U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICK P. WILSON and DEPARTMENT OF THE NAVY, NAVAL TRAINING CENTER, Orlando, FL

Docket No. 02-2124; Submitted on the Record;
Issued June 12, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective December 17, 2001 based on a finding that he refused to cooperate with vocational rehabilitation.

On November 3, 1994 appellant, then a 45-year-old utility systems operator, filed a notice of traumatic injury alleging that he hurt his lower back while shutting a door in the performance of duty. Appellant was initially treated by Dr. Chester Miltenberger, a Board-certified family practitioner, for low back pain. Dr. Miltenberger later referred appellant to Dr. Max Riddick, an orthopedist, who ordered a magnetic resonance imaging scan of the lumbar spine on November 7, 1994, confirming the presence of degenerative disc disease and herniated disc at L4-5.[1] The Office accepted the claim for low back strain, a herniated disc at L4-5 and aggravation of degenerative disc disease of the lumbar spine. Appellant returned to work for one day on May 16, 1995 but reported back pain. He underwent a series of lumbar epidural, physical injections, a course of physical therapy and an anterior discectomy at L4-5 on November 8, 1995. Appellant did not return to work and was eventually terminated from his job due to downsizing. He began receiving compensation on the periodic rolls.

Appellant was paid compensation for total disability wage loss until March 1, 1997. Effective March 2, 1997, appellant's benefits were reduced because he was not cooperating with vocational rehabilitation efforts.[2] Appellant had agreed to be retrained and was attending Daytona College but did not attend all of his courses.

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[1] A neurological study performed on March 27, 1995 showed no electrodiagnostic evidence for radiculopathy or neuropathy.

[2] In a February 12, 1998 decision, an Office hearing representative agreed that appellant had obstructed vocational rehabilitation efforts and that a reduction in compensation benefits was consistent with regulatory authority.

In a January 21, 1999 letter, appellant expressed his willingness to cooperate with vocational rehabilitation so his benefits were reinstated and a new vocational rehabilitation plan was outlined together with a signed agreement on May 6, 1999. Appellant agreed to return to college in order to obtain an associate's degree in computer information systems analysis from Seminole Community College, which would lead him to obtain either a position as a computer operator, data entry clerk or a supervisor of computer operators as described in the Department of Labor, *Dictionary of Occupational Titles* (DOT). A rehabilitation specialist had determined that these positions were reasonably available within appellant's commuting area and that labor market surveys had verified that information. Appellant agreed to participate in the plan by attending classes, completing assignments in a timely manner and providing his rehabilitation counselor with a copy of his grades and transcript at the end of each semester. He was expected to graduate in August 2000. The record reflects that appellant enrolled in two classes during the summer term of 1999 and received a "B" in one class but failed the other one. Appellant alleged that he was totally disabled and unable to continue school so he did not enroll for any classes during the fall term of 1999.

Appellant's treating physician of record is Dr. Miltenberger, a Board-certified internist. In a July 13, 1999 report, Dr. Miltenberger indicated that he had been treating appellant for his work injury since November 3, 1994 and that he was the only physician currently treating him for back pain and spells of neuropathy. He reported that appellant had been on a regiment of physical therapy and drug therapy for pain, anxiety and depression. Dr. Miltenberger opined that "due to the nature of his disease and drug therapy; I believe at this time [appellant] is not doing himself any good attending college. He stated that, until such time as the pain and neuropathy were eliminated and appellant was off his medications, rehabilitation was not helping or going to contribute to gainful employment." He concluded that appellant was temporarily totally disabled.

In a September 17, 1999 letter, the Office notified appellant that the medical report from Dr. Miltenberger provided no objective findings or medical rationale as to why he had to be weaned off his medication and was no longer able to attend school. The Office advised appellant that, under section 8113(b) of the Federal Employees' Compensation Act that when a claimant without good cause fails to apply for and undergo vocational rehabilitation, he or she risks reduction of his compensation prospectively based on what probably would have been the individual's wage-earning capacity had he or she not failed to apply for and undergo such vocation rehabilitation. Appellant was given 30 days to contact the Office in writing to make necessary arrangements for him to enter into the training program or to provide additional evidence and reasons in writing as to his inability to participate in the training program. Otherwise, appellant was informed that he risked reduction of his compensation benefits.

The Office sent appellant for a second opinion evaluation with Dr. Donald Pearson, a Board-certified orthopedist, on October 12, 1999. The physician noted that appellant had no neurological defects on physical examination. He diagnosed degenerative disc disease, status post fusion but stated that appellant could perform light-duty work for eight hours per day.

In a rehabilitation report dated January 19, 2000, the counselor indicated that appellant had enrolled in college on January 5, 2000 for the spring term.

In a February 29, 2000 report, Dr. Miltenberger noted that appellant had been under his care for several years for lower back pain. He noted that appellant sometimes presented in a wheelchair or with a cane depending on his pain that day. He opined that appellant could only work 2 hours per day with a 10- to 15-pound lifting restriction.

In a rehabilitation report dated October 23, 2000, the counselor noted that appellant had neglected to provide his report for the spring and summer terms of 2000 until October 20, 2000. The report card revealed that appellant had failed three out of six classes, and obtained a "D" in the fourth class. The counselor noted that appellant's failure to obtain passing grades in required coursework demonstrated that he was continuing to obstruct completion of his Office sponsored training program. It was recommended that appellant's benefits be suspended until such time as he completed 12 credits with a "C" average during the fall 2000 school term.

In a letter dated October 27, 2000, the Office notified appellant that he had 30 days to provide his counselor with a favorable progress report or to show good cause for not undergoing the training programs or else the rehabilitation effort would be terminated and action taken to reduce his compensation. The Office noted that appellant's compensation would be suspended pursuant to section 8113(b) of the Act if he fails to cooperate with rehabilitation efforts. Appellant was specifically notified that he was required to maintain a "C" grade point average as stated in the rehabilitation agreement.

In a report dated December 20, 2000, an Office rehabilitation specialist indicated that additional grades from appellant's fall semester had been received and included a "D" in one course. It was recommended that the Office find that appellant was failing to cooperate with vocational rehabilitation.

Because a conflict existed in the record regarding appellant's work capacity, the Office referred appellant, along with a statement of accepted facts, and a copy of the medical record to Dr. Emmanuel Scarlatos, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In a March 5, 2001 report, Dr. Scarlatos noted that appellant's chief complaint was low back pain with bilateral anterior and posterior radiculitis. He stated:

> "[Appellant] is continuing to experience low back bilateral radicular symptomatology as before with occasional episodes of lower extremity collapse resulting from temporary and transient paralysis of the lower extremities, which he indicates occurs 25 [to] 50 percent of the time, furthering the case that during these intervals he is totally confined to a wheelchair. He is experiencing difficulty in carrying out his vocational responsibilities and, in general, activities of daily living."

Notwithstanding, Dr. Scarlatos opined that appellant was physically capable of completing the rehabilitation program of college training and that he was capable of performing a light-duty job with a 30-pound lifting restriction and limited forward bending. The physician noted that appellant experience short-term memory loss that may well be related to the amount of sedative medication he was taking. It was suggested that this matter be addressed by Dr. Miltenberger. He further recommended that appellant follow an exercise program and use a transcutaneous electrical nerve stimulator unit.

In a December 4, 2001 rehabilitation report, the counselor indicated that appellant had not been provided a surplus computer as requested, but that he had been able to use the computer laboratory more easily. Appellant was noted as having asked the Office to help him pay for additional tutoring, as he was earning "A"s and "B"s in his classes as the result of the tutoring sessions. The counselor also stated that appellant had been regularly attending his classes.

In a decision dated December 17, 2001, the Office suspended appellant's compensation finding that he did not show good cause for failing to comply with rehabilitation efforts. Appellant disagreed with the suspension and requested a hearing.[3]

In a January 17, 2002 report, Dr. Miltenberger stated that appellant had been under his care for lower back pain, neuropathy and musculoskeletal spasm due to his "worker's [compensation] claim." The physician stated that, due to the reduction in appellant's compensation benefits, he was reluctantly releasing appellant from total disability to light duty. Dr. Miltenberger listed appellant's work restrictions as follows: "limited standing or sitting no more than 2 hours at a time, light lifting, ten (10) [pounds] or less."

In a vocational rehabilitation report dated February 4, 2002, the counselor indicated that appellant was expected to graduate in May 2002 if he passed his last three classes during the spring semester. By letter dated March 15, 2002, the Office authorized appellant to receive tutoring for a total of four hours per week.

In a May 21, 2002 memorandum of a teleconference, the Office indicated that Dr. Miltenberger had confirmed that appellant could maintain a full course load at college from an orthopedic perspective, but that the "plethora of medications" he was taking caused cognitive problems such as short-term memory loss. The physician apparently recommended that appellant take only two courses at a time, as appellant was unable to go off of his medication entirely due to persistent low back pain, hypertension and insomnia. The Office further noted that appellant's rehabilitation counselor had confirmed that while appellant regularly attended his classes he had been unable to maintain a "C" average as directed. The rehabilitation counselor indicated that appellant had difficulty with his course load because of his memory problems and the Office's refusal to provide him an at-home computer. It was noted that it was difficult for appellant to go back and forth from his home to school given that he was confined to a wheelchair.[4]

In a decision dated July 11, 2002, an Office hearing representative affirmed the Office's December 17, 2001 decision.

[3] On January 1, 2002 appellant elected to take disability retirement.

[4] In a letter dated August 5, 2002, the rehabilitation counselor specifically stated that the Office's requirement that appellant take four classes per semester resulted in appellant's failing at least one class each semester. She noted that when appellant took his failed classes over he was able to pass them. She further stated that appellant consistently attended his classes and completed all of his assignments in a timely manner.

The Board finds that the Office erred in suspending appellant's compensation. Section 8113(b)[5] of the Act provides as follows:

> "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."

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…. 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 … 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). This reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of [the Office]."[6]

In this case, the Office suspended appellant's compensation on the grounds that he failed to comply with vocational rehabilitation efforts. Appellant signed a vocational agreement in which he agreed to obtain a degree from Seminole Community College in order to qualify for three identified vocational jobs in his commuting area in the field of computer science. As part of the agreement, appellant agreed to maintain a "C' average but he was unable to pass all of his courses in the time frame agreed upon with the Office. Appellant contended that his work injury precluded him from attending all of the required courses and maintaining a "C" average. He specifically noted that he was disadvantaged by the fact that he had to sit in a wheelchair and could not easily get to school to use the college-based computer for his homework. Appellant denied his willing obstruction of the rehabilitation efforts in his case.

The Board has carefully reviewed the case record and concludes that appellant did not fail to cooperate with his rehabilitation plan. The rehabilitation counselor has specifically stated that appellant regularly attended his classes and completed his work assignments but that he was at a disadvantage being in a wheelchair and not having access to a computer at home. Moreover, appellant's treating physician has stated that appellant was under medication which hindered his cognitive memory skills. The physician noted that appellant was better off taking only two courses per semester but the Office required him to carry a full case load. As noted by the

[5] 5 U.S.C. § 8113(b).

[6] 20 C.F.R. § 10.519.

rehabilitation counselor, appellant's grades improved when his case schedule was reduced and he was able to maintain a "C" average. In light of appellant's medical situation, the Board finds that he demonstrated "good cause" as to why he was unable to fully comply with the rehabilitation program. Accordingly, the Board finds that the Office erred in reducing appellant's compensation pursuant to 5 U.S.C. § 8113(b).

The decision of the Office of Workers' Compensation Programs dated July 11, 2002 is hereby reversed.

Dated, Washington, DC
June 12, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member