

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID L. MAES and DEPARTMENT OF AGRICULTURE,
CARSON NATIONAL FOREST, Taos, NM

*Docket No. 03-1334; Submitted on the Record;
Issued July 22, 2003*

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 monetary compensation to zero on the grounds that he failed to cooperate with vocational rehabilitation efforts without good cause.

The Office accepted that, on August 20, 2000, appellant, then a 39-year-old casual firefighter, sustained bilateral knee sprains when he slipped and fell while walking on a steep slope in the performance of duty. Appellant stopped work on August 23, 2000 and the Office began paying appropriate compensation benefits.

In a report dated April 3, 2001, Dr. David W. Caldwell, appellant's treating Board-certified orthopedic surgeon, stated that appellant had reached maximum medical improvement, required no further treatment at the time, but might require surgery in the future. Dr. Caldwell stated that appellant might have difficulty returning to work as a firefighter, but suggested appellant try to do more hiking and see how his knee held up under rough conditions.

On July 26, 2001 appellant was referred for vocational rehabilitation services. However, on September 24, 2001, vocational rehabilitation efforts were interrupted, as appellant's condition had worsened, necessitating arthroscopic surgery of both knees. Dr. Paul M. Legant, appellant's Board-certified orthopedic surgeon, performed left knee arthroscopy on October 1, 2001 and right knee arthroscopy on November 5, 2001.

In a report dated April 2, 2002, Dr. Legant stated that appellant had no objective signs of gross abnormality, good stability, no significant swelling and full range of motion of both knees. He stated that, from an objective standpoint, he would not limit appellant's occupational or recreational pursuits, but because of appellant's subjective complaints, he recommended that appellant undergo a functional capacity evaluation to determine his ability for work.

By letter dated April 22, 2002, appellant's rehabilitation counselor informed him that a functional capacity evaluation, recommended by Dr. Legant, was scheduled for May 2, 2002.

On May 1, 2002 appellant canceled the appointment, stating that he was scheduled for a magnetic resonance imaging (MRI) scan on the same day, which he could not miss. Accordingly, the functional capacity evaluation was rescheduled for May 16, 2002. On May 15, 2002, however, appellant again canceled his scheduled functional capacity evaluation and informed his rehabilitation counselor that he had cysts on his knees and needed to have them surgically removed before being functionally evaluated. In a report dated May 15, 2002, the rehabilitation counselor noted that she had called Dr. Legant's office and was informed that he had no record of appellant having any cysts on his knees. The rehabilitation counselor then informed the Office that appellant had failed to cooperate with the planned functional capacity evaluation.

By letter dated May 16, 2002, the Office advised appellant that the rehabilitation counselor had informed the Office that he had failed to cooperate with the rehabilitation effort on his behalf in that he had failed to keep both his original and rescheduled functional capacity evaluation appointments. Appellant was advised that, if he failed or refused to participate in vocational rehabilitation without good cause, his compensation benefits would be reduced to zero. Appellant was allowed 30 days to make a good faith effort to participate in vocational rehabilitation, or to provide good reason for not cooperating.

In a decision dated June 28, 2002, the Office reduced appellant's compensation benefits by 100 percent, effective July 14, 2002, due to his failure to participate in the essential preparatory effort of vocational testing. The Office found that, while appellant had contacted the Office and cited medical reasons for not participating in the functional capacity evaluation, he had not provided any supporting medical evidence which established that he could not participate in rehabilitation efforts.¹ The Office explained that appellant had not indicated that he was willing to make a good faith effort to continue with the recommended functional capacity evaluation and reduced his compensation to zero on the grounds that, due to the lack of contrary evidence, it was assumed that participation in rehabilitation efforts would have resulted in a return to work with no loss of wage-earning capacity. The Office noted that appellant's entitlement to further wage-loss compensation would be restored following written notification of his intent to comply with rehabilitation efforts and actual completion of the functional capacity evaluation.

On July 25, 2002 the rehabilitation specialist noted that appellant's case file had been closed.

By letter dated July 26, 2002, appellant requested reconsideration of the Office's decision reducing his compensation benefits, and stated that he had been advised by his physician, Dr. Harry G. Bishara,² not to attend the functional capacity evaluation. Appellant explained that, due to his August 20, 2000 employment injury, he had developed Baker's cysts in both knees,

¹ In its June 28, 2002 decision, the Office stated that, on June 11, 2002, appellant telephoned the Office and informed them that he had a letter from his physician indicating that he was temporarily totally disabled. The Office advised appellant to forward the medical documentation to the Office, but no new medical evidence was received. The Board notes that there is no evidence of this telephone conversation contained in the record.

² Dr. Bishara specializes in public health and general preventive medicine.

which required surgery. Therefore, it was not possible for him to participate in vocational rehabilitation. Appellant concluded that his intentions were to restore his knees to the best condition possible.

In support of his request, appellant submitted a report dated May 17, 2002, from Dr. Bishara who noted that appellant's arthroscopic surgery had improved the stability of his joints, but had not relieved his pain. On examination appellant was found to have a large Baker's cyst in each knee. This finding was confirmed by an MRI scan performed on May 9, 2002. He stated that, due to appellant's continued pain, he required surgery to remove the cysts. Dr. Bishara concluded that appellant should continue with physical therapy twice a week until the surgery was completed, continue therapy post surgery to rehabilitate his knees, and then begin a home exercise program.

In a decision dated August 9, 2002, the Office found the newly submitted evidence and arguments to be insufficient to warrant modification of the prior decision reducing benefits.

The Board finds that the Office properly reduced appellant's monetary compensation to zero on the grounds that he failed to cooperate with vocational rehabilitation efforts without good cause.

Section 8104(a) of the Federal Employees' Compensation Act provides that the Secretary of Labor may direct a permanently disabled individual whose disability is compensable under the Act to undergo vocational rehabilitation.³ Additionally, the Act and the implementing regulations provide for sanctions if an employee without good cause fails to apply for and undergo vocational rehabilitation when so directed.⁴ These sanctions remain in effect until the employee in good faith complies with the Office's directives.

Section 10.519 of Title 20 of the Code of Federal Regulations details the actions the Office will take when an employee refuses to undergo vocational rehabilitation. The regulation provides in relevant part that if an employee without good cause fails or refuses to apply for, undergo, participate in, or continue to participate in a vocational rehabilitation effort 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, counseling, functional capacity evaluations, and work evaluations), [the Office] cannot determine what would have been the employee's wage-earning capacity.

“(c) Under the circumstances identified in paragraph (b) of this section, 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

³ 5 U.S.C. § 8104(a).

⁴ 5 U.S.C. § 8113(b); 20 C.F.R. § 10.519 (1999).

compensation accordingly (that is, 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

The record reflects that, on May 1, 2002, appellant canceled his functional capacity evaluation appointment for the following day, asserting that he had a schedule conflict. The evaluation was rescheduled for May 16, 2002, but appellant again canceled his appointment the day before, stating that he had been advised by his physician not to attend the evaluation due to pending surgery. Following the Office’s June 28, 2002 reduction of benefits, in support of his request for reconsideration, appellant again stated that he had been advised by his physician not to attend the functional capacity evaluation, and submitted a medical report from Dr. Bishara in support of his request.

The evidence shows that the Office referred appellant to a vocational rehabilitation counselor to begin rehabilitation services and on two occasions scheduled appellant for a functional capacity evaluation. Appellant did not keep either of his scheduled appointments. Furthermore, the evidence does not support appellant’s allegation that he was under medical advice not to attend the functional capacity evaluation. In a report dated May 17, 2002, Dr. Bishara confirmed appellant’s assertion that he had developed Baker’s cysts in both knees and required additional surgery, but Dr. Bishara did not state that appellant was totally disabled and did not address appellant’s ability to participate in the functional capacity evaluation. Appellant therefore failed, without good cause, to participate in preliminary vocational rehabilitation meetings such that he failed to participate in the “early but necessary stages of a vocational rehabilitation effort.”⁶

Office regulations provide that when an employee fails to participate in the early stages of vocational rehabilitation, 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.⁷ Appellant did not submit evidence to refute such an assumption, and the Office in its June 28, 2002 decision, had a proper basis to reduce his disability compensation to zero effective July 14, 2002.

⁵ 20 C.F.R. § 10.519(b), (c).

⁶ See 20 C.F.R. § 10.519(b), (c).

⁷ See note 5 *supra*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Service*, Chapter 2.813.11(a) (November 1996).

The decisions of the Office of Workers' Compensation Programs dated August 9 and June 28, 2002 are hereby affirmed.

Dated, Washington, DC
July 22, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member