U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHLEEN J. DAVILA and U.S. POSTAL SERVICE,
POST OFFICE, Long Beach, CA

Docket No. 00-361; Submitted on the Record;
Issued January 25, 2002

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

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 low back strain and herniated disc at L4-L5 resulting from a June 21, 1986 employment injury. Appellant has not worked since the date of the injury and had been receiving temporary total disability benefits. On May 2, 1995 appellant's treating physician, Dr. Thomas J. Meyer, a Board-certified orthopedic surgeon, opined that appellant could return to full-time work with restrictions including no lifting over 50 pounds and intermittent sitting, walking and standing. The Office referred appellant to a rehabilitation counselor. In the vocational rehabilitation report dated August 31, 1995, the rehabilitation counselor, Ellie J. Ettner, stated that appellant attempted to participate in testing but "gave short shrift to the process, thereby, indicating either an inability to perceive the importance, an unwillingness to cooperate, or lack of concentration, or a combination thereof, thereby making the testing process useless or at the very least inaccurate and unreliable." In a rehabilitation report dated December 20, 1995, Ms. Ettner stated that appellant presented herself to her as being unable to benefit from rehabilitation services. She stated that appellant appeared lethargic, spoke with flat affect, did not seem able to concentrate and reported being unable to drive herself anywhere past the grocery store. Ms. Ettner also stated that appellant reported ongoing medical problems, which combined with her industrial injury, complicated her physical condition, reported little or no stamina and needed therapeutic counseling to deal with severe depression. She stated that she tried to administer tests but appellant "spent so little time on them that the scores were invalid." Ms. Ettner stated that appellant's husband accompanied her to the office and acted like a spokesperson while appellant looked off to her side "as if disinterested in the conversation."

By letter dated December 12, 1995, the Office informed appellant that Ms. Ettner advised that she, appellant, had not actively participated in the rehabilitation efforts and she had 30 days to contact the Office to inform them whether she would make a good faith effort to participate in the rehabilitation effort and return to gainful employment. The Office stated that appellant

should call the rehabilitation counselor within 30 days and if she did not plan to participate, she must provide a written explanation of her reasons for her refusal to cooperate within 30 days of the date of the letter. The Office informed appellant that if she did not comply with the instructions in the letter, the rehabilitation effort would be terminated and her compensation would be reduced to zero pursuant to section 8113(b) of the Federal Workers' Compensation Act.

By letter dated December 26, 1995, appellant stated that she had problems remembering and her concentration was extremely poor. She stated that she was on medication for pain "round the clock," she was in extreme pain from lung surgery performed in February 1993, that she suffered from depression due to pain syndrome and took medication for hypertension because of a heart condition. She stated that she would not benefit from vocational rehabilitation at this time. Appellant also stated that she had done everything that she had "been told to do," that she went to see Ms. Ettner as instructed by the office, she answered the questions she was asked and did the tests she was given to the best of her ability.

By decision dated August 21, 1996, the Office reduced appellant's compensation to zero, stating that appellant failed to undergo the vocational testing in good faith and had provided inadequate reasons for her failure to comply.

By letter dated September 9, 1996, appellant requested an oral hearing before an Office hearing representative, which was held on September 24, 1997. Appellant described her job duties as a clerk, the medication she was taking including muscle relaxants, prozac and heart medication. She stated that it made it hard to concentrate all the time. Appellant stated that, as far as she knew, she never refused anything that Ms. Ettner asked her to do. Appellant did not recall Ms. Ettner telling her at the time she took the tests that she was not performing well and her husband testified Ms. Ettner never informed him prior to their receiving written correspondence from the Office that appellant was not cooperating.

At the hearing, appellant submitted a medical report from Dr. Meyer dated September 5, 1996 and two reports from Dr. Robert A. Stein, an internist, dated September 18, 1996 and June 16, 1997. In his September 5, 1996 report, Dr. Meyer stated that he found that appellant's injuries were permanent in 1991 and her restrictions were the same. He stated that appellant had apparently "done very poorly on her rehabilitation tests and the cognitive nature of this and a large part of that is probably related to the muscle relaxants and pain medications which she takes on a regular basis under my direction." In his September 18, 1996 report, Dr. Stein stated that he treated appellant since October 1994. He diagnosed chronic back pain syndrome with significant pain and debility and disability. Dr. Stein stated that appellant had underlying degenerative disc disease and required narcotic analgesic medication as well as muscle relaxant therapy on a daily basis. He stated that she also had secondary depression, symptoms suggestive of fibromyalgia, chronic headaches, essential hypertension, which was well controlled and possible hypertensive heart disease and or cardiomyopathy. Dr. Stein stated that appellant was on Vicodin four to six times daily, Soma four to five times daily and hypertensive therapy in the form of Zestril. He stated that it was "certain that the combination of her illness and associated chronic pain as well as the medications required for these would make it impossible to perform any occupational or rehabilitation due to physical and central nervous system manifestations and effects."

In his June 16, 1997 report, Dr. Stein stated that appellant continued to have chronic pain and substantial anxiety and depression. He stated that appellant continued to required Elavil at bedtime and Vicodin and Soma for her chronic pain and that she had been tried on multiple other medications without significant benefits. Dr. Stein diagnosed chronic back pain syndrome, degenerative disc disease, severe depression, anxiety, suspected fibromyalgia, chronic headaches, essential hypertension and chronic chest pains. He stated that due to these illnesses, appellant was totally disabled and her illness and the medications required for it made "vocational rehabilitation unlikely to be of benefit."

By decision dated February 11, 1998, the Office hearing representative affirmed the Office's August 21, 1996 decision, stating that based on the evidence in the record at the time, the Office properly reduced appellant's compensation to zero. The Office hearing representative found, however, that Drs. Meyer's and Stein's reports supported appellant's contention that her medication regimen contributed to her poor performance at rehabilitation and established a *prima facie* case that appellant might have been unable to complete the testing due to the medication she was using. The Office, therefore, remanded the case for the Office to ascertain the exact nature of appellant's medication regimen from Drs. Meyer and Stein and refer appellant with a statement of accepted facts and the case record to a second opinion physician to determine whether the medical regimen identified by appellant's treating physicians precluded her from participating in vocational rehabilitation, specifically, the vocational testing. The Office stated that if appellant's medication precluded her from participating, the physician should address if an alternative course of medication is possible and he should address appellant's ability to work from a physical standpoint.

In a report dated April 17, 1998, a second opinion physician, Dr. Mark Borigini, a Board-certified internist with a specialty in rheumatology, considered appellant's history of injury, performed a physical examination and reviewed diagnostic tests of record including x-rays, magnetic resonance imaging (MRI) scans and computerized axial tomography (CAT) scans. He diagnosed chronic pain syndrome, which was "apparently made worse, either consciously or not, according to the psychiatric notes, by her personality disorder," consisting of a narcissistic type. Dr. Borigini stated that appellant might have fibromyalgia because of the diffuse pain and poor sleep, although appellant had diffuse pain all over, not just in the classic fibromyalgia tender points.

Dr. Borigini opined that appellant's hypertension or general physical health did not prevent her from returning to work. He noted that the main medications appellant had used since 1995 was for blood pressure and Zestril, Vicodin and Soma. Dr. Borigini stated that he did not think appellant's usage of Vicodin and Soma had any bearing on appellant's cognitive abilities for the type of work she was doing. He stated that he did not believe that appellant developed any permanent medical residuals, based on an internal medicine basis, based on her authorized medications for her orthopedic conditions. Dr. Borigini stated that he did not believe that appellant's internal medical conditions affected her ability to understand, read, talk or speak and he did not believe she had physical limitations, "aside from chronic pain." He stated that appellant's chronic complaints are "what are apparently stopping her from working in a full-time job." Dr. Borigini stated that if appellant returned to work she should do so gradually, starting part time, since she had not worked for "some time." He stated that appellant had been taking Vicodin and Soma chronically for years and she did not participate in any vocational

rehabilitation program, even in 1993, when she was supposedly off those medications. Dr. Borigini stated that there was no evidence that "it really made any difference, in terms of her participation in that program." He concluded that appellant was "able to take care of herself, communicate and ambulate," and that on "a nonindustrial basis," she should not lift more than 20 pounds. Dr. Borgini stated that she could stand for up to one hour at a time with sitting in-between the standing.

In a report dated April 13, 1998, a second opinion physician, Dr. Thomas R. Dorsey, a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination and reviewed the diagnostic tests of record including x-rays, MRI scans and CAT scans. He diagnosed "back pain, subjective symptoms, only." Dr. Dorsey stated that there were no findings that would indicate any significant orthopedic pathology of the lumbar spine or thoracic spine related to the June 21, 1986 employment injury. He stated that appellant had some mild scoliosis which was excluded as a work-related condition. Dr. Dorsey stated that she only had complaints of pain, not related to organic factors.

On June 3, 1998 the Office issued a notice of proposed termination of compensation and medical benefits.

In a report dated May 12, 1998, Dr. Meyer summarized the medication appellant had received since 1997 including Vicodin and Soma. He stated his diagnoses of her condition were degenerative disc disease of the lumbosacral spine at L3-L4, L5-S1 and L4-L5. He opined that appellant's subjective complaints were supported by objective findings on the physical examination and the results of the April 23, 1998 MRI scan, which showed disc deterioration at L4-L5, L3-L4 and L5-S1 and x-rays. Dr. Meyer stated that appellant's back condition was the same as in June 1990 and her work restrictions were no continuous standing or sitting more than one to two hours at a time and lifting no more than 50 pounds on only an infrequent basis. He stated that when appellant underwent vocational testing in 1995, she was using fairly low doses of Vicodin and Soma, around three each day, on the average, but that "can certainly impair cognitive performance." Dr. Meyer stated, however, that appellant was not totally disabled due to taking the medicine. He stated that he was not familiar with the exact activities that took place in the vocational evaluation but written test taking and activities similar to that with cognitive abilities would be mostly affected by these medications, more than gross motor skills. Dr. Meyer opined that appellant could work four hours a day in light-duty capacity. He stated that "the particulars of what she does, particularly with more intellectual skills, may be impaired by the medicines" and psychometric testing would be helpful to identify the nature of her impairment from that.

By decision dated June 23, 1998, the Office terminated benefits, stating that the evidence was insufficient to establish that she had a medical condition that prevented her from doing the necessary vocational testing in 1995. The Office, therefore, reduced appellant's compensation to zero.

Appellant requested an oral hearing before an Office hearing representative, which was held on December 16, 1998. At the hearing, appellant stated that she was taking Bicodin, Soma, Elavil and Daypro and took Vicodin and Soma about every four hours but did not know the amount of the dosage of the Vicodin and took Elavil all night and took Daypro two or three

weeks "out of the month." Appellant stated that when she met with Ms. Ettner, she tried to do the testing and did everything Ms. Ettner asked. She stated that the medication made it hard for her to read, that she had difficulty comprehending what she read, but she did the tests to the best of her ability. Appellant described her medical examinations with Drs. Borigini and Dorsey. Appellant and her husband, who accompanied her to the vocational consultant, stated that Ms. Ettner never told them that appellant was not cooperating.

Appellant submitted an additional medical report from Dr. Meyer dated June 29, 1998. In his report, he reiterated his opinion that there were objective findings to support appellant's subjective complaints as in the April 23, 1998 MRI scan and appellant continued to have residuals from the June 21, 1986 employment injury. Dr. Meyer stated that her problems were exacerbated by her distress dealing with the Department of Labor over the years. He stated that he would downgrade appellant's lifting restriction from 50 to 30 pounds. Dr. Meyer stated that due to the degenerative condition in her lumbar spine, appellant should be precluded from repetitive bending, stooping and twisting from the waist.

By decision dated March 18, 1999, the Office hearing representative affirmed the Office's August 21, 1996 and June 23, 1998 decisions.

The Office subsequently referred appellant to an impartial medical specialist, Dr. Donald E. Julian, a Board-certified orthopedic surgeon, to resolve the conflict between Drs. Stein and Dorsey as to whether appellant continued to suffer residuals of the June 21, 1986 employment injury. In his report dated June 7, 1999, Dr. Dorsey considered appellant's history of injury, performed a physical examination and reviewed diagnostic tests including MRI scans, x-rays and a bone scan. He diagnosed, *inter alia*, lumbar and lumbosacral strain and sprain, chronic and recurrent, cervical sprain and strain, herniated nucleus pulposus at L4-L5 per the MRI scan and degenerative disease at L4-L5 and L5-S1. Dr. Dorsey concluded that appellant had residuals from her June 21, 1986 employment injury regarding her low back and intermittent thigh numbness but was able to work with limitations four hours a day. He stated that with appropriate counseling, vocational rehabilitation was "not out of the question," and appellant appeared intelligent enough to be able to accomplish a retraining program if she consciously wished to participate.

By decision dated July 7, 1999, the Office stated that Dr. Julian's report confirmed that appellant had residuals from her June 21, 1986 employment injury, consisting of a herniated nucleus pulposis at L4-L5 that led to some degenerative changes. The Office stated that the original June 3, 1998 proposal to terminate appellant's entitlement to all the Office benefits was voided. The Office stated that it was not expanding appellant's claim to include any entitlement to benefits for her cervical spine or any L5-S1 problems. The Office further stated that nothing in Dr. Julian's report indicated that the Office should reinstate appellant's monetary compensation and the March 18, 1999 decision was not modified.

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

Section 8113(b) of the Act[1] provides as follows:

> "If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under 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), further 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 to 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 would probably have been the employee's wage-earning capacity had there not been such a failure or refusal. If an employee without good cause refuses to apply for, undergo, participate in, or continue participation in the early but necessary stages of a vocational rehabilitation effort (interviews, testing, counseling and work evaluations), the Office cannot determine what would have been the employee's wage-earning capacity had there been no 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 monetary compensation under the provisions of this paragraph shall continue until the employee in good faith complies with the direction of the Office."[2]

The Board has held that appellant must substantiate her allegations of inability to participate in vocational rehabilitation with medical evidence supported by medical rationale to establish "good cause."[3]

In this case, in the vocational report dated August 31, 1995, the rehabilitation counselor, Ms. Ettner stated that appellant gave "short shrift to the process, thereby, indicating either an inability to perceive the importance, an unwillingness to cooperate, or lack of concentration, or a combination thereof, thereby making the testing process useless or at the very least inaccurate

[1] 5 U.S.C. §§ 8101-8193.

[2] 20 C.F.R. § 10.124 (b); *Jonathan Gibbs*, 52 ECAB ____ (Docket No. 99-361, issued October 2, 2000).

[3] *Yusuf D. Amin*, 47 ECAB 804, 808-10 (1996).

and unreliable." In the December 20, 1995 rehabilitation report, Ms. Ettner stated that appellant spent so little time on the tests that the scores were invalid. Appellant contended that she performed the tests to the best of her ability and that the medication she was taking for her physical condition impeded her ability to perform the tests. Appellant, however, has not submitted medical evidence to support her contention. In his September 5, 1996 report, appellant's treating physician, Dr. Meyer, stated that appellant's poor performance on her rehabilitation tests was "probably related" to the muscle relaxants and pain medication which appellant was taking on a regular basis under his direction. In his May 12, 1998 report, Dr. Meyer stated that when appellant underwent vocational testing in 1995, she was using fairly low doses of Vicodin and Soma, around three each day, on the average and that "can certainly impair cognitive performance." He stated, however, that appellant was not disabled due to taking the medicine. Dr. Meyer stated that he was not familiar with the exact activities that took place during vocational testing, but written test taking and activities similar to that involving cognitive abilities would be mostly affected by these medications, more than gross motor skills. He opined that appellant could work four hours a day in a light-duty capacity and her intellectual skills "may be" impaired by the medicines and he suggested psychometric testing to determine the nature of any such impairment. In his June 29, 1998 report, Dr. Meyer reiterated that appellant had residuals from her June 21, 1986 employment injury and that she could work with restrictions.

Dr. Meyer's report is not probative, however, in that he stated that the medication appellant was taking could impair her cognitive performance and her intellectual skills might be impaired by the medication but did not conclusively state that the medication appellant was taking impaired her performance to undergo the vocational testing. Further, he stated appellant's poor performance on the rehabilitation tests was "probably" due to her muscle relaxants and pain medication. His opinion is speculative and equivocal and, therefore, does not establish that appellant was unable to perform vocational testing due to the medication she was taking.[4]

In his September 18, 1996 report, Dr. Stein stated that the combination of appellant's illnesses and medication she was taking, *i.e.*, Vicodin, Soma and Zestril, would make it impossible for appellant to perform any occupational or rehabilitation due to physical and central nervous system manifestation and effects. In his June 16, 1997 report, he stated that the combination of appellant's illnesses and the medication she was taking for them would make vocational rehabilitation unlikely to be of any benefit. Dr. Stein, however, did not provide a rationalized medical opinion explaining how those medications would affect appellant to the extent she could not perform vocational testing. His opinion also does not reconcile his conclusion that appellant could not undergo vocational testing with the other doctors' opinions of record including Dr. Meyer's that appellant could work part time with restrictions. The Board has held that a medical opinion not fortified by medical rationale is of little probative value.[5]

The medical reports of the second opinion physicians, Drs. Borogini and Dorsey, do not establish that appellant was unable to undergo the vocational testing due to the medication she was taking. In his April 17, 1998 report, Dr. Borigini stated that appellant's ability to participate

[4] *See Betty M. Regan*, 49 ECAB 496, 502 (1998); *Alberta S. Williamson*, 47 ECAB 569, 573-74 (1996).

[5] *Ronald C. Hand*, 49 ECAB 113, 118 (1997).

in vocational rehabilitation was not affected by the medicine she was taking. He also stated that appellant's internal medical conditions did not affect her ability to understand, read, talk or speak. Dr. Borgini stated that appellant was able to take care of herself, to communicate and ambulate. He opined that appellant could return to work with restrictions but should start working part time since she had not worked for a long time.

In his April 13, 1998 report, Dr. Dorsey opined that appellant had complaints of pain unrelated to organic factors and had no residuals related to the June 21, 1986 employment injury.

The Office subsequently referred appellant to an impartial medical specialist, Dr. Julian, to resolve the conflict between Drs. Stein's and Dorsey's opinion as to whether appellant had residuals from her June 21, 1986 employment injury. In his June 7, 1999 report, Dr. Julian opined that appellant had residuals from her June 21, 1986 employment injury regarding her back and intermittent thigh numbness but was able to work with limitations four hours a day. He stated that vocational rehabilitation was not "out of the question," and appellant could accomplish retraining if she consciously wanted to participate. Although the Office did not specifically refer appellant to Dr. Julian to resolve the issue of the effect of appellant's medication on her ability to undergo vocational testing, his opinion that appellant could undergo vocational rehabilitation if she chose confirms that the medication appellant was taking did not impede her performance. In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[6] As the impartial medical specialist, Dr. Julian's opinion which is complete and well rationalized is entitled to greater weight.

As appellant did not substantiate her allegations of her inability to undergo the vocational testing with conclusive, rationalized medical evidence, appellant did not establish good cause for her failure to cooperate with vocational rehabilitation. The Office, therefore, properly reduced appellant's compensation to zero.[7]

[6] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

[7] Appellant's contention that she was denied due process because the Office did not specifically inform her that medical evidence was necessary to show good cause for failure to participate in vocational rehabilitation is without merit. The Office gave appellant ample opportunity through letters, notice of termination and hearings to submit additional evidence.

The March 18 and July 7, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
January 25, 2002

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member