U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS O. WILLIAMS and DEPARTMENT OF THE NAVY, NAVAL PUBLIC WORKS CENTER, Oakland, CA

Docket No. 01-1206; Submitted on the Record;
Issued June 5, 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 reduced appellant's compensation benefits to zero on the grounds that he refused to participate in vocational rehabilitation efforts.

On April 9, 1990 appellant, then a 45-year-old motor vehicle operator, sustained a right hip fracture and posterior dislocation when he fell from a backloader. He required a closed reduction that day and arthrotomy with removal of bone fragments on April 12, 1990. His case was placed on the periodic rolls effective June 5, 1990. Appellant returned to light-duty work four hours a day on December 1, 1990. He was off work from December 19, 1990 to January 15, 1991.

In a January 28, 1991 report, Dr. Shively, an attending orthopedic surgeon, noted that on July 27, 1990 appellant developed "severe avascular necrosis with joint narrowing" in the right hip, resolved with rest and medication by January 1, 1991. On December 20, 1990 Dr. Shively found "massive heterotropic ossification." He opined that appellant would become permanently disabled with hip stiffness and pain and required continued medical care.

Appellant's application for disability retirement was approved on March 27, 1992 and made effective April 4, 1992. On August 20, 1992 appellant underwent a total right hip replacement due to the formation of heterotropic bone. Appellant elected to receive benefits under the Federal Employees' Compensation Act effective August 23, 1992.

In a December 31, 1996 report, Dr. Paul R. Lipscomb, an attending Board-certified orthopedic surgeon, stated that the April 9, 1990 right hip fracture and dislocation caused avascular necrosis of the femoral head, leading to a painful osteoarthritis of the right hip, necessitating hip replacement. Dr. Lipscomb noted that appellant had six subsequent dislocations of his right hip prosthesis.

On April 24, 1997 the Office referred appellant, the medical record and a statement of accepted facts to Dr. Robert S. Ferretti, a Board-certified orthopedic surgeon, for a second opinion on causal relationship. In a May 19, 1997 report, Dr. Ferretti opined that appellant's right hip condition was causally related to the April 9, 1990 injury. Dr. Ferretti opined that appellant could work 8 hours a day light duty, with 4 hours of walking or standing, no repetitive bending, no stooping, climbing, heavy pushing or pulling, or lifting over 30 pounds.

Based on Dr. Ferretti's report, the Office referred appellant for vocational rehabilitation services, with initial development in August 1997. Appellant was first referred to a rehabilitation counselor in September 1998. However, the rehabilitation effort was delayed as appellant sustained a dislocation of the right hip prosthesis on September 21, 1998, requiring surgical revision of the acetabulum with insertion of an additional screw on December 1, 1998.

On November 1, 1999 appellant was assigned to Stephen Davis, a certified vocational rehabilitation counselor. In a December 14, 1999 initial report, Mr. Davis noted appellant's assertion that he was too disabled to work. He noted administering vocational test batteries over a two-day period, that appellant was cooperative during the administration of the vocational testing and "appellant tried to do his best o[n] all the tests that he was required to take."

In a March 5, 2000 report, Mr. Davis related appellant's assertion that he was too disabled to work, based on the December 19, 1999 report of Dr. Ken Fujii, an attending Board-certified orthopedic surgeon. Mr. Davis related that appellant threatened Office personnel and appeared very agitated. He noted that appellant scored poorly on vocational aptitude testing of his linguistic, mathematical, fine motor and mechanical capabilities, but that he made a "good faith effort." Mr. Davis opined that appellant's extremely low test scores demonstrated that appellant was "not a candidate for vocational retraining." He, therefore, recommended termination of the rehabilitation effort.

In a March 27, 2000 letter, the Office advised appellant that his refusal to participate in the preparatory stages of vocational rehabilitation could result in reduction of his compensation to zero under section 8113(b) of the Act and 20 C.F.R. § 10.519. The Office noted that appellant had not submitted medical evidence indicating that he was totally disabled for all work. The Office afforded appellant 30 days in which to submit additional evidence.

In a March 31, 2000 telephone memorandum, an Office claims examiner noted that appellant had called that day and expressed his willingness to cooperate fully with the vocational rehabilitation effort. The Office instructed appellant to telephone Mr. Davis to advise him of his willingness to participate.

In an April 13, 2000 letter, appellant asserted that he did not threaten Mr. Davis or others associated with the Office and that he had not interfered with the rehabilitation effort. Appellant stated that he would participate fully in vocational rehabilitation.

In a May 30, 2000 letter, the Office requested that Dr. Fujii submit current medical information regarding appellant's physical findings and work capacity.

In a May 30, 2000 letter, the Office noted that appellant had not contacted Mr. Davis as instructed in the March 31, 2000 telephone call. The Office again advised appellant that his

refusal to participate in vocational rehabilitation could result in reduction of his compensation to zero and of the penalty provisions for such refusal under section 8113(b) of the Act and its implementing regulations. The Office afforded appellant 20 days in which to submit medical evidence substantiating total disability for work, or his compensation benefits would be reduced to zero.

In a June 1, 2000 telephone memorandum, the Office noted that appellant called that day asserting he was willing to cooperate fully. The Office provided appellant with Mr. Davis' number and again instructed him to call Mr. Davis. The Office also reviewed Dr. Ferretti's work restrictions and appellant agreed they were accurate.

In a July 3, 2000 telephone memorandum, an Office claims examiner noted that Mr. Davis had called and stated that appellant was cooperating with the rehabilitation effort.[1]

In a July 12, 2000 report, Mr. Davis noted that appellant cooperated at a June 27, 2000 meeting, structuring an action plan to assist him in finding nonfederal employment. Mr. Davis scheduled appointments for appellant with five employment offices. Appellant registered with four of the five offices and searched listings and selected jobs that Mr. Davis characterized as appropriate.

In a July 19, 2000 letter, Mr. Davis stated that appellant had refused to attend a scheduled meeting with him that day. Appellant asserted that he was terminating any further involvement with his rehabilitation counselor based on the recommendations of Dr. Fujii. Appellant "refused" to follow through with the vocational activities Mr. Davis had planned.

In a July 19, 2000 telephone memorandum, an Office claims examiner noted that Mr. Davis called that day and that appellant was refusing to participate in vocational rehabilitation as he believed himself too disabled for work.

In a July 19, 2000 letter, the Office advised appellant that his refusal to participate in vocational rehabilitation could result in the reduction of his compensation benefits to zero and of the applicable penalty provisions. He was afforded 30 days in which to submit additional evidence. Appellant submitted additional evidence.

In a July 11, 2000 note, Dr. Fujii stated that appellant had a postoperative right hip dislocation in May 1999, with persistent restricted range of motion. He opined that appellant could perform light duty with no more than 4 hours standing a day, no lifting over 30 pounds and no bending.

In a September 19, 2000 letter, the Office directed Mr. Davis to close appellant's vocational rehabilitation file.

By decision dated September 19, 2000, the Office reduced appellant's compensation to zero, effective October 8, 2000, on the grounds that he refused to participate in the preliminary phases of the vocational rehabilitation program without providing good cause for such refusal.

[1] Mr. Davis identified several sedentary clerk positions for further development.

Appellant disagreed with this decision and, in a September 25, 2000 letter, requested reconsideration. He asserted that he participated in vocational testing as directed by Mr. Davis and was cooperating fully with all rehabilitation efforts. Appellant submitted additional evidence.

In an August 14, 2000 letter, Dr. Fujii found appellant disabled for jury duty, as he had bilateral hip replacements, which made it difficult for him to walk.

In a September 12, 2000 letter, the Office advised appellant that vocational rehabilitation efforts would be closed due to his assertion that Dr. Fujii advised against participation.

In a September 25, 2000 letter, Sandra Leggitt, an employee of the employing establishment's department at Yuba Community College, noted that appellant was enrolled in Cal-JOBS and was eligible for Main Stream and veterans' services. Ms. Leggitt stated that appellant was seen on July 5, 2000, when a job search was performed and his skills and abilities discussed. Appellant also participated in several followup calls. Ms. Leggitt stated that appellant had "always been cooperative and responsive."

The record indicates that appellant's claim was deleted from the periodic rolls on September 27, 2000.

In a March 7, 2001 file worksheet, the Office reinstated payment of appellant's schedule award for a permanent impairment of the right leg, effective January 28, 2001. The award had been in interrupted status due to the reduction of appellant's compensation to zero.[2]

By decision dated March 8, 2001, the Office amended the September 19, 2000 decision, finding that appellant's compensation benefits would be reduced to zero effective September 9, 2001 if he continued to refuse to participate in vocational rehabilitation. The Office found that appellant had not shown good cause for his failure to comply with vocational rehabilitation.[3]

The Board finds that the Office properly reduced appellant's compensation benefits to zero on the grounds that he refused to participate in vocational rehabilitation efforts.

Section 8113(b) of the Act provides that if a claimant fails to undergo vocational rehabilitation as directed under section 8104 of the Act, "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

[2] There is no claim of record for a schedule award, which was evidently developed under a different claim number. The schedule award issue is not before the Board on the present appeal.

[3] The Board notes that, although the file demonstrates that the Office resumed payment of appellant's schedule award in January 2001, there is no indication of record that appellant's case was replaced on the periodic rolls after his compensation was reduced to zero effective October 8, 2000. The "September 19, 2001" date may, in fact, be a typographical error, as it is so similar to the date of the September 9, 2000 decision. Also, the March 7, 2001 worksheet contains very similar errors confusing the year 2000 with 2001.

wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary."[4]

Section 10.519(b) and (c) of the Office's regulations provides that, if a suitable position is not identified because of the failure or refusal to cooperate in the early but necessary stages of a vocational rehabilitation effort, *i.e.*, meeting with nurse, interviews, testing, counseling, functional capacity evaluations or work evaluations, then the Office will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity and will reduce compensation to zero. This reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of the Office.[5]

In this case, the Office accepted that on April 9, 1990 appellant sustained a right hip fracture and dislocation, requiring eventual replacement of the right hip. An April 24, 1997 medical report obtained from Dr. Ferretti, a Board-certified orthopedic surgeon and second opinion physician, stated that appellant was capable of full-time light-duty work. The Office thus referred appellant for vocational rehabilitation services, assigning him to Mr. Davis, a certified vocational rehabilitation counselor, on November 1, 1999.

The record demonstrates that appellant cooperated with vocational aptitude testing on December 14, 1999. However, beginning on March 5, 2000, appellant asserted that Dr. Fujii, an attending Board-certified orthopedic surgeon, found him too disabled to work and he would thus no longer cooperate with the vocational rehabilitation effort.

The Office advised appellant by March 27, 2000 letter that his refusal to participate in vocational rehabilitation efforts, without the submission of medical evidence substantiating total disability for work, would result in the reduction of his compensation benefits to zero. Appellant telephoned the Office on March 31, 2000, expressing his willingness to cooperate. The Office instructed him to telephone Mr. Davis. Although appellant reiterated in an April 13, 2000 letter that he was willing to cooperate with Mr. Davis, he did not call Mr. Davis as instructed, or submit the requested medical evidence.

In a May 30, 2000 letter, the Office again advised appellant that his refusal to cooperate with the vocational rehabilitation effort without good cause would result in cessation of his compensation and afforded appellant 20 days in which to submit medical evidence demonstrating a total disability for work. Appellant then cooperated with Mr. Davis through approximately July 12, 2000, structuring an employment plan and registering with employment offices as instructed. However, on July 19, 2000 appellant informed Mr. Davis he was terminating all involvement with vocational rehabilitation based on Dr. Fujii's recommendations.

The Office issued a third notice to appellant on July 19, 2000, affording him 30 days to submit medical evidence from Dr. Fujii. Appellant submitted a July 11, 2000 note from Dr. Fujii, finding appellant able to work full-time light duty with restrictions. Dr. Fujii did not find that appellant was totally disabled for work.

[4] 5 U.S.C. § 8113(b).

[5] 20 C.F.R. § 10.519(b) and (c).

Based on the lack of medical evidence supporting appellant's refusal, the Office issued the September 19, 2000 decision reducing appellant's compensation to zero effective October 8, 2000. He then requested reconsideration and submitted an August 14, 2000 letter from Dr. Fujii finding appellant disabled from jury duty due to bilateral hip replacements.[6] Dr. Fujii did not comment on appellant's work capacity in this report, or state that he was totally disabled for all work. The Office then issued a March 8, 2001 decision amending the September 19, 2000 decision, finding that appellant remained in refusal and that his compensation would be reduced to zero effective September 19, 2001.

The Board finds that appellant did not submit sufficient medical evidence establishing that he was totally disabled for work on and after November 1, 1999, when he was assigned to Mr. Davis for vocational rehabilitation. Dr. Fujii's July 11, 2000 note finds appellant capable of full-time light-duty work. His August 14, 2000 note finding appellant permanently disabled from jury duty does not state that appellant was also totally disabled for work. Thus, appellant's refusal to participate in vocational rehabilitation efforts was not justified and the Office's reduction of his compensation to zero was proper under the law and facts of the case.

The decisions of the Office of Workers' Compensation Programs dated March 8, 2001 and September 19, 2000 are hereby affirmed.

Dated, Washington, DC
June 5, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[6] There is no indication of record that appellant had a left hip replacement, or that the procedure was in any way related to the accepted April 9, 1990 right hip fracture and its sequelae.