U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TERRENCE E. MOORE and U.S. POSTAL SERVICE, POST OFFICE, Long Beach, CA.

Docket No. 03-769; Submitted on the Record;
Issued August 26, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's compensation should be reduced to zero effective December 29, 2002 due to his failure without good cause to cooperate with rehabilitation efforts.

On a July 31, 1972 appellant, then a 23-year-old letter carrier, injured his back when he lost his balance while reaching for a parcel. The claim was accepted for thoracic strain. Appellant suffered a recurrence on March 5, 1974 and a hemilaminectomy at L4-5 was authorized; as were additional back surgeries that were performed in 1975, 1978 and 1981, the last two were fusions. Appellant was placed intermittently on temporary total disability until he went on the periodic roles on April 15, 1980.

In a January 8, 1997 report, Dr. Brain Gwartz, a Board-certified anesthesiologist and pain management specialist, wrote that appellant could perform no lifting over 1 pound, no bending, stooping, squatting or crawling and no standing or sitting over 15 minutes. In a video surveillance tape created as part of September 14, 2000 postal investigation, appellant was seen performing various activities that exceeded his medical restrictions including a visit to Disney World with his grandchildren where he was observed on his feet for more than 11 hours, climbing stairs and getting on and off rides. He was also observed driving a car, walking without a cane, bending over repeatedly and carrying packages.

In a November 6, 2000 work capacity evaluation, Dr. Gwartz wrote that appellant had severe nerve damage in his spine and was permanently restricted to working no more than two hours a day with no driving, reaching above his shoulder, twisting, climbing, squatting and no sitting standing or reaching for more than one hour a day. Dr. Gwartz noted that appellant requires morphine on a daily basis to sustain his current activities.

In a June 7, 2001 letter, the Office referred appellant for a second opinion. In a June 18, 2001 report, Dr. Thomas Dorsey, a Board-certified orthopedic surgeon, wrote that appellant presented with low back pain greater on the left, radiating into his lower extremities, with diffuse

numbness bilaterally, especially in three toes on the left foot. Appellant indicated that his testicles felt as if they were in a vice and that he needed a cane most of the time. After reviewing appellant's medical history, the surveillance video and conducting a physical examination, Dr. Dorsey diagnosed arachnoiditis and status post lumbar spinal procedures. He found that appellant had good motor strength bilaterally in his lower extremities and his neural channels to be normal; there was no evidence of nerve root compression. Dr. Dorsey commented that on the videotape appellant was notably functional in terms of bending, walking, standing and some lifting. He observed that appellant had a voluntary tremor in his left foot that went away when distracted. Dr. Dorsey opined that appellant could work eight hours a day with restrictions including no bending, lifting, standing and walking for more than six hours a day.

In a June 17, 2002 letter, the Office referred appellant for vocational rehabilitation. In a June 30, 2002 memorandum, Aquiles Palamino, a vocational rehabilitation specialist, wrote that she met with appellant and explained the Office's rules and regulations regarding vocational rehabilitation and conducted an initial interview. During the interview appellant indicated that he did not believe he could return to work after not working for 30 years and noted that he was dependent on his medicine and would not stop taking it. He felt strongly that he was totally and permanently disabled and did not want to participate in rehabilitation activities.

In a July 18, 2002 letter, appellant indicated that he had relocated to Draper, Utah. In a September 4, 2002 letter from the Office to appellant's new rehabilitation counselor, the Office indicated that appellant was unwilling to discuss any issues related to returning to work. In an August 30, 2002 letter, the Office informed appellant that there was no current medical evidence that indicated that he could not work and requested an updated medical report. In a September 4, 2002 letter, the Office informed appellant of his responsibilities in cooperating with rehabilitation and the sanctions for failing to cooperate.

In a September 9, 2002 letter, Dr. Lynn Webster, a Board-certified anesthesiologist, wrote that appellant suffered from failed back syndrome, L3, L4, L5 and S1 and was unable to sit or stand for longer than 15 minutes and must constantly change positions due to pain. In a September 13, 2002 report, Mark Hendrick, appellant's new vocational rehabilitation specialist, wrote that appellant disagreed with Dr. Dorsey's conclusions and did not believe he was physically capable of returning to any type of work and that he had to stay in bed for the majority of his day due to pain. Appellant also said that he was unwilling to return to work for less than $52,000.00 annually. Mr. Hendrick also listed several occupations that were consistent with appellant's transferable skills.

In a November 4, 2002 letter to Dr. Webster, the Office requested that he review the surveillance video and asked if that caused him to change his opinion. The record does not contain a response from Dr. Webster.

In a November 4, 2002 letter to appellant, the Office indicated that, based on the reports from his vocational rehabilitation specialist, it understood that appellant was unwilling to participate in a possible rehabilitation effort and reiterated the sanctions for failing to comply. The Office informed appellant that he had 30 days to both contact his rehabilitation specialist and the Office to indicate that he would comply with the rehabilitation effort or provide medical documentation establishing why he could not comply. If appellant failed to comply with these

requirements the Office indicated that it would terminate the rehabilitation effort and begin the process to reduce his compensation.

In a November 7, 2002 Office memorandum of a telephone conversation initiated by appellant, he reportedly said he cannot physically perform the vocational rehabilitation nor can he sit in a classroom; that he had tried both in the 1970s and was unable to complete them. Regarding the surveillance tape, appellant said he was on 16 milligrams (mg) of morphine that day and was in bed for three weeks after it to recover from the pain. In a November 7, 2002 memorandum of a telephone conversation with appellant, Mr. Kendrick wrote that appellant said that he was not refusing to participate in the vocational rehabilitation efforts, but that he was physically incapable of returning to any work or to attend classes. In a handwritten note received by the Office on November 26, 2002, appellant wrote "I never expressed an unwillingness to participate." In a December 10, 2002 reply to a member of Congress, who the appellant had contacted, the Office noted that appellant had not resumed cooperation with his vocational rehabilitation efforts.

In a December 11, 2002 decision, the Office reduced appellant's compensation to zero effective December 29, 2002 for refusing to participate in vocational testing or show good cause why he could not. The decision further indicated the reduction would remain in force until appellant either underwent the directed testing or showed good cause why he could not comply.

The Board finds that the Office properly determined that appellant was not entitled to further compensation on the grounds that his compensation had been reduced effective December 29, 2002 due to his failure without good cause to cooperate with rehabilitation efforts.

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."[1]

Section 10.519 of the Office's regulations further provides:

> "Under 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 to participate in a vocational rehabilitation efforts when so directed [the Office] will act as follows: … (b) Where a suitable job has not been identified, because the failure or refusal occurred in the early but necessary stages of a vocational rehabilitation effort (that is, meetings with the [Office] nurse, interviews, testing,

[1] 5 U.S.C. § 8113(b).

> counseling, functional capacity evaluations, and work evaluations), [the Office] cannot determine what would have been the employee's wage earning capacity… in the absence of evidence to the contrary, [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 [the Office] will reduce the employee's monetary compensation accordingly (that is, to zero). The reduction will remain in effect until such time as the employee acts in good faith to comply with the directions of [the Office].[2]

In the present case, the Office properly reduced appellant's compensation effective December 29, 2002 on the grounds that he failed without good cause to participate in the early stages of vocational rehabilitation efforts. The record reveals that on several occasions appellant indicated that he could not participate in preliminary vocational rehabilitation meetings and testing with his rehabilitation counselor.

The Office advised appellant in a November 4, 2002 letter that he had 30 days to participate in such efforts or provide good cause for not doing so; and that his compensation would be reduced to zero if he 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 such as medical evidence, for not doing so within 30 days of the Office's letter.[3] Appellant stated on various occasions that he felt he could not return to work because he had not worked for 30 years, because he was dependent on his medications and that he would not work for less than $52,000.00 annually, but these are insufficient reasons to support his failure to participate as they are not supported by corroborating medical evidence.[4]

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."[5] 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.[6] Appellant did not submit sufficient evidence to refute such an assumption and the

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[2] 20 C.F.R. § 10.519

[3] Appellant argued that the Office waited too long to implement vocational rehabilitation efforts, but there is no time limit *per se* on initiating such efforts if there is evidence of potential rehabilitation. *See generally* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.5 (December 1993).

[4] *See Yusuf D. Amin*, 47 ECAB 804 (1996).

[5] *See* 20 C.F.R. § 10.124(f)

[6] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11a (December 1993).

Office had a proper basis to reduce her disability compensation to zero effective December 29, 2002.

The Board notes that, when compensation is properly reduced under the Act for nonparticipation in vocational rehabilitation efforts, section 8113(b) of the Act and the relevant Office regulations do not limit such reduction to compensation claimed in connection with an injury for which a vocational rehabilitation program was ostensibly initiated. Appellant's vocational rehabilitation program was initiated in connection with his July 31, 1972 claim, but the vocational rehabilitation process takes into account work restrictions necessitated by all medical conditions, including restrictions necessitated by all employment-related injuries.[7] Section 8113(b) provides for ending a reduction of compensation for nonparticipation in vocational rehabilitation efforts when the employee in good faith complies with the direction of the Office with regard to such rehabilitation efforts. Appellant's reduced compensation for nonparticipation in vocational rehabilitation efforts, within the meaning of the Act, continue because he has not provided sufficient evidence or argument to establish that he is entitled to ongoing disability compensation.

The December 11, 2002 decision by the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
August 26, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.3 (December 1993).