United States Department of Labor
Employees' Compensation Appeals Board

C.L., Appellant	)	
and	)	**Docket No. 10-351**
	)	**Issued: April 8, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Malone, NY, Employer	)	

Appearances:
Mark J. Sullivan, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 18, 2009 appellant filed a timely appeal from the August 27, 2009 merit decision of the Office of Workers' Compensation Programs reducing her compensation to zero for her failure to cooperate with vocational rehabilitation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

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

FACTUAL HISTORY

On June 7, 2008 appellant, then a 40-year-old rural carrier associate, sustained injury when her motor vehicle was struck from behind while she was attempting to make a left turn. She received medical treatment that day and diagnostic testing of the cervical and lumbar spine and right hip revealed no abnormality or fracture. Appellant's claim was accepted by the Office for cervical and lumbar sprains.

Appellant received treatment from Dr. Anjni Bhagat, an internal medicine specialist, for residuals of her accepted conditions and he prescribed a course of physical therapy. Dr. Bhagat described residuals of radiculopathy into the lower extremities for which appellant was disabled. Appellant was referred by the Office to Dr. Christopher Horn, an orthopedic surgeon. In a November 12, 2008 report, Dr. Horn advised that physical examination of appellant was nonspecific as to her neurologic complaints and that her history was suggestive of transient neck and back pain.[1] He recommended an additional 12 sessions of physical therapy before a return to full duty in eight weeks.

The Office found a conflict in medical opinion between appellant's treating physician and the second opinion physician, and referred appellant to Dr. Marco Berard, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion as to whether she was disabled from performing the duties of her date-of-injury position and, if so, the extent of her capacity for work. In a February 20, 2009 report, Dr. Berard reviewed the history of injury and medical treatment. He advised that appellant was not able to return to her regular work duties due to residuals from her accepted injury. Dr. Berard found that she could perform light to sedentary work, 4 hours a day, with 15-minute breaks every 2 hours. Appellant was limited to squatting, kneeling or climbing less than one hour per day. Dr. Berard strongly suggested a functional capacity examination before reevaluating appellant.

In a letter dated March 27, 2009, the employing establishment advised that it was unable to offer appellant a position which accommodated her physical restrictions. On April 9, 2009 the Office referred her for vocational rehabilitation, with instructions that her counselor proceed with a vocational assessment and testing as needed, and to develop a plan for short-term training and testing or job placement.

On May 8, 2009 the Office informed appellant that she had been referred for vocational rehabilitation counseling in order to help prepare her for other employment. Appellant was notified of her obligation to cooperate fully in all aspects of the return-to-work effort.

In a letter received on May 11, 2009, appellant advised the rehabilitation counselor that she had an epidural steroid injection in her lower back and was faxing a copy of her physician's report. Noting that her physician would be "calling" the counselor, she provided contact information in the event the counselor had "any questions." Appellant submitted an April 27, 2009 treatment record from Dr. Vladmir Medved, an osteopath Board-certified in family practice. Dr. Medved diagnosed lumbago, sciatica, neck pain, muscle spasm and L5 radiculopathy. He stated that appellant was disabled from doing her job.[2]

On May 6, 2009 appellant's representative contended that Dr. Berard had not provided a well-rationalized medical opinion and noted the recommendation for obtaining a functional

[1] Dr. Horn noted that cervical and lumbar magnetic resonance imaging scans of July 15, 2008 showed no obvious disc herniation or impingement on the spinal cord with some degenerative changes at L4-5 and in the cervical spine.

[2] The record reflects that Dr. Medved referred appellant to Dr. Jerry Traver, an anesthesiologist, for steroid injections.

capacity examination. He stated that appellant was awaiting information regarding a job offer within the limitations delineated by Dr. Berard.

In a May 9, 2009 report, the vocational rehabilitation counselor stated that she had five separate contacts with appellant from April 15 through May 8, 2009. On April 15, 2009 she scheduled an initial meeting, which was held at appellant's home on April 17, 2009. Appellant expressed high interest in returning to work and a willingness to explore alternative occupations that fell within her physical limitations. The rehabilitation counselor spoke with appellant by telephone on April 22, May 7 and 8, 2009 regarding job opportunities and her medical treatment.[3]

On June 2, 2009 appellant informed the Office that her physician refused to perform a steroid injection because payment for the procedure was denied. In a note dated June 3, 2009, the rehabilitation counselor indicated that appellant's physician had advised her not to work due to pain and had cancelled her epidural steroid injection because payment was denied by the Office.

In a report dated June 9, 2009, the vocational rehabilitation counselor stated that she had performed a job search and identified 20 jobs within appellant's restrictions. She forwarded information about the positions to appellant, together with a cover letter.[4] Appellant seemed less cooperative stating that she was unable to work until her pain decreased. On June 12, 2009 the rehabilitation counselor asked the claims examiner for information regarding approval of the steroid injections, noting that she was unable "to move the [rehabilitation] case until we know she will be getting the treatment she is requesting." The report of the rehabilitation counselor also noted that appellant's participation in a work hardening program at a local facility had been confirmed and appellant was contacted to discuss further details. Appellant's participation in work hardening was authorized on June 17, 2009. On June 18, 2009 the counselor had a discussion with appellant's medical providers about registration to become authorized in order that their bills for services could be paid. The physician's office provided the relevant identification number. On June 22, 2009 it was noted that appellant was contacted by the work hardening provider to set up an initial meeting, but she declined based on advice "not to cooperate with the work hardening program or to talk with the [rehabilitation counselor] until she is able to get her suggested … injection."

In a disability slip dated June 29, 2009, Dr. Medved listed appellant as unable to work from June 29 through August 1, 2009. A June 30, 2009 note from Dr. Medved restricted her from driving more than 20 minutes a day due to her limitations.

On July 10, 2009 the rehabilitation counselor reiterated that she made arrangements at a local rehabilitation facility for a vocational evaluation coupled with the work hardening program. Appellant informed a representative of the facility that she was advised not to cooperate with the

[3] On May 14, 2009 the rehabilitation counselor noted that appellant had many transferable skills, was motivated to return to work and had realistic goals. She noted that a vocational evaluation did not seem necessary as appellant did not seek additional training.

[4] The record does not contain any documents or other information relating to the 20 positions identified by the vocational rehabilitation counselor.

work hardening program or to talk to the rehabilitation counselor until she was able to obtain authorization for her pain management injection.

The Office advised appellant on July 13, 2009 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, or to give reasons for her noncompliance, together with supporting evidence. The Office notified her that, pursuant to 5 U.S.C. § 8113(b) and its implementing regulations, her refusal to participate, without good cause, could result in the reduction of her compensation benefits prospectively based upon what probably would have been her wage-earning capacity had she not failed to cooperate in vocational rehabilitation efforts.[5]

In July 30, 2009 letter, appellant's representative acknowledged receipt of the job leads provided by the rehabilitation counselor. He contended that no consideration had been given to appellant's work capacity evaluation and that her work limitations had not been adequately addressed. Appellant's representative argued that none of the jobs complied with the limitation on driving. He further stated that appellant had not expressed any unwillingness to participate in vocational rehabilitation and would make every effort to participate when presented with job leads reflecting her restrictions.

On August 10, 2009 the rehabilitation counselor noted that she had not received any response to an e-mail in which she requested that appellant contact her.

In an August 27, 2009 decision, the Office reduced appellant's wage-loss compensation to zero for refusal to participate in vocational rehabilitation, finding that she refused to undergo the essential preparatory effort of vocational testing. The claims examiner noted that appellant did not contact the Office or her rehabilitation counselor with the intent to resume participation or establish good cause for her failure to comply.

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."[6]

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

[5] In a July 13, 2009 letter, the Office requested a copy of the functional capacity evaluation referred to in Dr. Berard's report.

[6] 5 U.S.C. § 8104(a).

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."[7]

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].
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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 [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 until such time as the employee acts in good faith to comply with the direction of [the Office]."[8]

[7] *Id.* at § 8113(b).

[8] 20 C.F.R. § 10.519.

Given the variety of reasons that 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.[9]

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[10] Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[11]

ANALYSIS

The Board finds that appellant has not established good cause for her failure to cooperate with the vocational rehabilitation process.

The record establishes that appellant initially cooperated with her vocational rehabilitation counselor, who had five contacts with appellant from April 15 through May 8, 2009, including telephone calls and a meeting held at appellant's home on April 17, 2009. Appellant expressed interest in returning to work and a willingness to explore alternative occupations that fell within her physical limitations. On May 14, 2009 the rehabilitation counselor noted that appellant had transferable skills and was motivated to return to work with realistic work goals. Appellant was referred for vocational rehabilitation based on the report of Dr. Berard, the impartial medical specialist, who found that she was able to engage in light to sedentary work within set physical limitations.

After her physician cancelled an epidural steroid injection on or about June 2, 2009, because payment was not processed by the Office, appellant informed the counselor on June 22, 2009 that she would be unable to work, perform a job search, or engage in a work hardening program until such injections were authorized. The issue is whether appellant submitted sufficient medical evidence to establish that her refusal to participate in rehabilitation was with "good cause." The Board has recognized that the medical inability to participate in vocational rehabilitation, if properly substantiated, may constitute good cause for an employee's failure to participate.[12]

In *Linda McCormick*,[13] the Board found that the employee failed to submit sufficient medical evidence to establish good cause for her failure to participate in vocational

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[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.12.a (November 1996). *See C.C.*, Docket No. 09-556 (issued October 1, 2009).

[10] 5 U.S.C. § 8102(a).

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

[12] *See Carolyn M. Leek*, 47 ECAB 374 (1996); *Linda McCormick*, 44 ECAB 958 (1993).

[13] *Id*.

rehabilitation. Appellant contended that she could sit for only short periods and was physically unable to meet with the rehabilitation counselor. She submitted several work restriction evaluation reports from an attending physician, who listed her work restrictions, and from an osteopath, who advised she was totally disabled for any work. The Board affirmed the reduction of her wage-loss benefits, finding that neither physician adequately addressed why she was so disabled that she could not meet with the vocational counselor or participate in the initial stages of the rehabilitation process. In *Carolyn M. Leek*,[14] the reports from the employee's attending chiropractors were found to be of limited probative value in that they did not provide rationale explaining why she was prevented from engaging in a functional capacity evaluation due to residuals of her accepted condition.

In *Yusuf D. Amin*,[15] the employee was referred for rehabilitation and scheduled for vocational testing which he partially completed. He was subsequently directed to finish testing and submitted a report from an attending physiatrist who related that the employee remained under his care, his major affective disorder with dysthymic disorder was chronic and that the employee had marked impairment of his ability to comprehend and follow instructions due to chronic depression and the side effects of medication. The physician addressed how the employee's condition impaired his ability to accept or carryout responsibility for directions, control and planning. A clinical psychologist subsequently advised the Office that he recommended the employee be evaluated under special conditions, such as 60-minute testing intervals every two weeks. The Board found that the employee's physicians explained that he would be able to participate in vocational testing within specified conditions such that their reports substantiated "good cause" for his failure to fully cooperate with vocational rehabilitation.[16]

Appellant was referred to Dr. Berard, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Berard advised the Office on February 20, 2009 that appellant was not able to return to her regular employment as a rural letter carrier but she had the capacity to perform light to sedentary duty, four hours a day, within specified physical limitations. Based on his recommendations, appellant was referred for vocational rehabilitation.

On appeal, appellant's representative contends that the Office was not in the process of developing a suitable vocational rehabilitation plan and that there was no evidence of agreed physical restrictions. The Board finds that appellant's work restrictions were clearly set forth in the report of Dr. Berard, the impartial medical specialist, who provided a well-rationalized narrative report addressing his findings on examination of appellant and her capacity for part-time work. The only medical evidence submitted by appellant were brief treatment records and notes from Dr. Medved advising that she was disabled for work from June 29 through August 1, 2009 and unable to drive for more than 20 minutes. The Board finds that this medical

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[14] *Id.*

[15] 47 ECAB 804 (1996).

[16] *See also Mary Ann J. Aanenson*, 53 ECAB 761 (2002) (the Board found that the medical evidence was sufficient to support that the employee's failure to continue to participate in vocational rehabilitation was for good cause where her doctor withdrew her for a period of 60 days because she did not have the alertness or capacity to absorb the material in her computer classes).

evidence is not sufficient to establish "good cause" for her failure to participate in vocational rehabilitation commencing June 22, 2009. As in *McCormick* and *Leek*, the physician did not provide any explanation in support of his statement that appellant was totally disabled for the period indicated. He did not address why appellant was unable to participate in the work hardening program arranged as part of her vocational rehabilitation. In contrast to *Amin*, Dr. Medved provided no narrative report addressing why she was unable to continue participation in vocational rehabilitation, attend meetings concerning her participation in the work hardening program or unable to meet with her rehabilitation counselor after June 22, 2009. There is no medical opinion from a physician addressing why steroid injections were a necessary component for her participation in vocational rehabilitation or the work hardening program. The record supports that she initially cooperated with such efforts but as of June 22, 2009, refused cooperation after she was denied an injection based on nonreimbursement. The evidence of record supports that the rehabilitation counselor was working with appellant's medical provider to enroll them as authorized providers so their bills could be paid. Appellant effectively ceased participation in vocational rehabilitation as of that date without good cause, qualifying her participation based on the denied steroid injection for which there is no evidence of medical necessity.

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. Appellant has failed to establish good cause for her failure to cooperate with the vocational rehabilitation process. Accordingly, the Board finds that the Office met its burden to reduce her wage-loss benefits under section 8113(b).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the August 27, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 8, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board