United States Department of Labor
Employees' Compensation Appeals Board

BARBARA ANN WILSON, Appellant	)	
and	)	**Docket No. 04-1940**
	)	**Issued: June 21, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Tabor City, NC, Employer	)	

Appearances:
Barbara Ann Wilson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On July 29, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated September 24, 2003 and June 17, 2004 which found that appellant failed to participate in the Office's vocational rehabilitation program without good cause. Appellant also timely appealed a July 6, 2004 decision which found that she had not established entitlement to a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of these decisions.

ISSUES

The issues are: (1) whether the Office properly reduced appellant's compensation benefits under 5 U.S.C. § 8113(b) to reflect her loss of wage-earning capacity had she continued to participate in vocational rehabilitation; and (2) whether appellant is entitled to a schedule award.

FACTUAL HISTORY

On June 7, 2000 appellant, then a 43-year-old rural carrier, filed a traumatic injury claim, alleging that, while reaching into the back seat of her car to pick up mail, she pulled her neck and right shoulder. The Office accepted appellant's claim for cervical strain, right shoulder strain and left rotator cuff repair. On December 5, 2000 appellant was assigned a registered nurse to assist her in recovery from her employment injury.

On November 16, 2001 appellant filed a claim for a schedule award.

By letter dated July 2, 2002, the Office referred appellant to Sondra Henry for the development of a vocational rehabilitation program aimed at restoring her to gainful employment in the open labor market. Ms. Henry first met with appellant on July 17, 2002 at which time she referred appellant for a vocational rehabilitation evaluation. Although appellant missed several appointments, Karen Campbell, a clinical psychologist, evaluated her on November 19 and 25, 2002. She indicated that appellant was at an average range of intellectual functioning overall and that appellant may have a mild adjustment disorder but that there was no evidence of a major psychological disorder. Ms. Campbell noted that appellant could benefit from some direction in identifying and channeling her resources and talents. On December 13, 2002 Ms. Henry indicated that a vocational rehabilitation plan had been approved for appellant. In a report dated December 17, 2002, Ms. Henry indicated that, based on the intellectual, academic and personality tests, appellant could benefit from additional training at Cape Fear Community College with the goal of becoming a hotel manager or restaurant manager with an entry level salary of $25,000.00 per year. On December 23, 2002 appellant signed an agreement with Ms. Henry establishing her vocational rehabilitation plan which involved agreeing to participate full time in classes leading to an associates degree and job placement. On January 7, 2003 Ms. Henry indicated that appellant was being trained on January 7, 2003 and would complete her associates degree in hotel management by December 2004. She indicated that the labor market survey confirmed that these jobs were being performed in sufficient numbers within appellant's commuting area, was in the sedentary to light-duty range and, therefore, consistent with the work restrictions as outlined by her physicians. The salary of these jobs ranged from $25,000.00 to $30,000.00. By letter dated January 10, 2003, the Office informed appellant that she was expected to cooperate fully with the plan.

In a medical report dated February 10, 2003, Dr. George V. Huffmon, III, an attending Board-certified neurosurgeon, listed his impression as follows:

> "Cervical spondylosis, degenerative disc disease at 4-5/5-6 with arterolisthesis at 4 on 5. I feel we need to repeat her cervical magnetic resonance imaging (MRI) [scan] to make sure that nothing has worsened. We wi[ll] repeat her flexion/extension films and we are going to go ahead and check an MRI [scan] of the brain because of this left facial weakness. I do have a problem with her driving from Whiteville to Wilmington to go to Cape Fear. There is a community college much closer to her that would be easier on her driving. The last thing in the world we want her to do is drive long distances. My recommendation is that they try to get her into classes closer to home…."

By letter dated February 28, 2003, the Office notified appellant that it had been advised she stopped participating in the Office-approved training program in hotel management as she believed that it was beyond her ability to drive 45 minutes to school. The Office noted that it had no previous record of any injury-related driving restrictions. The Office advised appellant to submit a detailed medical report which provided an explanation as to why she was unable to drive; (2) the objective findings supporting the opinion and an explanation of the maximum number of hours and miles that appellant was able to drive in one sitting. The Office noted that section 8113(b) of the Federal Employees' Compensation Act provides that, if an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed and the Office finds that, in the absence of such failure, the individual's wage-earning capacity would probably have increased substantially, it could reduce 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 vocational rehabilitation. The Office informed appellant that, if she did not comply with the instruction to undergo the approved training program or did not show good cause for not undergoing the training program, the rehabilitation effort would be terminated and action initiated to reduce her compensation to reflect her probable wage-earning capacity.

On March 27, 2003 appellant submitted the results of an x-ray taken of the cervical spine on March 13, 2003. Dr. E. David Evans, a Board-certified radiologist, listed his impression as: "Subluxation of C4 upon C5 with flexion that does reduce with extension. Overall this is similar to May 22, 2001." Dr. Bill H. McCuskey, a Board-certified radiologist, interpreted an MRI scan of the same date as showing minimal C4-5 and C5-6 spondylosis with no significant change since the prior examination of May 22, 2001.

By decision dated April 23, 2003, the Office adjusted appellant's compensation because it found that she had failed, without good cause, to undergo vocational rehabilitation as directed. The Office found that appellant's former position paid $731.67 per week and currently paid $831.33 per week. It determined that she had a wage-earning capacity as a hotel/motel manager of $27,500.00 per year, or $528.00 per week. The Office found that appellant's loss in earning capacity was $263.41 per week, that her new compensation rate every four weeks was $820.00 with a net compensation every four weeks of $595.04.

In a note dated June 28, 2003, appellant requested reconsideration. She indicated that Dr. Huffmon took her out of school in January and that she did not quit on her own. Appellant noted that her husband, brother or friend drives her to her doctor's appointments. She submitted a July 10, 2003 report by Dr. Huffmon, who stated:

> "[Appellant] has cervical degenerative disc disease at C4-5 and C5-6 with a bulging disc and anterolisthesis at C4-5 that changes about two [millimeters] in flexion. What I have requested is that appellant be sent to school closer to her home than having to come all the way into Wilmington to Cape Fear Community College on a daily or even three times a week basis. The woman has neck pain. She has cervical degenerative disc disease and anterolisthesis at 4-5 and it hurts her to drive. If forced to drive, she certainly can, but she is in such pain when she gets there that she is not able to concentrate on her school work. It is not unreasonable to ask since there is a closer community college for her to be enrolled there rather than having to drive to Wilmington. I feel it is paramount to

> punishing [appellant] for having cervical degenerative disc disease when another less painful alternative is clearly available. I would request that the [Office] reconsider this. Common sense and human compassion would dictate it is the best alternative."

In an August 5, 2003 note, Dr. Huffmon indicated that he did not believe that appellant needed surgery and recommended a pain clinic for evaluation and physical therapy. On August 5, 2003 appellant had an x-ray which was interpreted by Dr. L. Neal Beard, Jr., a Board-certified radiologist, as indicating "anterolisthesis of C4 on C5 which is exacerbated slightly with flexion and reduces somewhat on extension as described above."

By decision dated September 24, 2003, the Office determined that the evidence was not sufficient to establish that appellant was unable to participate in the vocational rehabilitation program as directed.

By letter dated January 29, 2004, the Office asked appellant to contact her doctor for an appointment to obtain an impairment rating.

By letter dated February 20, 2004, appellant again requested reconsideration. Appellant contended that she did not request to attend classes at Cape Fear Community College and she noted that another college was closer to her home but that the vocational rehabilitation counselor indicated that it did not offer the recommended program. Appellant submitted a March 2, 2004 note from Dr. Huffmon who indicated that appellant was still having bilateral neck pain and pain running down her left arm with numbness and tingling in her fingers on both sides. Appellant received a transforaminal epidural steroid injection at C4-5 on March 30, 2004.

By letter dated April 19, 2004, the Office requested that Dr. Huffmon provide an impairment rating. If appellant was not found at maximum medical improvement or if he was unable to provide this information, the physician was asked to advise the Office. A copy of this letter was received by the Office on April 26, 2004 and contained a handwritten note that Dr. Huffmon had referred appellant to Dr. David Esposito, a Board-certified orthopedic surgeon, and that Dr. Huffmon did not perform impairment ratings.

By decision dated June 17, 2004, the Office denied modification of the September 24, 2003 decision.

By decision dated July 6, 2004, the Office denied appellant's claim for a schedule award.

LEGAL PRECEDENT -- ISSUE 1

Section 8104 of the Act provides that the Secretary of Labor may direct a permanently disabled individual whose disability is compensable under the Act to undergo vocational rehabilitation.[1] The Act and the implementing regulations provide for sanctions if an employee

[1] 5 U.S.C. § 8104(a).

without good cause fails to apply for and undergo vocational rehabilitation as directed.[2] 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:

> "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:
>
> > (a) When a suitable job has been identified, [the Office] will reduce the employee's future monetary compensation based on the amount which would likely have been his or her wage-earning capacity had he or she undergone vocational rehabilitation. [The Office] will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with the [Office] nurse and the employer. The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of [the Office]."[3]

Application of the principles set forth in *Albert C. Shadrick*[4] will result in the percentage of the employee's loss of wage-earning capacity.

ANALYSIS

The Board finds that the Office properly determined that appellant's benefits should be reduced based on her ability to earn wages as a hotel/motel manager. Appellant failed to comply with the Office's vocational rehabilitation program. By letter to appellant dated February 28, 2003, the Office informed appellant that it had been advised that she had stopped participating in the approved training program. The Office asked appellant to provide medical evidence that she was unable to drive to her classes. The Office informed appellant that, if she did not comply with the instructions to undergo the approved training program or show good cause for not undergoing the training program within 30 days, action would be initiated to reduce her compensation based on probably wage-earning capacity in hotel/motel management. A formal decision issued on April 23, 2003 reduced appellant's compensation benefits to reflect her wage-earning capacity as a hotel/motel manager. Subsequently, appellant submitted evidence by Dr. Huffmon indicating that he had a problem with her long drive to go to Cape Fear to attend classes and recommended that she attend classes closer to home. Dr. Huffmon indicated that, although appellant could drive to school, she was in so much pain once she arrived that she could not concentrate on her schoolwork. However, Dr. Huffmon did not supply a rationalized reason

[2] 5 U.S.C. § 8113(b); 20 C.F.R. § 10.519.

[3] 20 C.F.R. § 10.519 (1999).

[4] 5 ECAB 376 (1973); 20 C.F.R. § 10.403(d)-(e).

that appellant cannot attend school as directed by the vocational rehabilitation program. Dr. Huffmon does not indicate how far appellant can drive. Furthermore, Dr. Huffmon had not indicated prior to the assignment of appellant to classes that she could not drive for long distances.

Based on the position of hotel/motel manager which paid a rate of $27,500.00 annually and application of the principles set forth in *Albert C. Shadrick*, codified at 20 C.F.R. § 10.403, the Office determined that appellant's loss of wage-earning capacity was $263.41 based on a weekly pay rate of $731.67 minus the adjusted earning capacity of the new position of $486.26. Utilizing the correct compensation rate of three-fourths, the Office determined that appellant was entitled to a compensation rate of $197.56 per week, increased by applicable cost-of-living adjustments of $205.00 per week to equal a new compensation rate of $820.00 every four weeks. The Office made deductions of $210.44 for health insurance premium and $1.80 for optional life insurance to equal $595.04 every four weeks. The Board has reviewed these calculations and finds that they appropriately represent appellant's loss of wage-earning capacity.

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of the Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for permanent impairment of the scheduled member or function. A claimant seeking a schedule award under section 8107, therefore, has the burden to establish that she sustained a permanent impairment of a schedule member or function as a result of an injury sustained while in the performance of duty.[5]

Section 8107 of the Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[6] The Act, however, doe not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[7] The fifth edition of the A.M.A., *Guides* was required on all medical opinions dated after February 1, 2001.[8]

[5] *See, e.g., Ernest P. Govednik*, 27 ECAB 77 (1975) (no medical evidence that the employment injury caused the claimant to have a permanent loss of use of a leg or any other member of the body specified in the schedule.)

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404 (1999).

[8] FECA Bulletin No. 01-05 (issued January 29, 2001); *see also Jesse Mendoza*, 54 ECAB ___ (Docket No. 03.1516, issued September 10, 2003); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

ANALYSIS -- ISSUE 2

Appellant has not submitted any rationalized medical evidence that supports that she had sustained any permanent impairment to a portion of her body covered by the schedule. The Office asked appellant's physician, Dr. Huffmon, to provide an impairment rating on appellant. However, Dr. Huffmon responded that would not do an impairment rating on appellant's shoulder and had referred appellant to Dr. Esposito. However, there is no report from Dr. Esposito in the record. The Board notes that appellant was provided with an opportunity to submit relevant medical evidence; however, the record does not contain sufficient medical evidence to establish any permanent impairment entitling her to a schedule award. Accordingly, the Office properly denied appellant's schedule award claim.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation benefits under 5 U.S.C. § 8113(b) to reflect her loss of wage-earning capacity had she continued to participate in vocational rehabilitation. The Board further finds that the Office properly denied appellant's claim for a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 6 and June 17, 2004 and September 24, 2003 are affirmed.

Issued: June 21, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member