

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SANDRA PIKELNY and DEPARTMENT OF HEALTH & HUMAN
SERVICES, JAMAICA TELESERVICE CENTER, Jamaica, NY

*Docket No. 98-1322; Submitted on the Record;
Issued September 14, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective January 7, 1997 under 5 U.S.C. § 8113(b) on the grounds that she failed to demonstrate a good faith effort in the vocational rehabilitation process.

On January 13, 1994 appellant, then a 49-year-old teleservice representative, filed a claim for an occupational disease (Form CA-2) alleging that she first became aware of her bilateral carpal tunnel syndrome in November 1993. Appellant further alleged that she became aware that her condition was caused by her employment on January 13, 1994. Appellant stopped work on January 12, 1994.

By letter dated July 24, 1994, the Office accepted appellant's claim for bilateral carpal tunnel syndrome. Appellant received compensation beginning January 13, 1994.

Dr. Michael Katz, a Board-certified orthopedic surgeon and appellant's treating physician, submitted numerous medical reports indicating that appellant was totally disabled.

By letter dated January 22, 1996, the Office referred appellant along with a statement of accepted facts, medical records and a list of specific questions to Dr. Raymond P. Koval, a Board-certified orthopedic surgeon, for a second opinion examination. By letter of the same date, the Office advised Dr. Koval of the referral.

Dr. Koval submitted a February 14, 1996 medical report providing appellant's employment and medical histories, a review of records and his findings on physical examination. Dr. Koval opined that appellant had bilateral carpal tunnel syndrome related to her employment. He stated that appellant's diabetes most likely played a role in her condition. Dr. Koval further stated that appellant's condition was permanent unless she underwent a surgical procedure which she refused to undergo. He then stated that appellant was capable of working eight hours per day with restrictions including, no use of computers and no repetitive action with her hands or wrists.

Dr. Koval concluded that appellant could not resume her normal work duties until a surgical release was performed.

In an internal memorandum, the Office indicated that appellant should be referred to Dr. Koval again to determine the relationship between appellant's nonemployment-related conditions involving her back and right knee, and her disability for the purpose of pursuing vocational rehabilitation.

By letter dated August 27, 1996, the Office again referred appellant along with a statement of accepted facts, medical records and a list of specific questions to Dr. Koval for a second opinion examination. By letter of the same date, the Office advised Dr. Koval of the referral.

Dr. Koval submitted a September 13, 1996 medical report revealing appellant's medical treatment, his findings on physical and neurological examination and a review of medical records. He opined that, based on his examination, appellant had degenerative arthritic changes in her cervical spine, back and left knee. Dr. Koval further opined that he found no evidence of any herniated discs contrary to magnetic resonance imaging (MRI) test results. Dr. Koval stated that appellant was able to perform sedentary work that did not involve lifting more than 25 pounds. He further stated that, due to appellant's neck, back and left knee, she should not climb stairs or kneel. Dr. Koval also stated that appellant could not perform any repetitive action or computer work due to her carpal tunnel syndrome. He concluded that appellant could work eight hours per day.

On September 24, 1996 appellant was referred to a vocational rehabilitation counselor.

The record contains reports commencing October 9, 1996 from a vocational rehabilitation counselor. In reports dated October 9 and 26, 1996, the rehabilitation counselor indicated appellant's lack of desire to return to work and the employing establishment's refusal to rehire appellant.¹ In a November 4, 1996 letter, the rehabilitation counselor advised appellant that the Office would be informed about her delay in discussing a prevocational evaluation plan at the International Center for the Disabled with her attorney. The rehabilitation counselor further advised appellant to sign an enclosed prevocational evaluation plan and award form (OWCP-16) without delay. In a report of the same date, the rehabilitation counselor advised the Office of appellant's refusal to proceed with the prevocational evaluation plan.

In a November 4, 1996 letter, the Office advised appellant that it proposed to terminate her compensation because she refused to cooperate with her vocational rehabilitation counselor. The Office noted that appellant failed to keep a scheduled appointment for vocational testing on November 1, 1996, to keep a second appointment on November 4, 1996 and to sign the plan that provided her with a thorough prevocational evaluation tentatively scheduled for November 18, 1996. The Office advised appellant that section 8113(b) of the Federal Employees' Compensation Act stated that, if an individual without good cause fails to undergo vocational rehabilitation when so directed, the Office may reduce prospectively the

¹ Appellant retired from the employing establishment on disability effective March 31, 1995.

compensation based on what probably would have been the individual's wage-earning capacity had she not failed to undergo vocational rehabilitation. The Office further advised appellant that 20 C.F.R. § 10.124(f) provides that if an individual without good cause fails or refuses to participate in the vocational rehabilitation the Office will assume, 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 compensation will be reduced accordingly. The Office indicated that this would result in the reduction of appellant's compensation to zero and would remain in effect until appellant in good faith complied with Office directions concerning rehabilitation. The Office directed appellant to contact it within 30 days and advised that she believed she had a good reason for not participating, she should so advise the Office within 30 days. It further advised that, if she did not comply, her compensation would be reduced as described.

In a November 9, 1996 report, the rehabilitation counselor indicated appellant's refusal to sign the Form OWCP-16. In subsequent reports, the rehabilitation counselor indicated appellant's continued refusal to cooperate with vocational rehabilitation due to her disability and fear of aggravating her condition by using public transportation to attend the evaluation.

By decision dated January 7, 1997, the Office reduced appellant's compensation benefits to zero effective that date on the grounds that she failed to cooperate with the vocational rehabilitation process pursuant to section 8113(b) of the Act. In so doing, the Office noted that appellant's claim was opened to vocational rehabilitation based on Dr. Koval's February 14, 1996 medical report indicating that appellant was capable of returning to work in a limited-duty capacity eight hours per day with restrictions. The Office also noted that appellant was advised by letter dated November 4, 1996 that her failure to continue good faith cooperation with the rehabilitation counselor constituted noncooperation with the vocational rehabilitation process. Further, the Office noted that appellant failed to contact the Office to demonstrate a good faith effort to continue the rehabilitation process. The Office then found that appellant's actions consistently demonstrated that she was unwilling to participate in the vocational rehabilitation process.²

By letter dated November 26, 1997, appellant, through her counsel, requested reconsideration of the Office's decision. Specifically, appellant contended that Dr. Katz's February 3, 1997 medical report supported her contention that her employment-related medical conditions prevented her from using public transportation, which was her only form of transportation, to travel to the vocational rehabilitation center. Appellant also contended that there was a conflict in the medical opinion evidence between Drs. Katz and Koval regarding the extent and degree of her disability.

Appellant's request for reconsideration was accompanied by the Office's July 12, 1994 letter accepting her claim for bilateral carpal tunnel syndrome. Appellant's request was also

² The Board notes that it appears from the evidence of record, specifically, the Office's November 4, 1996 letter, that the Office reduced appellant's compensation to zero on the grounds that she failed to participate in "the early but necessary stages" of the vocational rehabilitation process which prevented the Office from determining what would have been appellant's wage-earning capacity had there not been such failure or refusal, thus, the Office presumed that rehabilitation would have resulted in zero loss of wage-earning capacity.

accompanied by a February 3, 1997 medical report from Dr. Katz. In this report, he indicated a history of his previous treatment of appellant's back, hands and left knee, and diagnoses of degenerative spondylolisthesis, right carpal tunnel syndrome with diabetic neuropathy and internal derangement of the left knee. Dr. Katz opined that, if the above history was correct, appellant's impairment was permanent and partial in nature. He further opined that the above impairments were causally related to appellant's federal employment which developed into an occupational disease on November 1, 1993. Dr. Katz stated that appellant would continue to have degenerative changes of the left knee and recommended physical therapy and a knee brace to stabilize ambulation. He concluded that appellant "cannot utilize public transportation on her own and is rendered hereby totally disabled until further notice." Further, appellant's request was accompanied by an excerpt from a practice guide regarding the Act. Lastly, appellant's request was accompanied by an April 25, 1994 medical report of Dr. Herbert Jalens, a Board-certified orthopedic surgeon and second opinion physician. In this medical report, Dr. Jalens provided a history of appellant's medical treatment, his findings on physical examination and a review of medical records. Based on a review of the findings of an objective examination, Dr. Jalens opined that appellant had a C4-5 herniated disc with bilateral carpal tunnel syndrome and some functional overlay, chronic discogenic low back derangement with degenerative spondylolisthesis at L4-5 and osteoarthritis of the lumbosacral spine with a functional overlay. He opined that appellant was totally disabled at that time and he noted appellant's future medical treatment.

On December 11, 1997 an Office medical adviser reviewed the medical evidence of record and a statement of accepted facts. The Office medical adviser responded to specific questions regarding Dr. Koval's September 13, 1996 medical report and Dr. Katz's February 3, 1997 medical report. The Office medical adviser stated that Dr. Katz's medical report did not indicate any minimal physical findings regarding appellant's low back and knees. The Office medical adviser opined that there are "minimal [MRI] findings which do not support [a] diagnosis that would preclude use of public transportation." Regarding Dr. Koval's medical report, the Office medical adviser stated that the report appeared to be complete and conclusive. The Office medical adviser further stated that Dr. Koval's findings were consistent with his recommendation for sedentary employment.

In a December 24, 1997 decision, the Office denied appellant's request for modification based on a merit review of the claim. In an accompanying memorandum of the same date, the Office found the medical evidence of record insufficient to establish that appellant had any substantial disability at the time sanctions were applied in November 1996. The Office also found that, based on the Office medical adviser's opinion, there was no support for diagnoses that would preclude appellant from using public transportation. Finally, the Office found that contrary to appellant's contention, there was no conflict in the medical opinion evidence concerning her disability.

The Board finds that the Office improperly reduced appellant's compensation effective January 7, 1997 under 5 U.S.C. § 8113(b) on the grounds that she failed to demonstrate a good faith effort in the vocational rehabilitation process.

Section 8113(b) of the Act provides as follows:

“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 probably have 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

The Office has promulgated federal regulations under section 8113(b) of the Act concerning the obligation of employees to participate in vocational rehabilitation efforts as directed by the Secretary. Section 10.124(f) of the federal regulations provides:

“Pursuant to 5 U.S.C. § 8104(a), the Office may direct a permanently disabled employee to undergo vocational rehabilitation. If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue participation in a vocational rehabilitation effort when so directed, the Office will, in accordance with 5 U.S.C. § 8113(b), reduce prospectively the employee’s monetary compensation based on what would probably have been the employee’s wage-earning capacity had there not been such failure or refusal. 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 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.”⁴ (Emphasis added.)

Section 8123(a) of the Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁵

The Board finds that there is a conflict in the medical opinion evidence between Dr. Katz and the Office medical adviser regarding appellant’s failure to participate in the vocational rehabilitation process. The issue is whether appellant presented “good cause” in failing to

³ 5 U.S.C. § 8113(b).

⁴ 20 C.F.R. § 10.124(f).

⁵ 5 U.S.C. § 8123(a); *see also Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

continue her vocational rehabilitation. Appellant contended that her employment-related medical conditions prevented her from using public transportation to travel to the International Center for the Disabled for vocational rehabilitation services. Dr. Katz, a Board-certified orthopedic surgeon and appellant's treating physician, opined that appellant was totally disabled and that she "cannot utilize public transportation on her own." The Office medical adviser agreed with the findings of Dr. Koval, a Board-certified orthopedic surgeon and second opinion physician, that appellant could perform sedentary work and opined that there are "minimal [MRI] findings which do not support a diagnosis that would preclude appellant from using public transportation."

Inasmuch as the burden is on the Office to justify the reduction of benefits and the opinion of the Office medical adviser on which the Office relied in reducing appellant's compensation benefits to zero conflicts with the opinion of appellant's treating physician, Dr. Katz, the Office cannot invoke the penalties of section 8113(b) of the Act and section 10.124(f) of the federal regulations against appellant.

The December 24, 1997 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
September 14, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member