U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REBECCA H. SNOW and DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, Sacramento, CA

Docket No. 99-183; Submitted on the Record;
Issued July 14, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation by 100 percent effective June 8, 1998 on the basis that the evidence of record indicated that she would have sustained no loss of wage-earning capacity had she undergone vocational rehabilitation as directed by the Office.

On January 30, 1995 appellant, then a 54-year-old air realty specialist, injured her right knee while attempting to fix a copy machine. She filed a claim for benefits on February 4, 1995, which the Office accepted for right knee sprain. Appellant was paid compensation for appropriate periods and placed on the periodic rolls.

On March 29, 1995 appellant underwent arthroscopic surgery on her right knee. She returned to work on limited duty, but was separated from the employing establishment on January 20, 1996. Appellant has not been engaged in gainful employment since that date. She underwent additional surgery on her right knee on April 2, 1997, which was performed by Dr. Elliott A. Schaffzin, a Board-certified orthopedic surgeon. The Office subsequently accepted a consequential lumbar strain condition based on the April 23, 1996 report of Dr. Schaffzin, who opined that the condition was caused by gait problems with her right knee.

In order to clarify appellant's current condition, and in order to determine whether appellant was a candidate for vocational rehabilitation, the Office scheduled a second opinion examination for appellant with Dr. Norman S. Namerow, Board-certified in psychiatry and neurology, for July 2, 1997. In a report dated July 2, 1997, Dr. Namerow stated:

> "[I]f her surgeon is convinced that the original pathology has been corrected, [appellant] would be a reasonable candidate for a comprehensive inpatient pain management program. That is to say, there may be sufficient affective features to allow some functional improvement utilizing some functional improvement utilizing cognitive and behavioral pain management techniques. Because of the

> highly focal nature of her pain, and the potential for some underlying structural lesion as yet undiscovered, there is some hesitancy to an unequivocal affirmation that a comprehensive pain management approach would be effective. However, if there is no underlying untreated pathology to bring about persistent pain symptoms, [appellant] would be a good candidate and she has initially agreed to enter into such an effort. I would therefore recommend [appellant] be started in our pain management program where she will receive comprehensive treatment to include physical therapy in a progressive quota fashion, occupational therapy, recreational therapy, biofeedback and relaxation training, medication management, and psychological intervention, both in group and individual sessions."

In a work capacity evaluation dated August 15, 1997, Dr. Namerow advised that appellant could work three hours per day with the following restrictions: limited kneeling, bending, twisting, lifting, prolonged standing, long distance walking, climbing and walking on rough terrain. Dr. Namerow recommended that appellant avoid frequent right knee flexing, reaching for objects on the floor, lifting objects greater than five to eight pounds no more than two to three times per day, climbing ladders and repetitive stair walking.[1]

By letter dated September 2, 1997, the Office referred appellant for vocational rehabilitational treatment.

In a report dated November 6, 1997, Dr. Schaffzin stated that appellant had been experiencing increasing symptomatology in her right knee with physical therapy, and believed that she was unable to work. Dr. Schaffzin advised that, because of her knee pain and its effect on her, she was unable to work on a regular basis at that time.

The Office determined there was a conflict in the medical evidence condition between Dr. Namerow and appellant's treating physician, Dr. Schaffzin, regarding whether appellant was capable of performing light-duty work within restrictions for four hours per day. It therefore referred appellant for a referee examination with Dr. Robert B. Fenton, a Board-certified orthopedic surgeon, for December 19, 1997.

In a report dated December 19, 1997, Dr. Fenton, after reviewing the medical records, the statement of accepted facts and stating findings on examination, concluded that appellant was fully capable of active and gainful employment for four hours per day. He stated that during examination appellant acted in an inappropriate manner, extremely guarded and noted that she complained that her condition was worsened when offered any minimal assistance in lifting her leg. Dr. Fenton advised that, in general, appellant's objective findings were significantly disproportionate to his subjective findings. He further stated:

[1] An Office memorandum dated November 14, 1997, attached to the statement of accepted facts pertaining to the medical conflict statement, indicated that Dr. Namerow had submitted a September 24, 1997 report indicating appellant would be able to work four hours per day upon completion of an outpatient therapy program. This report, however, is not contained in the instant case file.

> "There is no reason why [appellant] is not capable of sedentary work and, in reality, if one can get her into a working environment where she spends less time thinking about her physical ills and aims her concentration on other normal daily activities, the patient might actually improve."

Dr. Fenton concluded by indicating the restrictions under which appellant could return to part-time work:

> "Specifically, I feel the patient is capable of sitting for unlimited durations of time as long as she is capable of standing at her will. With regard to walking, this should be limited to 5 minutes continuously per 30-minute period as should be the case with standing with no limitations regarding reaching at any level, twisting or usage of her upper extremities.... She should have permanent restrictions with regard to pushing, pulling and lifting[,] limiting these to 20 pounds maximum at any one lift and further limiting this to a 5-minute period per 30-minute duration of time.... She should permanently be restricted from any squatting, kneeling and climbing or remaining in any forward flexed position for a prolonged period of time as well."

Dr. Fenton also advised that appellant should minimize walking up stairs and that, if possible, an escalator or elevator should be provided for her assistance.

Dr. Fenton completed a work restriction evaluation form on January 19, 1998 with the following restrictions: up to four hours of continuous work per day; walking and standing only up to five minutes per day; walking and standing only up to five minutes every half hour; ability to sit as tolerated; operate a motor vehicle five minutes per half hour with the right lower extremity, no limit if operated with the right lower extremity and absence of clutch; pushing, pulling, lifting up to 20 pounds and no squatting, kneeling or climbing.

In memoranda dated October 16 and 20, 1997, the vocational rehabilitation counselor indicated that appellant disagreed with the medical opinion that she was capable of working four hours per day, asserting that Dr. Schaffzin, her treating physician, had recently advised her that she was still totally disabled and unable to participate in rehabilitation services or return to work. In memoranda dated November 10 and 12, 1997, the vocational counselor indicated that, although appellant verbally stated her willingness to participate in any rehabilitation services required, she consistently hesitated when asked to schedule and participate in specific vocational activities.

In a report dated November 6, 1996, Dr. Schaffzin reiterated his opinion that physical therapy was counterproductive for appellant because it only exacerbated her symptoms, and stated that he agreed with her belief that she was unable to work regularly for four hours per day.

In a memorandum dated March 5, 1998, the vocational counselor stated that appellant continued to assert that she would proceed with vocational testing only if authorized by her treating physician, who placed her on total disability and advised her that she was not ready to proceed with vocational rehabilitation. By memorandum dated March 12, 1998, the vocational

counselor stated that rehabilitation services would not be productive at that time given appellant's belief that she was not medically ready.

By notice of proposed reduction dated April 23, 1998, the Office advised appellant that it had been informed by the vocational counselor that she expressed an unwillingness to participate in a proposed rehabilitation effort because of her personal belief that she was too severely disabled to work. The Office advised appellant that the weight of the medical evidence, as represented by Dr. Fenton's referee medical opinion, indicated that she was not totally disabled, and that she was capable of working four hours per day. The Office further advised appellant that, pursuant to section 8113(b)[2] of the Act and section 10.124(f)[3] of the regulations, it would reduce her compensation to zero if she, without good cause, failed or refused to cooperate with the vocational rehabilitation program. The Office allowed appellant 30 days in which to submit reasons for her noncompliance, and to submit evidence in support of her position.

Appellant submitted a May 8, 1998 letter contesting the Office's proposed reduction of compensation. Appellant denied that she was unwilling to cooperate with the vocational rehabilitation efforts. She asserted that she was being pressured to do things that conflicted with the advice of her treating physician, Dr. Schaffzin, who told her she was totally disabled, and indicated that she disagreed with the opinion of the referee physician, Dr. Fenton, that she could perform limited duty for four hours per day. In support of her position, appellant submitted reports from Dr. Schaffzin dated April 2[4] and May 14, 1998.

By decision finalized June 8, 1998, the Office advised appellant that her compensation would be reduced to zero effective June 21, 1998 because she had refused to cooperate with rehabilitation efforts when the weight of the medical evidence showed that she was no longer totally disabled for work due to effects of her January 30, 1995 employment injury. The Office stated that it considered appellant noncooperative because although the weight of the medical evidence established she was capable of participating in the vocational rehabilitation program, appellant failed to participate in the required vocational testing.

By letter dated June 18, 1998, appellant requested reconsideration. In support of her request, appellant submitted a July 2, 1998 report from Dr. Schaffzin, in which he essentially reiterated his earlier findings and conclusions.

By decision dated August 25, 1998, the Office denied appellant's claim on reconsideration, finding that she failed to submit evidence sufficient to warrant modification.

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[2] 5 U.S.C. § 8113(b).

[3] 20 C.F.R. § 10.124(f).

[4] Dr. Schaffzin stated in this report that appellant had persistent ongoing right knee symptomatology which had not changed appreciably over an extended period of time, and that she also experienced left knee symptomatology and chronic low back pain. He advised that because of her ongoing symptomatology she was unable to engage in any type of gainful employment, and that a combination of bilateral knee, back and left wrist pain restricted her activities to the point that she was unable to carry on any type of job involving standing or walking, or one that required long periods of sitting or use of the upper extremities.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.[5]

The Board finds that the Office properly reduced appellant's compensation by 100 percent effective June 21, 1998 on the basis that the evidence of record indicated she would have sustained no loss of wage-earning capacity had she undergone vocational rehabilitation as directed by the Office.

Section 8113(b) 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 the failure, until the individual in good faith complies with the direction of the Secretary."[6]

Section 10.124(f) of the Office's regulations further 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 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 compensation under the provisions of this paragraph shall continue until the employee in good faith complies with the direction of the Office."[7]

In the present case, appellant's compensation was reduced to zero effective June 21, 1998 on the grounds that the weight of the medical evidence established she was capable of participating in the vocational rehabilitation program, but failed to participate in the required vocational rehabilitation efforts. The record reveals that, on several occasions, although appellant verbally agreed to cooperate with the vocational counselor, she never acted in

[5] *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

[6] 5 U.S.C. § 8113(b).

[7] 20 C.F.R. § 10.124(f).

accordance with her stated willingness to undergo vocational testing. Thus, appellant effectively refused to participate in preliminary vocational testing with her rehabilitation counselor. Appellant alleged that she could not participate in vocational rehabilitation efforts because her medical condition rendered her unable to do so. However, the weight of the medical evidence on this matter is represented by the February 19, 1998 opinion of Dr. Fenton, the Board-certified orthopedic surgeon and referee medical examiner to whom the Office referred appellant, who indicated appellant could perform limited-duty work for four hours per day within her physical restrictions.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[8] The Board finds that Dr. Fenton's opinion is sufficiently probative and well rationalized to merit the special weight accorded a referee medical examiner; thus, the Office properly relied on Dr. Fenton's opinion that appellant could perform work within her restrictions for four hours per day examination. Appellant submitted April 2 and May 14, 1998 reports from Dr. Schaffzin, her treating physician, who indicated that she was totally disabled from any type of work and was not capable of undergoing physical therapy, but this report is outweighed by the referee opinion of Dr. Fenton, the independent medical examiner, whose opinion the Office properly found constituted the weight of the medical evidence in this case.

The Office advised appellant in its April 23, 1998 letter she had failed to participate in the early stages of vocational rehabilitation efforts; that she had not established that her medical condition justified such failure; that she had 30 days to participate in such efforts or provide good cause for not doing so; and that her compensation would be reduced to zero if she did not comply within 30 days with the instructions contained in the letter. Appellant did not, however, participate in vocational rehabilitation efforts or provide good cause for not doing so within 30 days of the Office's April 23, 1998 letter.

Appellant's failure without good cause to participate in preliminary vocational meetings and testing constitutes a failure to participate in the "early but necessary stages of a vocational rehabilitation effort."[9] 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.[10] 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 June 21, 1998.[11]

[8] *Aubrey Belnavis*, 37 ECAB 206 (1985); 5 U.S.C. § 8123(a) .

[9] *See* 20 C.F.R. § 10.124(f).

[10] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.5 (December 1993).

[11] *See William F. McMahon*, 47 ECAB 526 (1996).

The Board therefore affirms the Office's June 8, 1998 decision reducing appellant's compensation by 100 percent.

Following the Office's reduction of compensation, the burden to establish entitlement to compensation shifted to appellant. Causal relationship must be established by rationalized medical opinion evidence. The medical evidence appellant submitted following the Office's June 8, 1998 decision reducing her compensation to zero was not sufficient to meet this burden. The July 2, 1998 report submitted by Dr. Schaffzin did not provide a rationalized, probative opinion that appellant was totally disabled and that her medical condition precluded her from participating in vocational rehabilitation efforts. Dr. Schaffzin's reports merely restate his findings and conclusions in previous reports, and are not sufficient to overcome the referee opinion of Dr. Fenton, which constitutes the weight of the medical evidence in this case. The Board therefore affirms the August 25, 1998 decision of the hearing representative affirming the June 8, 1998 decision reducing appellant's compensation to zero.

The decisions of the Office of Workers' Compensation Programs dated August 25, 1998 and June 8, 1997 are hereby affirmed.

Dated, Washington, D.C.
July 14, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member