United States Department of Labor
Employees' Compensation Appeals Board

S.B., Appellant	)	
and	)	**Docket No. 08-795**
	)	**Issued: June 5, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Minneapolis, MN, Employer	)	

Appearances:
Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On January 22, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 15 and December 20, 2007 merit decisions concerning the adjustment of his compensation for obstruction of vocational rehabilitation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office 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.

FACTUAL HISTORY

The Office accepted that on January 20, 1994 appellant, then a 34-year-old mail handler, sustained bilateral sprains of his lateral collateral ligaments, bilateral derangement of his medial

menisci and bilateral synovitis/tenosynovitis due to pulling a heavy mail container.[1] It paid him compensation for periods of disability. On March 4, 2003 Dr. Vance Askins, an attending Board-certified orthopedic surgeon, released appellant to work for eight hours per day with work restrictions, including no lifting more than 20 pounds and no engaging in twisting, squatting, kneeling, climbing, pushing or pulling. The Office directed appellant to begin vocational rehabilitation efforts with the goal of returning to new employment in the open labor market.

Appellant's vocational rehabilitation counselor, Donna B. Taylor, scheduled him to see a vocational rehabilitation evaluator on May 13, 2003 in order to determine what type of work he could perform. The evaluation had to be rescheduled because appellant indicated that he had a case of poison ivy. Meetings scheduled for June 2, 3 and 4, 2003 had to be rescheduled because he had problems with his vehicle. In a June 9, 2003 letter, the Office advised appellant that his compensation could be suspended under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 if he failed to cooperate with vocational rehabilitation efforts. On July 24, 2003 appellant underwent an initial vocational rehabilitation evaluation. The evaluator determined that appellant was physically and vocationally able to perform several constructed positions, including data entry clerk and receptionist. These positions, which were found to be reasonably available within his commuting area, did not require lifting more than 20 pounds or require climbing, stooping, kneeling or crawling.

On August 6, 2003 the Office approved a training program at the Sarasota County Technical Institute (SCTI) to provide appellant the basic clerical and computer skills needed for competitive employment in his commuting area.[2] Appellant was scheduled to start attending remedial classes at SCTI on September 2, 2003. He delayed taking a placement examination at SCTI for several weeks as he had the flu. Appellant initially neglected to register with the special needs department at SCTI and failed to appear for appointments with his guidance counselor at SCTI. His telephone service was cut off in September 2003 and Ms. Taylor indicated that appellant did not respond to her request for him to regularly contact her.

In a September 10, 2003 report, Dr. Donald Erb, an attending osteopath, stated that appellant advised him that he was not capable of sitting for vocational rehabilitation efforts. He diagnosed L4-5 and L5-S1 foraminal narrowing and degenerative arthritis. On October 17, 2003 Dr. Erb diagnosed bilateral knee pain and history of multiple bilateral knee surgeries. He noted a "lack of objective findings on examination" and discussed appellant's prescribed medications including Oxycontin, Vioxx, Paxil and Ambien.

In October 2003, Ms. Taylor advised that appellant reported that he could not participate in the rehabilitation training program due to his back condition. At this point, appellant had not yet attempted to participate in the training. On October 16, 2003 the Office again informed appellant that his compensation would be suspended if he failed to cooperate with vocational

[1] Appellant underwent a left partial medial meniscectomy with intra-articular ganglion debridement in July 1994, a left anterior cruciate ligament reconstruction in January 2002 and a right partial medial and lateral meniscectomy in February 2003. These surgeries were authorized by the Office.

[2] It was proposed that the training would last from September 2003 to July 2004 with the goal of preparing appellant for such clerical positions as receptionist or appointment clerk.

rehabilitation efforts. On October 20, 2003 appellant started the vocational rehabilitation training program at SCTI. Between October 20 and 31, 2003, he only attended 4 out of the 10 classes held.[3] In November 5 and 10, 2003 letters, Ms. Taylor advised appellant that his limited attendance at classes was unacceptable and informed him that he would have to submit medical reports supporting future absences. She advised him that he was expected to attend the remedial classes that were held during the day for three or fours hours per day.[4] During November 2003, appellant failed to attend the daytime remedial classes as instructed by Ms. Taylor.[5]

In December 2003, appellant continued to neglect Ms. Taylor's instruction to attend the daytime remedial classes. He attended 8 of 14 possible evening classes and the instructor for these classes advised Ms. Taylor that he was "cruising" and "not doing anything in class." In January 2004, appellant attended 9 of 18 possible classes but only stayed for about 30 to 60 minutes each time.[6] Instructors reported that he was not doing much in class. In January 2004, Ms. Taylor determined that appellant had obstructed vocational rehabilitation efforts without good cause and found that if he had participated in good faith in vocational rehabilitation he would have been able to perform the position of receptionist.[7]

In February 2004, appellant attended 5 of 19 possible classes. He stayed two hours on one occasion and 45 to 60 minutes on all other days. In March 2004, appellant did not attend any remedial classes. He submitted a February 9, 2004 report in which Dr. Erb diagnosed bilateral knee pain and low back pain. On February 11, 2004 Dr. Askins diagnosed lumbar back pain and history of knee surgery and indicated that appellant should be referred to a neurosurgeon.

In a March 8, 2004 decision, the Office reduced appellant's compensation under 5 U.S.C. § 8113(b) and 5 U.S.C. § 8104 to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts. It determined that appellant had failed, without good cause, to undergo vocational rehabilitation as directed. With respect to his wage-earning capacity, the Office further found that, if appellant had participated in good faith in vocational rehabilitation, he would have been able to perform the position of receptionist. It reduced appellant's compensation on what his wage-earning capacity would have been if he had

[3] It is unclear whether appellant attended the daytime training classes during this period or the much shorter evening training classes.

[4] Ms. Taylor indicated that the evening remedial training classes, held four days per week, only lasted one hour per session and did not provide appellant with sufficient means to gain the necessary work skills within a reasonable amount of time. The daytime training classes were held four or five days per week and lasted three or four hours per session. Ms. Taylor also noted that greater staff support was available during the daytime training classes.

[5] Appellant attended 10 of the 15 remedial classes that were held during the evening in November 2003.

[6] It appears that at least some of these classes were daytime classes.

[7] The position of receptionist was reasonably available in appellant's commuting area with weekly pay of $274.72. In early January 2004, Ms. Taylor had sent him another letter asking him to submit medical evidence supporting his claim that his medical condition prevented him from fully participating in vocational training. She reminded appellant that it was necessary to attend the daytime remedial classes for three or four hours per day.

cooperated with vocational rehabilitation efforts. Based upon the residuals of his injury and considering all significant preexisting impairments and pertinent nonmedical factors, it was found that, if he had participated in good faith in vocational rehabilitation, he would been able to perform the position of receptionist.[8]

On May 27, 2004 Dr. Erb discussed appellant's back and knee conditions but did not provide any opinion on his ability to work or sit for vocational rehabilitation classes. In a September 28, 2004 report, Dr. David M. Karp, an attending Board-certified orthopedic surgeon, stated that appellant reported worsening back symptoms. He recommended that appellant undergo additional diagnostic testing and pain management. In a September 28, 2004 disability certificate, Dr. Karp stated that appellant was "unable to sit for rehab[ilitation] at present time." On November 4, 2004 Dr. Erb diagnosed back and bilateral knee pain and depression and indicated that appellant "should not be working at this point."

In a January 18, 2005 decision, the Office denied modification of its March 8, 2004 decision.

Appellant submitted numerous medical reports detailing his treatment for various conditions, including back and knee problems. None of these reports discussed his ability to work or sit for vocational rehabilitation efforts. In a December 21, 2005 decision, the Office denied modification of its March 8, 2004 decision.

Appellant submitted a December 14, 2005 report in which Dr. Ryan S. Glasser, an attending neurosurgeon, indicated that August 16, 2005 magnetic resonance imaging (MRI) scan testing showed disc bulging at L5-S1 without significant nerve compression, bulging at L4-5 without any nerve compression and minimal degenerative changes at L3-4 without herniation. Dr. Glasser diagnosed longstanding back pain and lumbar degenerative disc disease. On October 10, 2006 Dr. William Crumley, an attending Board-certified pain management physician, diagnosed bulging discs at L3-4, L4-5 and L5-S1,[9] chronic low back pain, chronic bilateral knee pain, chronic left arm pain, anxiety and insomnia. He stated that appellant could not participate in vocational rehabilitation efforts due to the length of sitting involved.

In a February 15, 2007 decision, the Office denied modification of its March 8, 2004 decision.

Appellant submitted medical reports dated October 19, 23 and November 2, 2006 detailing the treatment of his abdominal area. In a September 15, 2007 report, Dr. Crumley stated that appellant's bulging discs at L3-4, L4-5 and L5-S1 caused pain in his back and made it "extremely difficult and uncomfortable" for him to remain seated for three or four hours at a time even with breaks of 5 or 10 minutes every hour.

[8] The Office used the *Shadrick* formula (derived from *Albert Shadrick*, 5 ECAB 376 (1953)) to calculate appellant's wage-earning capacity. This calculation included a figure for the amount appellant would have earned as a receptionist.

[9] Dr. Crumley indicated that he had reviewed the August 16, 2005 MRI scan testing.

In a December 20, 2007 decision, the Office denied modification of its March 8, 2004 decision. It found that the opinion of Dr. Crumley did not establish that appellant was incapable of participating in vocational rehabilitation efforts.

LEGAL PRECEDENT

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.[10] Section 8113(b) of the Federal Employees' Compensation Act provides that, if an individual, without good cause, fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of the Act, the Office, "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 [or her] wage-earning capacity in the absence of the failure," until the individual in good faith complies with the direction of the Office.[11]

Section 10.519 of Title 20 of the Code of Federal Regulations details the actions the Office will take when 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. Section 10.519(a) provides, in pertinent part:

> "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. [It] will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings 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]."[12]

The *Shadrick* formula (derived from *Albert Shadrick*, 5 ECAB 376 (1953)) is used to calculate a claimant's wage-earning capacity. The calculation involves obtaining figures for adjusted weekly pay rate (per 5 U.S.C. § 8101(4)); current rate of pay for the job held when injured and current actual earnings. The wage-earning capacity percentage is obtained by dividing current actual earnings by the current rate of pay for the job held when injured. The wage-earning capacity amount is calculated by multiplying the current rate of pay for the job held when injured times the wage-earning capacity percentage. The loss of wage-earning capacity figure is then obtained by subtracting the wage-earning capacity amount from the current rate of pay for the job held when injured. Finally, the compensation rate is obtained by multiplying the loss of wage-earning capacity figure times either 2/3 (no dependents) or 3/4 (one or more dependents) per 5 U.S.C. §§ 8105 and 8110.

[10] *Betty F. Wade*, 37 ECAB 556, 565 (1986).

[11] 5 U.S.C. § 8113(b).

[12] 20 C.F.R. § 10.519(a).

ANALYSIS

On January 20, 1994 appellant sustained bilateral sprains of his lateral collateral ligaments, bilateral derangement of his medial menisci and bilateral synovitis/tenosynovitis due to pulling a heavy mail container. On March 4, 2003 Dr. Askins, an attending Board-certified orthopedic surgeon, released appellant to work for eight hours per day with work restrictions, including no lifting more than 20 pounds and no engaging in twisting, squatting, kneeling, climbing, pushing or pulling. Appellant began participating in a vocational rehabilitation plan with his counselor, Ms. Taylor.

The Board finds that appellant obstructed his vocational rehabilitation plan. Ms. Taylor instructed appellant to attend a training program at the SCTI to provide him with the basic clerical and computer skills needed to perform the position of receptionist or similar jobs. After various delays, it was determined that appellant needed to take remedial skills classes at SCTI before he could take the clerical and computer classes. Ms. Taylor instructed appellant to take daytime training classes which were held four or five days per week and lasted three or four hours per session. In late October 2003, appellant began to irregularly attend evening remedial classes, which were held four times a week and only lasted an hour per session. He neglected Ms. Taylor's repeated instructions in November and December 2003 to attend the daytime remedial classes.[13] In January 2004, appellant began to attend some of the daytime remedial classes, but he attended fewer than half of the available classes in January and February 2004 and stayed an average of less than an hour for each three- to four-hour class. Moreover, his instructors reported that he did little or nothing in his classes.

The Board further finds that appellant did not show good cause for obstruction of his vocational rehabilitation plan. Appellant claimed that his medical condition, particularly his back condition, prevented him from sitting through the classes at SCTI. He submitted medical reports of Dr. Askins and Dr. Erb, an attending osteopath. These reports discussed appellant's back and knee conditions, but they provided no opinion regarding his ability to work or to sit for vocational rehabilitation classes. Subsequent medical reports generally indicated that he could not work or had difficulty sitting for his classes. However, these reports are of limited probative value because they contain insufficient medical rationale regarding appellant's ability to work or attend classes.[14]

In a September 28, 2004 disability certificate, Dr. Karp, an attending Board-certified orthopedic surgeon, stated that appellant was "unable to sit for rehab[ilitation] at present time." However, he did not explain how an objective medical condition prevented appellant from sitting in connection with his rehabilitation efforts. On November 4, 2004 Dr. Erb diagnosed back and bilateral knee pain and depression and indicated that appellant "should not be working at this point." He did not provide any reasoning for his opinion that appellant could not perform any work.

[13] Appellant only attended about half of the evening remedial classes and his instructors reported that he did little or nothing in these classes.

[14] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

On October 10, 2006 Dr. Crumley, an attending Board-certified pain management physician, diagnosed bulging discs at L3-4, L4-5 and L5-S1, chronic low back pain, chronic bilateral knee pain, chronic left arm pain, anxiety and insomnia. He stated that appellant could not participate in vocational rehabilitation efforts due to the length of sitting involved. In a September 15, 2007 report, Dr. Crumley stated that appellant's bulging discs at L3-4, L4-5 and L5-S1 caused pain in his back and made it "extremely difficult and uncomfortable" for him to remain seated for 3 or 4 hours at a time even with breaks of 5 or 10 minutes every hour. However, he did not present adequate medical rationale supporting his opinion that appellant could not sit for certain periods. Dr. Crumley did not explain the basis for his opinion in light of the fact that MRI scan testing did not show any impingement of appellant's low back discs upon nerve roots. He did not present sufficient objective findings on examination or diagnostic testing to support an opinion that appellant could not sit for his classes.

A review of the record indicates that appellant was offered repeated opportunities to complete the agreed upon vocational rehabilitation plan but failed to do so. There is no evidence that appellant's failure to fully participate in the rehabilitation program was based on "good cause."[15] The Office properly found that the reduction of appellant's compensation should be based on the determination that he probably would have been able to earn wages as a receptionist if he had not obstructed his vocational rehabilitation program.[16] For these reasons, it 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.

CONCLUSION

The Board finds that the Office 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.

[15] *See Michael D. Snay*, 45 ECAB 403, 410-12 (1994).

[16] *See supra* notes 11 and 12 and accompanying text. Ms. Taylor found that the position of receptionist was reasonably available in appellant's commuting area with weekly pay of $274.72. The Board notes that the evidence shows that appellant was vocationally and physically capable of working as a receptionist. The Office properly applied the *Shadrick* formula to calculate appellant's compensation based on the new wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' December 20 and February 15, 2007 decisions are affirmed.

Issued: June 5, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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