U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS W. LUCAS and DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, CANAVERAL NATIONAL SEASHORE, Titusville, FL

Docket No. 99-681; Submitted on the Record;
Issued January 19, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation under 5 U.S.C. § 8113(b) to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts.

On June 10, 1996 appellant, then a 36-year-old carpenter, sustained a low back strain and permanent aggravation of spondylolisthesis in the performance of duty.

By letter dated November 19, 1996, the Office advised appellant that he had been placed on the periodic compensation rolls effective October 1, 1996 to receive compensation benefits for temporary total disability.

On September 2, 1997 appellant was referred to a vocational rehabilitation specialist. He underwent evaluation of his educational and vocational skills and limitations on February 23, 1998.

In an undated individual placement plan, Ellen Fernandez, a vocational consultant, noted that appellant's treating physician had released him to return to light-duty work as of December 19, 1996 with no lifting over 25 pounds, no sitting, standing or walking for longer than 1 hour and no frequent bending, squatting or working on a ladder. She related that appellant could not return to his date-of-injury job as a carpenter because those duties exceeded his restrictions. Ms. Fernandez noted that appellant had worked in construction as a carpenter, crew foreman, construction superintendent, had taken an entry level drafting class and had decided to pursue an associate degree in drafting and design technology at a community college with a specialty in architectural drafting. She indicated that the position of architectural drafter was supported by the vocational evaluation conducted on February 23, 1998 in terms of interest, aptitude and academic achievement. Ms. Fernandez noted that appellant had agreed to complete a two-year drafting program, contractor's course and computer skills course and then participate in an independent job search.

In a report dated August 12, 1998, Ms. Fernandez related that appellant was registered for classes at a community college which would lead to a two-year associate degree in computer assisted design.

By letter dated August 18, 1998, the Office advised appellant that it had approved the training plan at the community college. The Office noted that, after appellant's training was completed, the Office would provide 90 days of placement services. The Office advised appellant that the Federal Employees' Compensation Act provided penalties for claimants who did not cooperate with vocational rehabilitation efforts.

In a report dated September 29, 1998, Dr. Donald E. Pearson, a Board-certified orthopedic surgeon and an Office referral physician, provided a history of appellant's condition and findings on examination and indicated that appellant could perform a sedentary job for eight hours a day and that there were no work restrictions regarding sitting or operating a motor vehicle. Additionally, Dr. Pearson noted that appellant's "remaining effects" were "probably more related to his underlying preexisting condition of lumbosacral spine."

By letter dated October 6, 1998, the Office advised appellant that the Office rehabilitation specialist had reported that appellant believed that he was too disabled to work or to attend classes to prepare him for a new job but that the medical evidence of record did not establish that he was totally disabled. The Office advised appellant that if he failed to cooperate with rehabilitation efforts without good cause his monetary compensation benefits could be reduced on the assumption that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity.

In a report dated October 25, 1998, Dr. Hany F. Helmy, a Board-certified orthopedic surgeon, stated that appellant had a severe and chronic pain in his lumbar spine which interfered with his ability to sit in class. He recommended that appellant undergo a spinal refusion at the site of a previous surgery.

By decision dated November 9, 1998, the Office reduced appellant's compensation under 5 U.S.C. § 8113(b) to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts. The Office determined that appellant had failed, without good cause, to undergo rehabilitation efforts as directed. With respect to his wage-earning capacity, it further found that, if appellant had participated in good faith in vocational rehabilitation, he would have been able to perform the position of architectural drafter.[1]

The Board finds that the Office did not meet its burden of proof in reducing appellant's compensation benefits due to an unresolved conflict in the medical opinion evidence.

[1] The Board notes that the case record contains additional evidence, which was not before the Office at the time it issued its November 9, 1998 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422, 428 (1997).

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.[2]

Section 8113 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 probably have been his wage-earning capacity in the absence of failure, until the individual in good faith complies with the direction of the Secretary."[3]

In this case, appellant had agreed to attend classes in a two-year program that would have prepared him to work in the field of architectural drafting. The Office approved the training program and appellant was registered to attend classes in the fall of 1998. On October 6, 1998 the Office advised appellant that it was informed by the vocational rehabilitation counselor that he had stopped attending classes. Appellant asserted that he had good cause for failing to continue in rehabilitation efforts because he was medically unfit to attend classes.

As noted above, in a report dated September 29, 1998, Dr. Pearson, a Board-certified orthopedic surgeon and an Office referral physician, indicated that appellant could perform a sedentary job for eight hours a day and that there were no restrictions regarding sitting. He further reported that any residual back problems could "probably" be attributed to appellant's preexisting condition. However, in a report dated October 25, 1998, Dr. Helmy stated that, appellant had a severe and chronic pain in his lumbar spine which interfered with his ability to sit in class. He further stated that surgical intervention at a previous surgery site was indicated.

Section 8123(a) of the Act provides, in pertinent part, "[i]f there is disagreement between the physician making the examination of the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[4]

[2] *Bettye F. Wade*, 37 ECAB 556, 565 (1986).

[3] 5 U.S.C. § 8113(b).

[4] 5 U.S.C. § 8123(a); *see Robert D. Reynolds*, 49 ECAB 561, 565-66 (1998).

The decision of the Office of Workers' Compensation Programs dated November 9, 1998 is reversed.

Dated, Washington, DC
January 19, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member