

**United States Department of Labor
Employees' Compensation Appeals Board**

MARINA L. SHELTON, Appellant)

and)

DEPARTMENT OF JUSTICE, IMMIGRATION)
& NATURALIZATION BORDER PATROL,)
El Centro, CA, Employer)

**Docket No. 04-1149
Issued: September 21, 2004**

Appearances:
Marina L. Shelton, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On March 22, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated April 24, 2003, which denied modification of a December 3, 2002 decision that reduced her wage-loss benefits for refusing, without good cause, to participate in vocational rehabilitation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this decision.

ISSUE

The issue is whether the Office properly reduced appellant's monetary compensation for failure to cooperate without good cause, in vocational rehabilitation.

FACTUAL HISTORY

On June 13, 1997 appellant, then a 47-year-old senior border patrol agent, filed a traumatic injury claim alleging that she injured her back when her vehicle was struck by a truck.

In a July 21, 1997 report, Dr. Harkeerat S. Dhillon, an orthopedic surgeon, diagnosed lumbar strain, possible degenerative disc disease and facet hypertrophy. In an August 14, 1997 letter, the Office accepted the claim for a lumbar strain and permanent aggravation of facet disease. Appellant's relevant medical history includes accepted lumbar strains in 1985, 1987, 1990, 1993 and 1994. Appellant stopped work on September 12, 1997 and has not returned. She received schedule awards for impairment to her lower extremities on October 30, 2000 and September 26, 2001.

In an August 3, 1999 decision, the Office terminated appellant's compensation finding that her work-related conditions had ceased. Appellant requested a review by the Branch of Hearings and Review. In a December 3, 1999 decision, the August 3, 1999 compensation order was set aside.

The Office referred appellant for a second opinion and in a January 17, 2000 report, Dr. Ian D. Brodie, a Board-certified orthopedic surgeon, stated that appellant presented with constant pain in the midline of her lower back and in the muscles on either side. He noted that the pain tracked through her right buttock and down her leg to the sole of her foot. Dr. Brodie stated that appellant's major complaint was of right-sided low back pain extending into the sacroiliac joint and buttock with burning sensation. On examination he noted that appellant sat comfortably for an hour, rose from the sitting position with little help from the arm rests. He noted that she had normal posture of the thoracic and lumbar spine without visible tilt or muscle spasms. She was able to heel-toe walk without pain. Dr. Brodie noted that appellant had tenderness over a wide area of the spine inclusive of the sacrum and pelvis and extending to the thoracolumbar junction to lumbosacral junction and on the muscles on either side of the midline. He added that x-rays reveal slight forward flexion of L4-5 but otherwise were normal. He noted that results of a magnetic resonance imaging (MRI) scan showed a mild disc protrusion at the L4-5 level with some narrowing of the spinal canal. Dr. Brodie diagnosed chronic strain of the lumbar spine with mild disc bulges at L4-5 and pain radiating into the right leg. In a February 7, 2000 follow-up report, requested by the Office, Dr. Brodie stated that appellant could work light duty 8 hours a day with no lifting over 10 pounds and no walking or standing for more than 4 hours.

The record contains a June 16, 2000 note to the file indicating that the employing establishment had no light-duty work available and that appellant was to be referred to vocational rehabilitation on June 22, 2000. In a November 6, 2000 report, Corinne Porter, a rehabilitation counselor stated that appellant was cooperating but did not believe that she could return to work for eight hours a day. In a November 10, 2000 report, Dr. Dhillon stated that appellant was totally disabled from working as she had pain in her thoracic and lumbar spine and refused to undergo needed surgical intervention, including a laminectomy, discectomy and arthrodesis with probable instrumentation and bone graft.

Appellant continued to participate in vocational rehabilitation while expressing concerns that she could not work an eight-hour day. In a December 7, 2000 letter, the rehabilitation counselor stated that a plan had been devised for appellant with the goal of training her to perform clerical duties in a medical office; a job that was readily available in appellant's area. In an October 30, 2001 form report, Dr. Brodie indicated that appellant could perform the administrative assistant job.

In a January 12, 2001 letter, appellant stated that she could not attend the training classes due to medications she was taking. In a February 20, 2001 letter, the Office informed appellant that it approved her rehabilitation plan and told her of the penalties for failing to participate in rehabilitation. In a March 26, 2001 letter to the Office, appellant contended that she was totally disabled as her condition was worsening, she was depressed and she had recently fallen down when her legs gave out. In a March 29, 2001 letter, the Office reminded appellant that the medical evidence supported that she could attend rehabilitation classes and perform in the position recommended and that there were penalties for refusing to participate. Appellant did not report at the beginning of her course work for the period March 1 to 31, 2001. In a July 13, 2001 letter, the Office advised appellant that she had 30 days to begin her rehabilitation program or face penalties. In a July 18, 2001 letter, appellant stated that she was not refusing to participate but she was unable to do so. The Office placed appellant on “interrupt status” on December 4, 2001.

In a December 20, 2001 letter, the Office determined that there was a conflict in the medical evidence between Drs. Dhillon and Brodie on the issue of whether appellant could participate in vocational rehabilitation and perform light-duty work. Appellant was referred together with a statement of accepted facts to Dr. Joseph P. Klein, a Board-certified orthopedic surgeon, for an impartial medical examination. In a January 22, 2001 report, Dr. Klein, diagnosed “degenerative arthritis of the lower lumbar spine with central canal stenosis at L4-5 with a four to five mm disc bulge associated with a bilateral lower extremity sciatic root symptoms.” He noted on examination that appellant had intermittent, minimal to slight lumbosacral pain, which become moderate with continuous or frequent bending, crouching, stooping, lifting, carrying and twisting. Dr. Klein noted that an MRI scan showed a slight reduction in lumbosacral spine motion. He added that appellant was not a candidate for surgery as there was no impingement by either disc or bony tissue on the nerve roots and no foraminal stenosis was noted. He added that appellant’s pain complaints far exceeded her demeanor as she rated her pain at a 10, but she was able to move easily, used no assistive devices and performed motions with her extremities and spine without significant pain. Dr. Klein opined that appellant could perform light duty and participate in vocational rehabilitation.

In a March 20, 2002 letter, appellant disagreed with Dr. Klein noting that she had taken two Vicodin prior to the examination. She also submitted a March 18, 2001 report from Dr. Dhillon who again found appellant was totally disabled due to her work injury.

In an April 7, 2002 report, the rehabilitation counselor noted that appellant refused to meet with her. In an April 29, 2002 letter, appellant contended that she was unable to participate in rehabilitation as she could not sit for 10 minutes and was seeking treatments from a pain management clinic. In a June 4, 2002 letter, the Office advised appellant that the medical evidence supported that she could perform the job the rehabilitation program had designed for her.

On September 30, 2002 the Office proposed reducing appellant’s compensation for refusing without good cause to participate in vocational rehabilitation. In an October 24, 2002 letter, appellant reiterated that she could not participate in rehabilitation as she was in constant pain and taking muscle relaxing and pain pills.

In a December 3, 2002 decision, the Office reduced appellant's compensation by \$285.81 per week, finding that she refused, without good cause, to participate in vocational rehabilitation and that \$285.81 was the amount she would have earned had she completed the vocational rehabilitation program and worked as a receptionist.

In a January 2, 2003 letter, appellant requested reconsideration and submitted a December 2, 2003 report from Dr. Lowell Reynolds, a pain management specialist, who addressed the medications she was taking.

By decision dated April 9, 2003, the Office denied modification of the December 3, 2002 decision.

LEGAL PRECEDENT

Section 8113(b) of the Federal Employees' Compensation 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

ANALYSIS

The Board finds that the Office properly reduced appellant's compensation by \$258.81 per week effective December 29, 2002 as she failed, without good cause, to participate in rehabilitation efforts.

In the present case, the Office properly determined that the medical evidence supported that appellant could perform in a clerical position. In making this determination, the Office relied on the medical report of Dr. Klein, a Board-certified orthopedic surgeon, selected as the impartial medical examiner. Dr. Klein was chosen to resolve a conflict in the medical evidence between Dr. Dhillon, appellant's treating physician and Dr. Brodie, an Office referral physician. In situations where there exist 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 upon a proper factual background, must be given special weight.²

¹ 5 U.S.C. § 8113(b).

² *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

The Board has carefully reviewed the opinion of Dr. Klein and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Klein's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, Dr. Klein provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing, and reached conclusions regarding appellant's condition which comported with this analysis.³ Dr. Klein provided medical rationale for his opinion by explaining that on examination he found no objective evidence to support that appellant could not perform vocational rehabilitation or the position of a clerk. He noted that her demeanor was inconsistent with her stated level of pain and that on examination she had intermittent, minimal to slight lumbosacral pain, which become moderate with continuous or frequent bending, crouching, stooping, lifting, carrying and twisting. He noted that an MRI showed a slight reduction in lumbosacral spine motion. Dr. Klein added that appellant was not a candidate for surgery as there was no impingement of either disc or bony tissue on the nerve roots and no foraminal stenosis was noted. Dr. Klein's report, as that of the impartial medical specialist is entitled to great weight and constitutes the weight of the medical evidence in this case.

While appellant subsequently submitted a report dated December 2, 2003 from Dr. Reynolds, this report merely noted appellant's pain complaints and addressed current medications. This report did not address appellant's condition in December 2002 and did not offer any opinion regarding appellant's ability to participate in vocational rehabilitation, as such this report is of limited probative value to the issue in this case and is not sufficient to outweigh the report of the impartial medical specialist.

The Board further finds that the Office properly reduced appellant's compensation effective December 29, 2002 on the grounds that she failed, without good cause, to participate in vocational rehabilitation efforts. The record reveals that appellant refused to participate in vocational rehabilitation program that was consistent with her medical restrictions and approved by the Office.

The Office advised appellant in letters dated June 4 and September 30, 2002 that failure to participate in vocational rehabilitation efforts when she had not established that her medical condition justified such failure would result in penalties, that she had 30 days to participate in such efforts or provide good cause for not doing so; and that her compensation would be reduced if she did not comply within 30 days with the instructions contained in the letters.

In spite of the Office's warnings, appellant did not participate in the vocational rehabilitation efforts or provide good cause for not doing so within 30 days of the Office's letters.

³ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation as she failed, without good cause, to participate in vocational rehabilitation efforts.

ORDER

IT IS HEREBY ORDERED THAT the April 24, 2003 decision by the Office of Workers' Compensation Programs is affirmed.

Issued: September 21, 2004
Washington, DC

Alec J. Koromilas
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member