U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHIRLEY J. HIGGS and DEPARTMENT OF LABOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, Dallas, TX

Docket No. 02-127; Submitted on the Record;
Issued August 2, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's entitlement to monetary compensation benefits on the grounds that she failed to cooperate with rehabilitation efforts.

On September 14, 2000 appellant, then a 40-year-old claims examiner, filed a claim for bilateral carpal tunnel syndrome as a result of her repetitive employment duties. The Office accepted appellant's claim for bilateral carpal tunnel syndrome and paid appropriate compensation. Appellant did not stop work until March 6, 2001 and on April 24, 2001 she was released to return to work four hours per day with restrictions; and eight hours a day with restrictions on May 7, 2001. She was paid disability compensation from April 24 to May 28, 2001.

Accompanying her claim, appellant submitted a narrative statement and an electromyogram (EMG). She indicated that the constant typing required in her position contributed to her carpal tunnel syndrome. The EMG revealed very mild bilateral carpal tunnel syndrome.

Thereafter, appellant submitted medical records from Dr. P.H. Wong, a Board-certified family practitioner, dated September 21, 1999 to November 3, 2000; medical records from Dr. Thomas C. Diliberti, a Board-certified orthopedic surgeon, dated January 26 to March 20, 2001; and a functional capacity evaluation dated March 20, 2001. The medical records from Dr. Wong dated September 21, 1999 to November 3, 2000 noted a history of appellant's carpal tunnel syndrome beginning in 2000. He noted that appellant's duties of computer data entry were a contributing factor to her carpal tunnel syndrome. Dr. Wong recommended work restrictions of six hours maximum typing and use of a head set from January 27 to March 27, 2001. The medical records from Dr. Diliberti dated January 26, 2001 to March 20, 2001 diagnosed appellant with bilateral carpal tunnel syndrome and bilateral cubital syndrome. His note of January 26, 2001 did not recommend work restrictions. Dr. Diliberti placed appellant off duty on March 6, 2001. The functional capacity evaluation dated March 20, 2001

noted appellant's current physical state was restricted light physical level. The evaluation indicated that appellant was unable to safely return to her light, highly repetitive, physical demand job as a claims examiner.

On April 6, 2001 appellant was notified that a nurse was assigned to assist with her rehabilitation.

In a letter dated April 6, 2001, the employing establishment notified appellant that a light-duty position as an OASIS coach was available to her immediately. The employing establishment indicated that the position was predominately sedentary where appellant would provide verbal instructions and technical input related to claims examiner documents, terminology and analysis. The position did not involve keyboard typing activities or other repetitive tasks involving appellant's hands; and pushing, pulling, and lifting duties were limited to less than five pounds.

Appellant submitted additional medical records from Dr. Diliberti dated April 10 to 30, 2001. Dr. Diliberti's set forth the following work restrictions: appellant would return to duty 4 hours a day for 2 weeks followed by regular full 8-hour day; a lifting restriction of 25 pounds with sit and stretch breaks every hour; with a 4-hour limit on typing and repetitive tasks. He noted these restrictions would be for a period of 1 year.

In a letter dated April 23, 2001, the employing establishment notified appellant that a temporary light-duty position as a claims examiner was available immediately. The employing establishment indicated that the position would be a claims examiner position with the following restrictions: typing was limited to 4 hours a day, with a 10-minute break every hour; no lifting over 25 pounds; the first 2 weeks of employment would be 4 hours per day, increasing to 8 hours per day after 2 weeks. The position was sedentary with lifting limited to files and books. Appellant would be paid for a Grade 12/1. Attached to the job offer was a job description for a senior claims examiner not a light-duty claims examiner.

In a letter dated April 24, 2001, appellant noted that she received two job offers from the employing establishment: one as an OASIS coach and another as a limited-duty claims examiner. She indicated that her physician Dr. Diliberti reviewed the job description as an OASIS coach and determined it to be unsuitable. Appellant indicated that she was neither accepting nor declining the job but needed further clarification regarding the duties she would be performing, the time per day each duty entailed, how much keying and typing would be involved in the duties and who her manager would be. She submitted another letter dated April 27, 2001 indicating that she requested wage-loss compensation for the period of April 3 to 30, 2001.

In a notice dated April 27, 2001, the Office advised appellant of proposed sanctions should she discontinue good faith participation in an Office approved rehabilitation program. The letter also indicated in pertinent part:

> "An employee who is undergoing vocational rehabilitation efforts at the direction of [the Office] may be required to accept an offer of work within his or her limitations while recuperating from a work-related injury, even if that work represents a temporary assignment and the employee has permanent appointment

status. Failure to accept such an assignment may be considered failure or refusal to participate in vocational rehabilitation efforts and such a failure may be sanctioned on that basis."

The Office indicated that it reviewed the limited-duty position of April 23, 2001 and has determined it is within the medical restrictions of Dr. Diliberti. The Office further indicated that absent evidence to the contrary, the Office would assume vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity. Appellant was provided with 30 days to submit evidence to the contrary.

In a letter dated May 4, 2001, the employing establishment noted that it sent appellant a job offer on April 23, 2001 however the incorrect position description was attached. The employing establishment provided appellant with a correct position description for a general claims examiner.

By decision dated May 29, 2001, the Office notified appellant that the proposed suspension of her compensation under 5 U.S.C. § 8104(a) was made final. The Office recommended that partial compensation payments be suspended effective April 24, 2001 and total compensation payments and medical benefits be suspended effective May 7, 2001 for the "reason that you have refused to accept a limited-duty assignment of work within the work limitations provided by your attending physician Dr. Diliberti." The Office noted in pertinent part:

"Under C.F.R. 10.518 and 10.519, where an employee is undergoing [the Office] directed vocational rehabilitation efforts, either with a registered nurse or a vocational rehabilitation counselor, an employer may offer the employee a temporary assignment pending further recovery from the work-related injury. An employee's right to compensation under the [Federal Employees' Compensation] Act shall be suspended during the period of refusal or failure to comply with vocational rehabilitation efforts at the direction of [the Office] while recuperating from a work-related injury, even if that work represents a temporary assignment and the employee has permanent appointment status. Failure to accept such an assignment may be considered failure or refusal to participate in vocational rehabilitation efforts, and such a failure may be sanctioned on that basis."

In a letter dated June 4, 2001, appellant indicated that she had not received compensation from April 24, 2001 until the present time, contending that she was denied due process.

By letter dated June 19, 2001, appellant requested reconsideration of the Office's decision. She indicated that the employing establishment offered her a position on May 14, 2001 but did not send out a suitability letter. Appellant indicated that both her compensation and medical benefits which were terminated which was inappropriate as she had not yet reached maximum medical improvement. She further noted that the Office failed to issue her a 15-day letter prior to suspension of her benefits. Appellant noted excerpts of section 8106 indicating that her benefits were wrongly terminated due to refusal of suitable employment and that a suitability letter should be issued to her for the May 4, 2001 job offer.

By decision dated July 13, 2001, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision. However, the Office modified its determination as to benefits and indicated appellant's benefits would be payable through May 28, 2001. The Office specifically noted that this decision was not a termination of benefits under 5 U.S.C. § 8106 rather a suspension for noncooperation under 20 C.F.R. § 10.519(b).

The Board finds that the Office improperly suspended appellant's compensation.

The Office in its decision's dated May 29 and July 13, 2001 sought to suspend appellant's compensation under 5 U.S.C. § 8104(a) for failure to participate in vocational rehabilitation. The Office specifically noted that appellant failed to accept employment offered to her on April 23 and 27 and May 4, 2001 and was thereby obstructing the vocational rehabilitation effort.

Section 8113(b) of the Act states:

> "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."[1]

Section 10.519 of Title 20 of the Code of Federal Regulations, the implementing regulations of 5 U.S.C. § 8113(b), further provides in pertinent part:

> "Under 5 U.S.C. § 8104(a), the Office may direct a permanently disabled employee to undergo vocational rehabilitation. 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 participation in a vocational rehabilitation effort when so directed, [the Office] will … reduce the employees' 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."[2]

[1] 5 U.S.C. § 8113(b).

[2] 5 U.S.C. § 8113(b); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment Vocational Rehabilitation Services*, Chapter 2.813 (April 1995).

In its July 13 and May 29, 2001 decisions, the Office failed to recognize that section 8113 allows it to reduce, not suspend, future benefits based on probable earning capacity when there has been a failure to undergo vocational rehabilitation without good cause. The Office erroneously concluded that this was a basis for "suspension" of benefits and erroneously quoted 20 C.F.R. § 10.519 in support of its finding.[3] The Board notes that section 10.519 makes no reference to a suspension of benefits. As the Office did not properly apply section 8113 and reduce appellant's compensation benefits according to her wage-earning capacity, the Office erred in issuance of its July 13 and May 29, 2001 decisions.[4]

Appellant contentions with regard to the application of section 8106 to her case, are not relevant as the Office was not terminating appellant benefits under 5 U.S.C. § 8106.

The decisions of the Office of Workers' Compensation Programs dated July 13 and May 29, 2001 are hereby reversed.

Dated, Washington, DC
August 2, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[3] The Act, section 8123(d) does allow for suspension of compensation for refusal to submit to or obstruction of a physical examination; however, this provision was not cited as a basis of the May 29, 2001 suspension of benefits; *see also Ernie Chavez*, 35 ECAB 479 (1983); *Jimmie L. Clark, Jr*. 42 ECAB 252 (1990).

[4] *Id.* Furthermore, even if the Office had sought to reduce appellant's compensation for failure to undergo vocational rehabilitation, its decisions did not note any specific evidence supporting its conclusion that appellant failed to apply for or undergo vocational rehabilitation.