U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT T. WILLIS and DEPARTMENT OF THE TREASURY, U.S. CUSTOMS SERVICE, St. Thomas, V.I.

Docket No. 97-242; Submitted on the Record;
Issued September 2, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to represent a zero percent loss of wage-earning capacity because he refused to cooperate in preliminary vocational rehabilitation efforts.

On August 2, 1991 appellant, then a 44-year-old motor vehicle operator, developed pain in his lower back and legs while lifting heavy boxes to load on a boat. He stopped working on December 6, 1991. The Office accepted appellant's claim for lumbar strain and bulging L4-L5 disc and began payment of temporary total disability compensation effective December 6, 1991.

In a January 24, 1992 report Dr. James Littman, a Board-certified radiologist, reported that a magnetic resonance imaging (MRI) scan of the cervical and lumbar regions of the spine showed a herniated nucleus pulposus at C5-C6 on the right, a herniated nucleus pulposus at L4-L5 on the left with compression of the L5 nerve root and scoliosis at the upper thoracic spine.

In a May 18, 1992 report Dr. Ali Moayeri, a Board-certified internist specializing in rheumatology, diagnosed herniated discs at L4-L5 and C5-C6, severe radiculopathy at L5-S1, severe lumbosacral sprain and strain and controlled hypertension. He indicated that appellant was totally disabled for work.

The Office referred appellant to Dr. Byron K. Hoffman, a Board-certified orthopedic surgeon, together with the statement of accepted facts and the case record, for an examination and second opinion. Dr. Hoffman referred appellant for another MRI scan. In an April 17, 1992 report Dr. Adrian G. Krudy, a Board-certified radiologist, stated that an MRI scan of the lumbosacral region showed a subtle myelographic defect consisting of a minimal ventral indentation on the thecal sac at the L4 disc level corresponding to a mild left paramedian disc protrusion noted on the January 24, 1992 MRI scan. He indicated that an MRI scan of the cervical spine showed a moderate disc herniation at the C5-C6 level.

In an April 27, 1992 report Dr. Hoffman stated that there was no evidence of orthopedic pathology related to the August 2, 1991 employment injury. He indicated that appellant's current subjective complaints were not associated with objective findings attributable to the employment injury. He stated that the findings on the MRI scans were not due to the employment injury. He commented that appellant's subjective symptoms would not be caused by the findings on the MRI scans. He concluded that appellant had no orthopedic disability due to the employment injury. He indicated that appellant could work in any occupational endeavor within his training without the imposition of work restrictions necessitated by the employment injury.

The Office referred appellant, together with the statement of accepted facts and the case record, to Dr. Donald C. Mann, a Board-certified neurologist, to resolve the conflict in the medical evidence between Dr. Moayeri and Dr. Hoffman. In an October 26, 1992 report Dr. Mann indicated that the lumbar MRI scans showed a possible slight disc bulge at L4-L5. He noted the MRI scan findings of a herniated C5-C6 but indicated that appellant had no substantial neck pain. He concluded that given the paucity of symptoms and the historical prominence of lumbar symptoms, appellant did not have an active cervical condition related to his injury. He diagnosed lumbar spondylosis with aggravation following the employment injury. He stated that the extent of the lumbar disc abnormality was minor and would not preclude appellant from working, although his back symptoms would prevent any lifting, bending, or carrying. He commented that appellant probably had an antecedent lumbar disorder aggravated by the employment injury. He indicated that appellant could be rehabilitated to full work and was not permanently and totally disabled as a result of the employment injury. He stated that appellant suffered from disc degeneration and disc irritation for the most part coming from degenerative changes in the disc. He noted that appellant also suffered from a problem with anxiety and depression which had slowed his recovery. He indicated that appellant currently was not able to return to work because of his employing establishment but could be employed in other occupations where sitting, standing for reasonable periods of time, talking and use of the hands were required. He stated that appellant may not bend, carry, lift or climb for another 6 to 12 months and therefore could not return to his job as a driver.

In subsequent reports Dr. Moayeri diagnosed herniated C5-C6 nucleus pulposus, herniated L4-L5 nucleus pulposus, scoliosis of the thoracic spine, cervical spondylosis and essential hypertension. He indicated that appellant continued to be totally disabled for work.

The Office referred appellant to Dr. Ralph J. Kovach, a Board-certified orthopedic surgeon, for an examination and second opinion. In an August 31, 1995 report Dr. Kovach noted Dr. Moayeri's diagnosis. He stated that his own examination showed no evidence of myofascitis. He noted that one MRI scan showed a herniated nucleus pulposus at the L4-L5 level while a second MRI scan showed more of a disc bulge with no actual nerve root pressure of the lumbar spine. He indicated that there was no evidence of radiculopathy or nerve compression in his examination or in the examinations of Dr. Hoffman and Dr. Mann. He stated that there was no indication that appellant injured his cervical spine and commented that if he did have a herniated cervical disc, it was not caused by the mechanism of injury in the employment injury. He noted that appellant's treating physician kept extending appellant's disability because of the herniated discs in the lumbar and cervical regions but reported that by his examination these

findings were not clinically present. He concluded that appellant was disabled from a return to work because he could not perform repeated heavy lifting. He stated appellant could be placed in a clerk-type position which would not require any heavy lifting or repeated bending. He commented that there was no evidence of a lumbar strain. He stated that appellant's current disability was from a work-related injury, and that a residual injury was present because of the amount of bulging of the disc. He indicated that this, however, did not preclude appellant from returning to work. He reported that appellant could lift and carry up to 20 pounds. In a subsequent report Dr. Kovach stated that appellant's bulging disc was caused by the employment injury. He indicated that the work restrictions were imposed because of the history of injury along with the proven bulging disc which would preclude appellant from performing heavier work than he had outlined in his first report.

In a January 29, 1996 letter the Office referred appellant to a rehabilitation counselor for development of a vocational rehabilitation program. In a February 13, 1996 memorandum an Office claims examiner indicated that appellant, in an office visit, noted that the rehabilitation counselor had advised him that if appellant did not cooperate with vocational rehabilitation efforts his compensation benefits would be in jeopardy. The claims examiner informed appellant that the there was insufficient medical evidence from his physician supporting his inability to work and warned him if he did not cooperate with the rehabilitation counselor, his compensation would be suspended.

In a February 19, 1996 report Dr. Moayeri again diagnosed herniated nucleus pulposus at C5-C6 and L4-L5, scoliosis of the thoracic spine, cervical spondylosis, essential hypertension, and chronic myofascitis of the lumbosacral spine. He stated that appellant complained of pain in his neck and back with pain radiating down the right arm and the left leg. He indicated that appellant had decreased range of motion of the neck and back with muscle spasm and tenderness. He reported that sensory examination was not conclusive because the sensory losses were spotty in distribution. Dr. Moayeri also discussed appellant's medications and the side effects from the medication. He concluded that appellant could not return to work for eight hours a day with or without restrictions.

In a February 22, 1996 report the rehabilitation counselor stated that appellant was evasive, deflective and assertive regarding any attempt to move the rehabilitation effort forward. He noted that appellant repeatedly stated that his physician listed restrictions that would prevent him from working again. The counselor indicated that appellant had initially stated that he did not want to return to work but subsequently expressed a willingness to explore employment possibilities within the federal government. The counselor reported that appellant had recently stated that his age and limitations would prevent a return to work.

In a February 28, 1996 letter appellant indicated that he would be moving in March from Cleveland, Ohio, to Washington, Georgia. In a March 6, 1996 report the rehabilitation counselor stated that appellant had not appeared for scheduled vocational testing on February 29, 1996. He submitted a copy of a certified letter dated February 21, 1996 which he had sent to appellant at his Cleveland, Ohio address. He noted that he had not received anything back from the Postal Service to show whether the letter had been delivered. In a March 7, 1996 memorandum an

Office rehabilitation specialist indicated that appellant had called on February 22, 1996 and essentially refused rehabilitation services.

In a March 8, 1996 letter to appellant the Office indicated that it had been advised that he had failed to participate in the rehabilitation efforts, particularly in failing to attend a vocational testing appointment. The Office warned appellant that if he failed to participate in the preparatory efforts for vocational rehabilitation, the Office would assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity and compensation would accordingly be reduced to zero. The Office indicated that the reduction would continue until the claimant, in good faith, complied with the Office's directions regarding rehabilitation. The Office gave appellant 30 days to comply with the rehabilitation effort or provide a good reason for not participating in the rehabilitation effort, with evidence to support his position. The Office stated that if appellant did not comply with the instructions, rehabilitation efforts would cease and action would be taken to reduce his compensation.

In an April 17, 1996 decision the Office reduced appellant's compensation to zero on the grounds that appellant had not cooperated in rehabilitation efforts, finding that such efforts would have resulted in a return to work with no loss of wage-earning capacity.

The Board finds that the Office properly reduced appellant's compensation to zero wage-earning capacity because he refused to cooperate with rehabilitation efforts.

The Federal Employees' Compensation Act, in 5 U.S.C, § 8113(b), states:

> "If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of this title, the [Office], 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 been his wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the [Office]."

The regulation implementing this section of the Act, 20 C.F.R. § 10.124(f), restates section 8113(b) and then states:

> "If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue participation in the early but necessary stages of a vocational rehabilitation effort (*i.e.*, interviews, testing, counseling, and work evaluations), the Office cannot determine what would have been the employee's wage-earning capacity had there not been such a failure or refusal. It will be assumed therefore, in the absence of evidence to the contrary, 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. Any reduction in the employee's monetary compensation under the provisions of this paragraph shall continue until the employee in good faith complies with the direction of the Office."

In the case of *Asline Johnson*[1] the Board upheld the provisions of 20 C.F.R. § 10.124(f) as an appropriate implementation of section 8113(b). The Office, however, has the burden of showing that it invoked these provisions properly and appropriately.[2]

In this case the weight of the medical evidence showed appellant was able to return to some type of work. Dr. Moayeri had continually diagnosed herniated cervical and lumbar discs. However, Dr. Hoffman, Dr. Mann and Dr. Kovach had all pointed out that the MRI scans of the lumbar region showed only a disc bulge. All three physicians indicated appellant's cervical condition was not related to the employing establishment and was not disabling. Dr. Moayeri gave no opinion on the cause of the cervical herniated disc. Dr. Hoffman, Dr. Mann and Dr. Kovach stated that appellant was able to perform some type of work. Dr. Moayeri continually stated that appellant was disabled for work. However, his opinion was based on a diagnosis of a herniated lumbar disc which no other physician accepted. Dr. Moayeri did not provide any rationale in support of his opinion that appellant continued to be totally disabled five to six years after the employment injury. His reports, therefore, have little probative value and are insufficient to establish that appellant continued to be totally disabled.

The Office claims examiner warned appellant that failure to cooperate with rehabilitation efforts would result in the suspension of compensation. After that time, the rehabilitation counselor sent appellant a letter for attending vocational testing. Appellant had indicated that he would be moving in March 1996 but the letter was sent to his current address on February 21, 1996, seven days before appellant informed the Office that he would be moving. Under these circumstances, it is presumed that appellant received the letter informing him of the rehabilitation testing.[3] The March 8, 1996 letter warning appellant that his compensation would be reduced if he continued to refuse to cooperate in rehabilitation efforts was sent to his address in Cleveland, Ohio but a copy was sent to appellant's attorney, whom appellant stated would still represent him. Appellant therefore received notice that his compensation would be reduced to represent a zero percent loss of wage-earning capacity unless he cooperated with rehabilitation efforts or gave a good reason, supported by evidence, for his refusal to participate in vocational rehabilitation. Appellant neither promised to cooperate with rehabilitation efforts nor presented any reasons for his refusal to participate in such efforts. The Office therefore properly reduced appellant's compensation.

[1] 41 ECAB 438 (1990).

[2] *Michael L. Bowden*, 41 ECAB 672 (1990).

[3] *Newton D. Lashmett*, 45 ECAB 181 (1993).

The decision of the Office of Workers' Compensation Programs, dated April 17, 1996, is hereby affirmed.

Dated, Washington, D.C.
September 2, 1998

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member