U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MANUEL I. LIZARDI CAMACHO and U.S. POSTAL SERVICE, POST OFFICE, San Juan, P.R.

Docket No. 97-1462; Submitted on the Record; Issued March 1, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's monetary compensation to zero for failure to cooperate with vocational rehabilitation.

The Office accepted appellant's claim for a lumbar sprain, herniated nuclear pulposus at C3-4, C4-5, and at L4-5 and L5-S1, left L5 radiculopathy, spondyloarthritis and degenerative disc disease. Appellant began receiving temporary total disability benefits.

In a work capacity evaluation dated October 27, 1995, Dr. Edgardo Gonzalez, an orthopedic surgeon and appellant's treating physician, stated that appellant could work four hours a day but could not bend, lift or twist. By letter dated March 12, 1996, the employing establishment offered appellant the position of modified mailhandler for four hours a day five days a week. The physical requirements of the job were intermittent sitting, walking and standing and no lifting, bending, squatting, climbing, kneeling and twisting. In a work restriction evaluation dated July 17, 1996, Dr. Gonzalez indicated that appellant could work four hours a day, and could perform intermittent sitting, walking and standing for four hours a day but he could not bend, lift, twist, squat, climb or kneel. In a report dated July 17, 1996, Dr. Gonzalez stated that after his June 15, 1995 employment injury, appellant initially received some therapeutic exercises but they were stopped because the Office did not authorize them. He opined that during the time appellant was receiving the therapeutic exercises, he improved significantly but when they were stopped his back and cervical condition became worse.

By letter dated December 4, 1996, appellant informed the rehabilitation specialist that he was unable to work because his health had deteriorated due to lack of "studies authorizations" [*i.e.*, an electromyogram (EMG) scan and a magnetic resonance imaging (MRI) scan, which were eventually done and therapies from the Office. To support his assertion, appellant submitted an attending physician's supplemental reports, CA-20a forms, dated from June 6 through December 3, 1996. A medical report dated July 10, 1996 from Dr. John M. Flynn, a Board-certified orthopedic surgeon and a second opinion physician, a medical report dated

October 11, 1996 from Dr. Julio A. de la Cruz Rosado, an orthopedic surgeon and a second opinion physician, and a work restriction evaluation from Dr. Gonzalez dated December 3, 1996. Appellant also submitted a lumbosacral computerized axial tomography (CAT) scan dated September 27, 1996 and an MRI scan dated October 1, 1996. The September 27, 1996 lumbosacral CAT scan showed, in part, a L3-4 mild posterior bulging disc and the posterior disc protrusion extending into the left neural foramina at L4-5 disc level. The CA-20a forms dated from June 6 to December 6, 1996 and the December 3, 1996 work restriction evaluation from Dr. Gonzalez indicate that appellant was unable to work due to back pain and weakness in his leg due to atrophy. The October 1, 1996 MRI showed, in part, spondyloarthritic changes throughout the cervical spine, central and right-sided disc herniation at C4-5, and central and right-sided osteophyte formation at C5-6.

In his July 10, 1996 report, Dr. Flynn considered appellant's history of injury, performed a physical examination, reviewed x-rays dated June 16, 1995 and a CAT scan dated June 26, 1995 and diagnosed cervical and lumbosacral spine pain by history, congenital fusion of bodies of C2 and C3 by x-ray and disc protrusion at L4-5, L5-S1 by CAT scan. He noted that appellant stated that on one occasion he attempted to return to light duties but due to the traveling imposed on him by the employing establishment, he was unable to work. Dr. Flynn stated that if appellant could live near his home, be assigned light-duty activities and receive intensive physical therapy, he could return to work.

In his October 11, 1996 report, Dr. Rosado considered appellant's history of injury, performed a physical examination, reviewed the diagnostic tests of record and diagnosed, *inter alia*, cervical strain, herniated nucleus pulposus at C3-4 and C4-5, lumbar strain, and herniated nucleus pulposus at L4-5 and L5-S1. He concluded that if appellant continued with supportive and symptomatic treatment, local measure and strengthening program, "perhaps" appellant could "attempt" to return to light-duty work as described by Dr. Gonzalez.

By letter dated December 23, 1996, the Office informed appellant that his rehabilitation counselor had informed the Office that he was unwilling to accept rehabilitation services because his treating physician stated that he could not work. The Office stated that if appellant failed to provide a reason within 30 days for not cooperating with the rehabilitation counselor, the rehabilitation service would be terminated and appellant's compensation would accordingly be reduced.

By letter dated January 20, 1997, appellant stated he was unable to work due to the degree of pain he was experiencing and asserted that the September 27, 1996 lumbosacral CAT scan and the October 1, 1996 MRI scan, Dr. Gonzalez's December 3, 1996 work restriction evaluation and Dr. Rosado's October 11, 1996 report established he could not work.

By decision dated February 18, 1997, the Office informed appellant that it was reducing his benefits to zero effective February 2, 1997 because he had not submitted any new evidence within the 30 days provided him and had failed to establish a good faith effort in the vocational rehabilitation service.

The Board finds that the Office erred in reducing appellant's monetary compensation to zero for failure to cooperate with vocational rehabilitation.

Section 8113(b) of the Federal Employees' Compensation 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."

Section 10.124(f) of Title 20 of the Code of Federal Regulations, the implementing regulations of 5 U.S.C. § 8113(b), provides in pertinent part:

> "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 probably would have been the employee's wage-earning capacity had there not been such a failure or refusal."

In the present case, on March 12, 1996 the employing establishment offered appellant the job of a modified mailhandler for four hours a day five days a week. The physical requirements of the job were intermittent sitting, walking and standing and no lifting, bending, squatting, climbing, kneeling and twisting. The employing establishment based its offer on Dr. Gonzalez's October 27, 1995 work capacity evaluation which Dr. Gonzalez reaffirmed on July 1, 1995. By letter dated December 4, 1996, appellant informed the rehabilitation counselor that he could not work because his health had deteriorated due to the end of his physical therapy and he submitted medical evidence to document his condition. The medical evidence appellant submitted documents that appellant continued to suffer from the accepted conditions and that his health deteriorated following the end of his physical therapy. The October 1, 1996 MRI and the September 27, 1996 CAT scan showed, in part, spondyloarthritic changes throughout his cervical spine and central and right-sided disc herniation at C4-5, central and right-sided osteophyte formation at C5-6 and posterior disc protrusion at L4-5. The CA-20a forms Dr. Gonzalez completed from June 6 to December 6, 1996 showed that appellant was unable to work due to back pain and weakness in his led due to atrophy. Dr. Gonzalez checked the "yes" box that appellant's condition was work related. In his July 10, 1996 report, Dr. Flynn, a second opinion physician stated if appellant lived near his home and received intensive physical therapy, he could return to light-duty work. In his July 17, 1996 report, Dr. Gonzalez stated that after the June 15, 1995 employment injury, appellant received physical therapy which significantly improved his condition but appellant's condition worsened after the Office declined to pay for treatment. In his October 11, 1996 report, Dr. Rosado, another second opinion physician, concluded that if appellant continued with supportive and symptomatic treatment, local measure and strengthening program, "perhaps" appellant could attempt to return to light-duty work. In his

December 3, 1996 work restriction evaluation, Dr. Gonzalez stated that appellant was unable to work.

The opinion of Dr. Gonzalez, appellant's treating physician, is somewhat conflicting in that he stated appellant could work part time in his July 17, 1996 opinion but stated in the CA-20a forms dated from June 6 through December 3, 1996 and in his December 3, 1996 work restriction evaluation that appellant could not work. However, his July 17, 1996 report in which he stated appellant's back and neck condition deteriorated due to lack of physical therapy treatment, the 1996 CA-20a forms he completed and the December 3, 1996 work restriction evaluation indicate that appellant could not work. Moreover, the opinions of the referral physicians, Dr. Flynn's dated July 10, 1996 and Dr. Rosado's dated October 11, 1996, indicate that appellant's return to light-duty work was contingent upon his receiving additional physical therapy which he was not receiving. Appellant therefore has presented good cause based on the medical evidence of record for his failure to continue with rehabilitation efforts.[1] The Office therefore erred in reducing appellant's compensation benefits based on his failure to cooperate with vocational counselor.

The decision of the Office of Workers' Compensation Programs dated February 20, 1997 is hereby reversed.

Dated, Washington, D.C.
March 1, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[1] *See Nathan Stelly*, 46 ECAB 396, 400 (1995).