explaining how appellant's disability for work was causally related to the accepted factors of employment, which occurred before August 11, 2003, and not to some intervening factors, including the personal matters she was attending to on her trip. Appellant contends that she complied with the Office's April 22, 2008 request for information. She argues that she was only doing what her doctor recommended.

In the case of *Mary Ann J. Aanenson*,[8] the employee's doctor withdrew her from vocational rehabilitation for a period of 60 days because she did not have the alertness or capacity to absorb the material in her computer classes. The Board found in that case that the employee's failure to cooperate with vocational rehabilitation was due to her doctor's recommendation that she not do so. The employee discontinued her participation in the training on his recommendation. The Board held that the evidence supported that her failure to continue the training program was with good cause.

The circumstances in the present case are similar. Appellant was not already participating in vocational rehabilitation, and Dr. Alonso did not give as clear an explanation.

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[4] *Id*. at § 10.519.

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.12.a (November 1996).

[6] 5 U.S.C. § 8102(a).

[7] *Harold S. McGough*, 36 ECAB 332 (1984).

[8] 53 ECAB 761 (2002).

The fact remains that her failure to undergo vocational rehabilitation when so directed was due to her doctor's recommendation that she not do so. Dr. Alonso recommended against it.

In *Yusuf D. Amin*,[9] a psychiatrist and a clinical psychologist substantiated that the employee's headaches, as well as his accepted emotional condition, caused marked interference with his ability to comprehend and follow instructions and marked impairment of other skills, such as the ability to make generalizations or decisions, necessary to carry out vocational testing activities. The Board held: "As appellant did substantiate his allegation of inability to participate in vocational rehabilitation, with medical evidence, appellant did establish 'good cause' for his failure to fully cooperate with vocational rehabilitation."[10]

The Office never notified appellant or Dr. Alonso that such additional rationale was required to avoid the penalty under section 8113(b) of the Act. Office procedures provide guidance on how to evaluate reasons for lack of cooperation. A situation which would be considered a valid reason for absence from work, an illness, for example, may be considered good cause for failure to cooperate with vocational rehabilitation for a reasonable period of time. Considering Dr. Alonso's recommendation in that light, the Board finds that appellant has made a *prima facie* showing for not participating in vocational rehabilitation. If the Office wanted more information from Dr. Alonso to clarify how returning symptoms of depression and anxiety would interfere with vocational rehabilitation efforts, it should have developed that evidence.

The Office has the burden of proof to justify any modification of appellant's compensation for wage loss, including any reduction under section 8113(b) of the Act. Where appellant has submitted *prima facie* evidence that she was following her doctor's orders not to undergo vocational rehabilitation, the Board finds that the Office did not meet its burden to justify the penalty under section 8113(b). The Board will therefore reverse the Office hearing representative's October 14, 2008 decision.

CONCLUSION

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

[9] 47 ECAB 804 (1996).

[10] *Cf. David L. Maes*, 54 ECAB 727 (2003) (the doctor did not address the claimant's capacity to participate in the functional capacity evaluation, so the evidence did not support the claimant's assertion that his doctor advised against it); *S.F.*, 59 ECAB ___ (Docket No. 08-426, issued July 16, 2008) (the claimant submitted no medical evidence to establish she had a medical condition that prevented her from enrolling in school and attending class); *R.H.*, 58 ECAB ___ (Docket No. 07-74, issued August 16, 2007) (the claimant asserted she could not meet with the rehabilitation counselor or drive to work due to his medication, but he submitted no medical evidence from his physician to support that contention); *F.R.*, 58 ECAB ___ (July 10, 2007) (progress notes merely summarizing treatment sessions and containing no opinion on disability did not show good cause for failing to participate in vocational rehabilitation).

ORDER

IT IS HEREBY ORDERED THAT the October 14, 2008 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 1, 2009
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