U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LILLIAN MARQUARDT and DEPARTMENT OF THE AIR FORCE, OGDEN ALC, HILL AIR FORCE BASE, UT

Docket No. 03-1205; Submitted on the Record;
Issued November 21, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's monetary compensation to zero on the grounds that she had failed to cooperate with vocational rehabilitation efforts without good cause; and (2) whether the Office properly denied authorization of services rendered by Dr. Dewey C. MacKay on September 23, 2002.

In this case, the Office accepted that appellant, then a 38-year-old electrical mechanic, had sustained a contusion to her head, left shoulder and sacrum along with a left shoulder and back strain as a result of a June 30, 1988 work injury. The Office subsequently accepted multiple contusions appellant incurred as a result of a January 19, 1989 motor vehicle accident as a consequential injury. Appellant was involved in another motor vehicle accident in April 1997, but the record is not clear whether appellant sought medical treatment for such.

Appellant initially returned to work on July 18, 1988 for four hours and then stopped. On July 12, 1989 the employing establishment offered appellant a light-duty position soldering circuit cards and repairing camera components for two hours a day. Although the Office initially found the job offer to be suitable, on December 28, 1989 it rescinded the suitable work finding when appellant's attending physician, Dr. Thomas Bauman, a Board-certified orthopedic surgeon, rescinded his work release. On September 14, 1990 the Office found that the employing establishment's limited-duty job offer of removing light-weight electronic components from packages and placing them into kits was suitable. Appellant returned to such limited-duty position for two hours per day effective October 15, 1990. By decision dated February 22, 1991, the Office adjusted appellant's compensation. On June 12, 1992 the employing establishment extended an additional temporary light-duty assignment to appellant for light-duty secretarial work for two hours per day. On January 6, 1995 appellant was separated from the employing establishment due to a reduction-in-force.

By decision dated October 4, 1994, the Office terminated appellant's compensation on the basis that the weight of the medical opinion evidence established that her disability resulting

from the injury ceased as there were no objective findings to support a continuing condition due to the injury. In a September 26, 1995 decision, an Office hearing representative reversed the October 4, 1994 decision and remanded the case for reinstatement of medical and compensation benefits and further development.

In a July 19, 1999 medical report, Dr. Thomas Bauman, a Board-certified orthopedic surgeon, opined that appellant could not work and was considered permanently disabled due to the disc of the lower back.

In a January 15, 2002 letter and medical report, Dr. Michael Jaffee, Board-certified in physical medicine and rehabilitation, advised that appellant was on permanent work restrictions due to back pain as a result of her work injury. In a work capacity evaluation form of the same date, Dr. Jaffee advised that appellant had permanent restrictions of sitting for no more than 15 minutes, walking no more than ½ block, standing for no more than 30 minutes, operating a motor vehicle for no more than 30 minutes and no twisting, pushing, pulling, lifting or climbing. He noted that maximum medical improvement had been reached and appellant was disabled due to degenerative back disease and headache.

In a March 20, 2002 letter, the Office referred appellant for a second opinion evaluation with Dr. MacKay, an orthopedic surgeon. He was provided with a statement of accepted facts, work restriction evaluation and a list of questions to address. In a report dated April 8, 2002, Dr. MacKay diagnosed chronic cervical thoracic spine pain, chronic shoulder pain, chronic lumbosacral spine pain, degenerative disc disease of the cervical, thoracic spine and degenerative disc disease of the lumbosacral spine. He advised that the injury, itself had long since healed, but appellant has developed degenerative disc disease of the cervical, thoracic and lumbosacral spine, which is confirmed on x-rays. As a result, appellant continues to have multiple aches and pains, which interfere with her ability to return to work. He opined that these aches and pains are directly related to appellant's injury, which produced the degenerative disc disease. Dr. MacKay advised that appellant's degenerative disc disease was symptomatic and that the symptoms were primarily degenerative in nature. He stated that appellant's significant aches and pains made gainful employment unlikely and noted that, as appellant does not have any real desire to return to work, vocational rehabilitation was almost an impossibility. Dr. MacKay advised that appellant's symptoms and her degenerative disc disease would preclude appellant from returning to her electronic mechanic position, but opined that she could probably do some light-duty job. He advised, however, that appellant does not have a real desire to return to work and she is extremely deconditioned. Dr. MacKay stated that appellant could be retrained in sedentary work and reconditioned and ultimately return to work, but opined that he saw that as "an extremely remote possibility."

Appellant was referred to a rehabilitation counselor on May 31, 2002 for medical and vocational rehabilitation services. On June 26, 2002 the Office approved the medical rehabilitation plan in accordance with the second opinion physician indication of the need to provide return to work physical therapy/work conditioning first and then to proceed with work restrictions. Appellant was to undergo a work conditioning program for three weeks.

On July 9, 2002 appellant underwent the initial evaluation for her work conditioning program. It was noted that when the work conditioning program was initiated, appellant complained of significant pain and the activities were modified as a result.

In a July 12, 2002 email, the rehabilitation specialist reported that appellant failed to attend the second day of her work conditioning program due to reported soreness, but had attended the work conditioning program on July 11, 2002 from 8:30 to 10:30 and that she then indicated having to stop the program due to increased pain. He further related that appellant reported that her pain medication was not relieving her pain since starting the work conditioning program, that she commented that she was "giving the program a try;" and appellant did not believe that she could continue in the program.

In a July 12, 2002 letter, the Office notified appellant of the penalties for failing to participate in vocational rehabilitation, that her refusal without good cause to participate in the essential preparatory efforts, such as interviews, testing, counseling, guidance and work evaluations, may subject her to penalties. Appellant was given 30 days to either contact her vocational rehabilitation specialist or to submit her reasons for failing to participate in the work conditioning therapy along with supporting evidence.

In a July 29, 2002 letter, appellant advised that she could not continue in the work conditioning program due to medical conditions arising from such efforts. Appellant related that she had sought medical attention as a result of the rehabilitation program on the second day that she did not attend the program. Appellant stated that on the fourth day, she could hardly move and had increased rectal bleeding and abdominal pains. Appellant advised that she did not seek medical attention the following day because it would have been a waste of time. A medical report dated July 10, 2002 from Dr. Marc L. Johnson, a Board-certified family practitioner, indicated that appellant presented with several complaints. The report failed to indicate whether or not appellant's medical conditions precluded her from participation in the vocational rehabilitation program.

By decision dated August 26, 2002, the Office invoked 5 U.S.C. § 8113(b) and 20 C.F.R. § 519 and reduced appellant's compensation to zero effective September 8, 2002, as a result of her "failure to undergo the essential preparatory effort of vocational testing" as part of vocational rehabilitation. The Office advised that the medical documentation did not support appellant's inability to participate in the work conditioning therapy and, thus, she did not show good cause for not complying. The Office advised that this reduction would continue until appellant, in good faith, underwent the directed vocational testing or showed good cause for her noncompliance.

By letter dated October 1, 2002, appellant requested reconsideration. In a September 23, 2002 report, Dr. MacKay advised that he had evaluated appellant on April 8, 2002 and stated in that evaluation that in order for appellant to return to work, she would need significant work hardening and conditioning. She would also need to be retrained in extremely sedentary work. He advised that appellant apparently attempted work hardening on July 9 and 11, 2002, but quit on July 12, 2002 due to extreme pain and abdominal problems. Dr. MacKay advised that obviously, if work hardening could not be accomplished, appellant would not be able to return to

work. He further advised that he had previously stated that he doubted appellant could return to gainful employment and stated that a return to work was a remote possibility.

By decision dated October 21, 2002, the Office denied modification of its August 26, 2002 decision.

By decision dated October 22, 2002, the Office denied authorization of services rendered by Dr. MacKay on September 23, 2002.

The Board finds that the Office properly reduced appellant's monetary compensation to zero.

5 U.S.C. § 8104(a) provides that the Secretary of Labor may direct a permanently disabled individual whose disability is compensable to undergo vocational rehabilitation. Section 8113(b) of the Federal Employees' Compensation Act provides:

> "If an individual without good cause fails to apply for or 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."[1]

Section 10.519 of the implementing regulations of 5 U.S.C. § 8113(b), further provides in pertinent part:

> "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:"
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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.

[1] 5 U.S.C. § 8113(b).

> "(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]."[2]

In this case, the Office referred appellant to vocational rehabilitation on the basis that Dr. MacKay, the Office referral physician, found that although appellant's degenerative disc disease was symptomatic and her aches and pains made gainful employment unlikely, she could engage in extremely sedentary employment following a reconditioning and retraining program. Dr. MacKay noted, however, that vocational rehabilitation would almost be an impossibility as appellant does not have a real desire to return to work. Following its procedures, the Office invoked a rehabilitation plan and appellant commenced the work conditioning program but stopped after two days as a result of alleged medical conditions preventing her from continuing. Although appellant submitted medical reports which documented that she sought medical attention after she stopped the work conditioning program, none of the reports state that appellant's medical conditions prevented her from participating in the work conditioning program. Dr. Johnson's report fails to discuss the subject and Dr. MacKay's supplemental report of September 23, 2002 fails to supply any new medical information pertaining to appellant's ability or inability to return to work. Absent medical evidence which clearly demonstrates that she cannot engage in the work conditioning therapy, appellant has not demonstrated that her failure to participate in the work conditioning program was with good cause. Accordingly, appellant's stoppage of the work conditioning program does not excuse her failure to participate in the "early but necessary stages of a vocational rehabilitation effort."[3]

Office regulations provide that in such a case it cannot be determined what would have been the employee's wage-earning capacity had there been no failure to participate and it is assumed, 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.[4] Appellant did not submit sufficient evidence to refute such an assumption and the Office had a proper basis to reduce her disability compensation to zero effective September 8, 2002.

The Board further finds that the Office properly denied authorization of services rendered by Dr. MacKay on September 23, 2002.

An employee is entitled to receive all medical services, appliances or supplies, which a qualified physician prescribes or recommends and, which the Office considers necessary to treat a work-related injury.[5] While the Office is obligated to pay for treatment of employment-related

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[2] 20 C.F.R § 10.519.

[3] 20 C.F.R. § 10.519(b)(c).

[4] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11a (December 1993).

[5] *Lisa DeLindsay*, 51 ECAB 634 (2000).

conditions, appellant has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition. To be entitled to reimbursement of medical expenses by the Office, appellant must establish a causal relationship between the expenditure and the treatment by submitting rationalized medical evidence supporting such a connection and demonstrating that the treatment is necessary and reasonable.[6]

Although a claimant is not entitled, as a matter of right, to reimbursement of medical expenses, which are not authorized by the Office, the Office nevertheless has the discretion to approve unauthorized medical care pursuant to section 8103.[7] The Office is required to exercise its discretion to determine whether medical care has been authorized, or whether unauthorized medical care involved emergency or unusual circumstances and is, therefore, reimbursable regardless of whether the underlying claim for benefits has been accepted or denied.[8] Likewise, a referral by an authorized physician is sufficient to obligate the Office to pay for reasonable and necessary treatment for an employment-related condition by another physician. In order to be entitled to reimbursement for medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury. Proof of causal relation in a case such as this must include supporting rationalized medical evidence.[9]

In the instant case, the Office sought a second opinion evaluation from Dr. MacKay, regarding the nature and extent of appellant's work-related injury and the nature and extent of her work tolerance limitations. Appellant underwent such second opinion evaluation on April 8, 2002 and Dr. MacKay rendered a report on the same date. On September 25, 2002 the Office received a supplemental report from Dr. MacKay, dated September 23, 2002. In her October 1, 2002 letter, appellant advised that the September 23, 2002 report from Dr. MacKay, was written in her behalf. The record is devoid of any written or electronic record of authorization for appellant to contact Dr. MacKay for a supplemental medical opinion. Furthermore, the Office did not request nor authorize Dr. MacKay to provide a supplemental medical narrative. The Board, therefore, finds that appellant has failed to establish that she is entitled to reimbursement for services rendered by Dr. MacKay in writing his supplemental report of September 23, 2002.[10]

[6] *See Dale E. Jones*, 48 ECAB 648 (1997).

[7] 5 U.S.C. § 8103.

[8] *See Michael L. Malone*, 46 ECAB 957 (1995).

[9] *See Cathy B. Millin*, 51 ECAB 331 (2000).

[10] Appellant submitted additional evidence to the Board; however, the jurisdiction of the Board is limited to the evidence that was before the Office at the time it issued its final decision; *see* 20 C.F.R. § 501.2(c). This decision does not preclude appellant from submitting additional evidence to the Office along with a request for reconsideration.

The October 21 and 22 and August 26, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
November 21, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member