United States Department of Labor
Employees' Compensation Appeals Board

RHONDA F. NELSON, Appellant	)	
and	)	**Docket No. 04-2123**
	)	**Issued: November 14, 2005**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Fresno, CA, Employer	)	

Appearances:
Thomas P. Fochs, for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 31, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated August 25, 2004, for denial of a claim for recurrence of disability, and July 23, 2004, denying modification of a September 12, 2001 Office decision reducing compensation due to her refusal to cooperate with vocational rehabilitation efforts. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly reduced appellant's compensation benefits on the grounds that she refused to cooperate with vocational rehabilitation efforts; and (2) whether appellant sustained a recurrence of disability causally related to her accepted bilateral carpal tunnel syndrome and bilateral medial epidcondylitis conditions.

FACTUAL HISTORY

Appellant, a 38-year-old mail processing equipment operator, filed a Form CA-2 claim for benefits on December 1, 1997, alleging that she developed bilateral carpal tunnel syndrome and bilateral elbow tendinitis conditions causally related to factors of her employment. On December 30, 1997 the Office accepted the claim for bilateral carpal tunnel syndrome and bilateral medial epicondylitis conditions. The Office commenced appellant's appropriate compensation for temporary total disability.

In a report dated April 12, 1999, Dr. Edward A. Lembert, a Board-certified orthopedic surgeon and appellant's treating physician, stated that appellant had trouble typing for more than 10 to 15 minutes at a time, which resulted in numbness in her hands. He advised that appellant was permanent, stationary and ratable. Dr. Lembert stated that appellant should not be assigned to jobs requiring repetitive use of her arms or hands, with no gripping or lifting more than five pounds on a permanent basis. In an April 15, 1999 work capacity evaluation, he indicated that appellant should be completely limited from repetitive movements involving the wrists and elbows and should engage in no lifting of more than five to ten pounds.

On June 2, 1999 the Office authorized appellant's referral for vocational rehabilitation.

The vocational rehabilitation counselor identified three positions within the restrictions outlined by Dr. Lembert: one for database administrator; one for user support analyst; and one for computer systems hardware analyst. Dr. Brian H. Clague, Board-certified orthopedic surgeon and appellant's new treating physician, approved the database administrator and computer systems hardware analyst positions as within her physical restrictions on March 17, 2000. In an Office memorandum dated April 25, 2000, the Office rehabilitation specialist stated that the vocational rehabilitation counselor had submitted a training program at San Joaquin Valley College in Fresno, California, which outlined a plan to train appellant for the three selected positions listed above.[1]

By letter dated May 16, 2000, the Office advised appellant that the positions identified by the vocational rehabilitation counselor and approved by Dr. Clague were within her physical limitations. The Office advised appellant that she was expected to begin working at or training for these positions.

In a report dated May 23, 2000, the vocational rehabilitation counselor stated that she had contacted San Joaquin Valley College and enrolled appellant in one of its training programs. Appellant's first class was scheduled for June 26, 2000. In a June 30, 2000 progress report, the vocational rehabilitation counselor stated that appellant had attended one class on June 26, 2000 but had not returned to class since then; she stated that she asked appellant how her day had gone and appellant had replied that she was experiencing physical problems with her hands.

[1] In the April 25, 2000 Office memorandum, the Office rehabilitation specialist noted that Dr. Clague had only approved job descriptions for computer systems hardware analyst and date base administrator. He stated, however, that, as the physical demands for the user support analyst are substantially similar to those entailed by the other two positions, the suitability of the other third position "appears to be established."

By letter dated August 2, 2000, the Office advised appellant that it proposed to reduce her compensation for wage loss to zero pursuant to section 8113(b),[2] because she had refused to cooperate with vocational rehabilitation efforts. The Office advised appellant that it had been informed by the vocational rehabilitation counselor that she had missed 13 of her first 15 classes at San Joaquin Valley College and had been dropped from the program.[3] The Office noted that although appellant had apparently mentioned having medical problems to school officials, it had no documentation of any medical condition which would have prevented her from attending school.[4] The Office advised appellant, if she failed or refused to participate in vocational rehabilitation without good cause, her compensation benefits would be reduced based on what probably would have been her wage-earning capacity had he or she not failed to apply for and undergo vocational rehabilitation. The Office then directed appellant to undergo the training program in computer support technology which was approved by the Office, and to contact the Office to make necessary arrangements to resume the training program. The Office advised her that, if she believed she had sufficient reasons or justification for not participating in the training program, she should state the reason in writing to the Office with supporting documentation. The Office afforded appellant 30 days to make a good faith effort to participate in vocational rehabilitation efforts and undergo the approved training program, or it would reduce her compensation to zero pursuant to section 8113(b).[5]

By letter to the Office dated August 28, 2000, appellant denied that she refused to attend classes at San Joaquin Valley College. Appellant alleged that she had not spoken to or been contacted by her vocational rehabilitation counselor since May 2000, and accused the vocational rehabilitation counselor of giving the Office inaccurate information. She stated that, although she had been looking forward to attending classes in order to get out of her house and be around people again, she told her vocational rehabilitation counselor that she felt an accelerated program would result in excessive homework, which would be difficult for her to complete in light of her bilateral hand conditions. Appellant stated that she told her school adviser about her disability and decided that it was in everyone's best interest that she take a leave of absence from the program in order to ameliorate her work-related hand and elbow symptoms. Appellant also alleged that she unsuccessfully attempted to schedule an appointment with Dr. Clague but was given "the runaround."

In support of her assertions, appellant submitted an August 24, 2000 report from Dr. Kenneth O'Brien, a Board-certified orthopedic surgeon, who stated that appellant had to quit

[2] 5 U.S.C. § 8113(b).

[3] In a July 20, 2000 report from San Joaquin Valley College, an advising committee from the school indicated that appellant had not attended 13 of the 15 scheduled classes and had completed 3 homework assignments of the 12 due. Appellant had apparently informed her admissions advisor that her medical problems might prevent her from returning to class. The report noted that, if she were to return to class at that time, it would have been extremely difficult for her to pass the course. The committee concluded that, if appellant were able to regularly attend class, complete her homework and take the examinations she could be successful in the course.

[4] In an Office memorandum dated August 2, 2000, the Office noted that the vocational rehabilitation counselor stated that appellant had not responded to telephone messages and indicated that her telephone does not accept calls from blocked numbers; therefore, they were unable to contact her.

[5] 5 U.S.C. § 8113(b).

attending classes at San Joaquin Valley College due to the stress of the program. He stated that the repetitive motions required by her class assignments caused severe exacerbation of pain. Dr. O'Brien stated that he intended to schedule appellant for surgery to correct her condition at a subsequent date. In an Office memorandum dated September 5, 2000, it was noted that appellant had not contacted San Joaquin Valley College or the vocational rehabilitation counselor since the August 2, 2000 warning letter had been issued.

In an Office memorandum dated October 3, 2000, the Office rehabilitation specialist stated that the Office had received no new medical report or request for surgery authorization from Dr. O'Brien since his August 24, 2000 report. The Office stated that it would not implement sanctions for noncooperation at that time, but would contact Dr. Clague, the attending physician, for an updated report. In an October 10, 2000 Office memorandum, the Office indicated that the vocational rehabilitation counselor was outlining a less accelerated training program and had located two new positions which it would submit for Dr. Clague's approval. The Office further noted that appellant was not responding to the vocational rehabilitation counselor's telephone calls, which raised a possible noncooperation issue.[6]

In a report dated November 2, 2000, Dr. Clague stated that appellant had undergone repeat nerve conduction studies in both of her arms which showed that there was no ulnar entrapment. He did note that appellant had some mild findings of a residual carpal tunnel syndrome. Dr. Clague further indicated that he had reviewed and approved the job description for graphic designer, DOT #141.061-018 and desktop publisher, DOT# 979.382-026, the new positions located by the vocational rehabilitation counselor. He stated that both of these were sedentary jobs, although they required a lot of hand movement with a mouse, and asserted that "she would do fine with this as long as she [did] not have to do a lot of forced gripping." On November 9, 2000 and December 18, 2000 Dr. Clague indicated to the vocational rehabilitation counselor that appellant could perform the graphic designer and desktop publisher positions.[7]

In a February 16, 2001 progress report, the vocational rehabilitation counselor stated that, although appellant, after rescheduling a December 27, 2000 appointment, had resolved to schedule another appointment with her after returning home after the holidays on January 16, 2001, she had failed to attend another appointment scheduled for January 22, 2001. The vocational rehabilitation counselor stated that appellant did not contact her to either explain her absence at the January 22, 2001 meeting or try to reschedule another appointment.

In a March 7, 2001 Office memorandum, the Office rehabilitation specialist stated that he would recommend treating appellant's pattern of missed appointments and refusal to contact the vocational rehabilitation counselor as noncooperation. He advised that, since a warning letter was previously released, a sanctions decision could be issued.

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[6] In an Office memorandum dated December 19, 2000, the Office noted that appellant was still not returning the vocational rehabilitation counselor's telephone calls. In an Office memorandum dated December 27, 2000, the Office stated that the vocational rehabilitation counselor received a letter from a claimant stating that her telephone had been disconnected and that she will be out of state for the holidays and would reschedule her appointment upon her return.

[7] The job descriptions for both of these positions indicated that appellant would need to complete a six-month educational program in order to qualify for them.

By decision dated September 12, 2001, the Office reduced appellant's wage-loss compensation benefits to zero on the grounds that she refused to participate in vocational rehabilitation without good cause. The Office stated that appellant had been referred for vocational rehabilitation, which had identified several jobs approved by his treating physician, Dr. Clague. The Office indicated that, when appellant missed 13 of the 15 classes at the training program which was necessary to complete in order for her to prepare for the identified jobs, and when she did not respond to telephone calls from the vocational rehabilitation counselor, it had issued a warning letter on August 2, 2000. The Office stated that, after appellant indicated that her participation in the classes had aggravated her accepted conditions, it had made efforts to secure alternative training programs which would be less intensive. The Office then located positions which were approved as within her physical limitations by Dr. Clague; however, when she continued to fail to contact her vocational rehabilitation counselor and continued to miss appointments, and failed to make efforts to begin training for the alternative programs, the Office determined that this pattern of noncooperation warranted sanctions.

The Office therefore reduced appellant's compensation based on 66 and 2/3 percent of the difference between her pay rate as determined for compensation purposes and what her wage-earning capacity would have been if she had cooperated with vocational rehabilitation efforts. In light of her noncooperation with vocational rehabilitation, the Office reduced her compensation to zero effective October 7, 2001, finding that the evidence of record showed that the position of database administrator represented her wage-earning capacity.

By letter dated October 10, 2001, appellant expressed her disagreement with the Office's September 12, 2001 decision reducing her compensation on the grounds that she refused to cooperate with vocational rehabilitation efforts. She asserted that Dr. Clague was not her treating physician, that the Office had authorized treatment by Dr. Clague only for a one-time visit in order to evaluate her condition for the San Joaquin Valley College training program. Appellant also denied the vocational rehabilitation counselor's assertion that she had engaged in a pattern of missed appointments.

In a report dated December 17, 2001, Dr. Ahsan K. Bajwa, Board-certified in psychiatry and neurology, stated that appellant began having pain and paresthesias in 1997, with symptoms that were initially nocturnal but had increased progressively and were present most of the time. Dr. Bajwa stated that appellant's hands fall asleep on a frequent basis, with pain extending to the elbows. He related that she dropped objects and that her hands fell asleep while driving, using the telephone and performing other, similar movements. Dr. Bajwa advised that appellant indicated that she continued to have constant pain and paresthesias, with moderate to severe pain, intermittently. Appellant stated that her pain increased with activity requiring pushing, pulling lifting, turning and twisting or with any other activity, and was present in both arms. Dr. Bajwa advised that appellant was permanently disabled and unable to return to her regular work and was also unable to return to vocational rehabilitation because of the severe pain and disability that she was experiencing. He recommend that appellant be examined by a hand surgeon but was very reluctant to do so.

In reports dated March 7 and 27, 2002, Dr. Bajwa essentially reiterated his previous findings and his conclusion that appellant remained totally disabled and unable to work. Dr. Bajwa stated in a March 20, 2002 disability slip that appellant would be disabled from

October 1, 2001 to June 20, 2002. In a report dated May 23, 2002, Dr. Bajwa stated that appellant had severe epicondylitis and severe tendinitis. He opined that she would be temporarily and totally disabled for the next six weeks.

By letter dated August 12, 2002, appellant requested reconsideration of the Office's September 12, 2001 decision. She denied that she had engaged in a pattern of noncooperation, asserting that she had difficulty obtaining medical records that the vocational rehabilitation counselor was receiving, that she was never warned there was a problem with her missing appointments, and that she would always call the vocational rehabilitation counselor whenever she missed an appointment. Appellant also asserted that the training programs that the vocational rehabilitation counselor was proposing for her were not appropriate for someone with her type of disability and her levels of training, education and experience.

Dr. Abbas Mehdi, a specialist in neurological surgery, performed a nerve conduction velocity study on January 29, 2003, which indicated that the median and ulnar nerves were within normal limits with normal conduction velocities. In a report dated May 28, 2003, Dr. Mehdi stated that when he examined appellant on July 10, 2002 she related complaints of hand, wrist and elbow pain, moderate to severe. He advised that the tests appellant underwent on January 29, 2003 clearly indicated absence of carpal tunnel syndrome and likely resolving of her carpal tunnel-related symptoms, mainly because she had had surgery performed. Dr. Mehdi stated that during this time appellant was continued on total temporary disability, mainly because she continuously complained of having severe pain. He related that, when he raised the issue of returning her to light duties, she indicated that she would not be able to do so. Dr. Mehdi stated that, during his most recent examination of appellant, on May 19, 2003, she was again complaining of moderate to severe pain bilaterally in her hands, elbows and wrists. She indicated that she had weakness in her hands and wrists, was dropping things, and had a tingling and abnormal sensation in her bilateral upper extremities. Dr. Mehdi stated that he advised appellant that he wanted to try to return her to at least light duty or modified duties before declaring her completely disabled.

In a September 24, 2003 letter, appellant indicated her willingness to cooperate with the Office's vocational rehabilitation program.

By letter dated April 19, 2004, appellant's attorney contended that the Office erred in reducing appellant's compensation to zero on the grounds that she refused to cooperate with vocational rehabilitation efforts in its September 12, 2001 decision. Appellant's attorney contended that: (a) there was no evidence that the Office or any physician considered all of appellant's accepted conditions when developing a vocational rehabilitation program for her. He stated that appellant had a prior accepted claim for overuse syndrome of the left shoulder and cervical strain, and that there is no evidence these claims were factored into the work restrictions issued by appellant's physicians; (b) there was no demonstration in the file that the Office had determined her conditions were permanent before she was referred to the vocational rehabilitation program, as is required under section 8104; (c) because Dr. Lembert had admitted to operating on the wrong body part, the Office was under an obligation to assist appellant with developing medical evidence as to whether or not she suffered injury or damage to the body part on which Dr. Lembert wrongly operated. Consequently, appellant's attorney contended that the claim must be accepted for surgery on a lateral epicondyle of the right elbow, as the malpractice

by Dr. Lembert was a consequence of the accepted conditions and the accepted surgeries in this case; (d) the positive electromyelogram of December 5, 2001 cited by Dr. Bajwa in his December 17, 2001 report demonstrated that appellant was justified in limiting the vocational rehabilitation effort; (e) the objective to train appellant as a database operator was beyond her physical limitations; appellant's attorney asserted that "it is common knowledge that to become a database administrator [appellant] needed to continuously engage in 'repetitive use of her arms and hands' [and therefore,] the intended goal of the vocational rehabilitation program ignored [appellant's] physical and medical disabilities and the work restrictions placed upon her by Dr. Lembert and … Dr. Clague"; the selected position was beyond appellant's established medical restrictions and limitations; (f) Dr. Clague approved positions that required appellant to engage in repetitive activity with her upper extremities for up to two thirds of her workday and lift up to 10 pounds, thereby exceeding her established medical restrictions and work limitations; (g) the Office improperly reduced appellant's compensation because the vocational rehabilitation was not designed to train appellant to become a database administrator.

Appellant's attorney further contended that appellant's advanced age, in addition to her lack of training, education and experience, even had she completed the training program developed by the Office, disqualified her from a position as a database administrator with any of the employers identified by the labor market survey. In addition, he stated that of the eight employers identified, six specifically stated that they were not hiring for the position of database administrator and did not foresee hiring in the future. He stated that of the two employers that may have been hiring for that position, both required either system certification or system specific knowledge which appellant would not have attained at the conclusion of the training program developed by the Office's vocational rehabilitation counselor. Thus, appellant's attorney contended that the labor market survey clearly demonstrated that a database administrator position was not readily available to someone with appellant's age, experience and knowledge.[8]

With regard to the Office's finding that appellant engaged in a pattern of noncooperation with her vocational rehabilitation counselor, appellant's attorney stated that although she missed appointments with the vocational rehabilitation counselor, this was because she was unable to drive to those appointments because of her disability with her upper extremities. Appellant's attorney indicated that appellant either rescheduled the missed appointments or completed telephonically; however, the vocational rehabilitation counselor never informed the Office that appellant had done these things. Appellant's attorney contended that the vocational rehabilitation training plan failed to provide appellant with required training, such as courses in

[8] Appellant's attorney stated:

> "Of the eight employers interviewed [for the database administrator position] three required a degree and two required system certification or system-specific training and knowledge. Because [appellant's] training program was not leading to a degree, nor was it proving her with the required system certification or system specific knowledge required of five employers, she was unqualified for a position with employers one, two, three, six and seven. Every employer required a minimum of six months experience, if not two to three years of experience as a database administrator. However, the only employer accepting as little as six months of computer experience, the City of Fresno, stated that it was not hiring for the targeted position for the foreseeable future."

A+ Microsoft Windows and networking -- which were required to qualify her for a position as a database administrator, as demonstrated by the labor market surveys relied upon by the Office in its decision of September 12, 2001. Finally, appellant's attorney contended that appellant submitted medical evidence sufficient to establish that she was totally disabled because of her accepted conditions and was therefore unable to complete her training program and unable to perform the selected positions referenced in the September 12, 2001 Office decision.

On June 5, 2004 appellant filed a Form CA-2a claim for benefits, alleging that she sustained a recurrence of disability on December 5, 2001 which was causally related to her accepted condition.

By letter dated June 30, 2004, the Office advised appellant that it required additional factual and medical evidence to determine whether she was eligible for compensation benefits based on a recurrence of disability. The Office asked appellant to submit a comprehensive medical report from her treating physician describing her symptoms and the medical reasons for her condition, and an opinion as to whether her claimed condition as of December 5, 2001 was causally related to her April 5, 2003 employment injury.

By decision dated July 23, 2004, the Office denied modification of the September 12, 2001 decision reducing compensation.

By decision dated August 25, 2004, the Office denied appellant compensation for a recurrence of her accepted bilateral carpal tunnel and epicondylitis conditions. The Office found that appellant failed to submit medical evidence sufficient to establish that the claimed conditions or disability as of December 5, 2001 which was caused or aggravated by the accepted conditions.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act, in 5 U.S.C. § 8113(b) states:

> "If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of this title, the [Office], 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 [Office]."[9]

The Act further provides: "If an individual without good cause fails to apply for and undergo vocational rehabilitation, when so directed under section 8104" the Office, 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 [her] wage-earning capacity in the

[9] 5 U.S.C. § 8113(b).

absence of the failure, until the individual in good faith complies" with the direction of the Office.[10] Under this section of the Act, an employee's failure to willingly cooperate with vocational rehabilitation may form the basis for termination of the rehabilitation program and the reduction of monetary compensation.[11] In this regard, the Office's implementing federal regulation states:

> "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) Where 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]."[12]

ANALYSIS -- ISSUE 1

In the instant case, the record clearly supports the Office's determination in its September 12, 2001 decision that appellant engaged in a pattern of noncooperation with vocational rehabilitation efforts. On June 2, 1999 the Office authorized appellant's referral for vocational rehabilitation. The vocational rehabilitation counselor identified three positions as suitable for appellant based on the work restrictions and physical limitations outlined in Dr. Lembert's April 12, 1999 report and April 15, 1999 work capacity evaluation; two of the positions were then approved as within appellant's work restrictions by Dr. Clague, her new treating physician. She then enrolled appellant in the San Joaquin Valley College training program which would provide her with the requisite training to attain employment in one of these positions. Appellant verbally agreed to cooperate with the vocational counselor and initially participated in the training program by enrolling in the training class at San Joaquin Valley College, but she subsequently failed to act in accordance with her stated willingness to undergo vocational training. She did not attend 13 of the first 15 classes scheduled, informing school officials, but not her vocational rehabilitation counselor, that her class assignments were aggravating her accepted hand, wrist and elbow conditions. The Office sent appellant a letter on August 2, 2000 warning her that her continued refusal to cooperate with vocational rehabilitation efforts would result in the reduction of her compensation to zero. The Office then directed appellant to undergo the training program in computer support technology which was approved by the Office and to contact the Office to make necessary arrangements to resume the training

[10] 5 U.S.C. § 8113(b).

[11] *See Wayne E. Boyd*, 49 ECAB 202 (1997) (the employee failed to cooperate with the early and necessary stage of developing a training program).

[12] 20 C.F.R. § 10.519.

program. Appellant then informed the Office that her accepted conditions were causing her problems and stated that she had advised her vocational rehabilitation counselor that she felt an accelerated program like the one at San Joaquin College would result in excessive homework which would be difficult for her to complete in light of her bilateral hand condition. She also attached an August 24, 2000 report from Dr. O'Brien which purported to support these assertions and recommended surgery.

Although the record indicates that appellant subsequently continued to display a lack of cooperation -- a September 5, 2000 Office memorandum noted that appellant had not contacted the school or the vocational rehabilitation counselor since the August 2, 2000 warning letter, and an October 3, 2000 Office memorandum stated that the Office had received no new medical report or request for surgery authorization from Dr. O'Brien since his August 24, 2000 report -- the Office stated that it would not implement sanctions for noncooperation at that time, but would contact Dr. Clague, the attending physician, for an updated report. In an October 10, 2000 Office memorandum, the Office indicated that the vocational rehabilitation counselor was outlining a less accelerated training program and had located two new positions which it would submit for Dr. Clague's approval. The Office further noted that appellant was not responding to or returning the vocational rehabilitation counselor's telephone calls, which again raised a possible noncooperation issue. On November 2, 2000 Dr. Clague approved the job descriptions for graphic designer and desktop publisher, the new positions located by the vocational rehabilitation counselor. The job descriptions indicated that appellant would require a six-month training program in order to qualify for the positions. However, appellant's continued failure to answer the vocational rehabilitation counselor's telephone calls -- at one point appellant had a caller ID block put on her number which blocked the vocational rehabilitation counselor's telephone calls -- was noted again in a December 19, 2000 Office memorandum. The Office stated in a December 27, 2000 memorandum that the vocational rehabilitation counselor received a letter from claimant stating that her telephone had been disconnected and that she will be out of state for the holidays and would reschedule her appointment upon her return. However, in a February 16, 2001 progress report, the vocational rehabilitation counselor stated that, although appellant, after rescheduling the December 27, 2000 appointment, had resolved to schedule another appointment with her after returning home after the holidays on January 16, 2001, she had failed to attend another appointment scheduled for January 22, 2001. The vocational rehabilitation counselor stated that appellant did not contact her to either explain her absence at the January 22, 2001 meeting or try to reschedule another appointment.

In a March 7, 2001 Office memorandum, the Office rehabilitation specialist stated that he would recommend treating appellant's pattern of missed appointments and refusal to contact the vocational rehabilitation counselor as noncooperation. He advised that, since a warning letter was previously released, a sanctions decision could be issued. Appellant did not submit any other documentation or medical evidence supporting her alleged inability to participate in vocational efforts until September 12, 2001, when the Office issued its decision reducing appellant's wage-loss compensation benefits to zero on the grounds that she refused to participate in vocational rehabilitation without good cause. The Office stated that it had issued appellant a warning letter on August 2, 2000, after which appellant had restated her intention to participate in rehabilitation efforts after indicating that her participation in the San Joaquin Valley College classes had aggravated her accepted conditions. However, when she continued to miss scheduled appointments with her vocational rehabilitation counselor, placed a block on her

telephone, failed to return telephone calls or contact the vocational rehabilitation counselor, failed to reschedule appointments with the vocational rehabilitation counselor and failed to make efforts to begin training for the alternative programs in accordance with her stated intentions, the Office determined that this pattern of noncooperation warranted sanctions. This decision was proper, as the record indicates that appellant had ample opportunity over a course of two years, from June 1999 to September 2001, to maintain regular contact with her vocational rehabilitation counselor and attend meetings to discuss her progress and to coordinate her training with her vocational rehabilitation counselor in order to return to gainful employment, but continually failed to do so. Therefore, appellant effectively refused to participate in vocational testing with the vocational counselor without good cause.

The Board has previously recognized that medical inability to participate in vocational rehabilitation, if properly substantiated, may constitute good cause for failure to participate in vocational rehabilitation.[13] However, the only medical evidence appellant submitted was the August 24, 2000 report from Dr. O'Brien, which did not constitute sufficient medical evidence that she was medically unable to participate in vocational rehabilitation. Dr. O'Brien's report merely stated in summary fashion that appellant had to quit attending classes at San Joaquin Valley College due to the stress of the program and because the repetitive motions required by her class assignments caused severe exacerbation of pain. Dr. O'Brien stated that he scheduled appellant for surgery to correct her condition at a subsequent date, which did not submit any additional reports or a request for authorization to perform this surgery. Therefore, his report did not contain a probative, rationalized opinion establishing that appellant's accepted conditions prohibited her from engaging in vocational rehabilitation. Appellant's treating physician, Dr. Clague, indicated after reviewing the job descriptions that appellant was capable of performing the listed positions and released her to begin vocational rehabilitation to train for these positions.

Accordingly, the Office properly determined that appellant would have had the wage-earning capacity of a database administrator if she had cooperated with vocational rehabilitation. Thus, the Office had a proper basis to reduce her disability compensation effective September 12, 2001.[14] The Board therefore finds that the Office has met its burden of justifying a reduction in appellant's compensation for total disability.

Following the Office's reduction of compensation, the burden to establish entitlement to compensation shifted to appellant.[15] Appellant and her attorney contended that she submitted medical evidence sufficient to establish that she was totally disabled because of her accepted conditions and was therefore unable to complete her training program and unable to perform the selected positions referenced in the September 12, 2001 Office decision. The Board finds, however, that the medical evidence appellant submitted following the Office's September 12, 2001 decision reducing her compensation to zero was not sufficient to meet this burden. This evidence consists of reports dated December 17, 2001 and March 7 and 27, 2002 from Dr. Bajwa

[13] *Carolyn M. Leek*, 47 ECAB 3745 (1996); *Linda M. McCormick*, 44 ECAB 958 (1993).

[14] *See William F. McMahon*, 47 ECAB 526 (1996).

[15] *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

and the January 29, 2003 nerve conduction study report and May 28, 2003 report from Dr. Mehdi. In his December 17, 2001 report, Dr. Bajwa stated that appellant experienced moderate to severe pain and paresthesias in hands which were present most of the time. He related that appellant stated that her hands fell asleep on a frequent basis, with pain extending to the elbows, that she dropped objects and that her hands fell asleep while driving, using the telephone and performing other, similar movements. Dr. Bajwa stated that her pain increased with activity requiring pushing, pulling, lifting, turning and twisting or with any other activity, and was present in both arms. He concluded that appellant was permanently disabled and unable to return to her regular work and was also unable to return to vocational rehabilitation because of the severe pain and disability that she was experiencing. Dr. Bajwa stated that he had recommended that appellant be examined by a hand surgeon but that she was reluctant to do this. In his March 7, 20 and 27, and May 23, 2003 reports, he essentially reiterated his previous findings and his conclusion that appellant remained totally disabled and unable to work.

Dr. Bajwa's reports, however, do not establish that appellant is totally disabled or that her medical condition precluded her from participating in the training program outlined by the vocational rehabilitation counselor. None of Dr. Bajwa's reports contained a rationalized medical opinion to contradict the weight of the medical evidence, as represented by Drs. Lembert and Clague. These physicians indicated that appellant was capable of returning to work as long as it not require forced gripping, repetitive use of her arms, hands or elbows, or lifting more than five to ten pounds. Dr. Clague specifically approved several sedentary jobs which he deemed to be within these restrictions. Further, the May 28, 2003 report from Dr. Mehdi tended to support the Office's determination that appellant was capable of returning to some form of light work within her work restrictions. Dr. Mehdi advised that the tests appellant underwent on January 29, 2003 clearly indicated absence of carpal tunnel syndrome and likely resolving of her carpal tunnel-related symptoms, mainly because she had had surgery performed. Although Dr. Mehdi related that appellant continuously complained of having severe pain in her hands, elbows and wrists, he stated that he had recommended to appellant that he wanted to try to return her to at least light duty or modified duties before declaring her completely disabled.

With regard to the extensive list of contentions submitted on reconsideration by appellant's attorney, none of these contain any sufficient grounds upon which to find error in the Office's September 12, 2001 decision reducing appellant's compensation. The Office properly rejected his contentions that the Office erred by failing to find that Drs. Lembert and Clague's work restrictions were inadequate in developing a vocational rehabilitation program for her because they did not consider all of appellant's accepted conditions. Both of these physicians gave appellant a full and fair examination and determined on the basis of these examinations that appellant could begin vocational training and perform work within her outlined restrictions. It is appellant's burden to submit medical evidence showing that she had additional medical

conditions which established that her planned training program exceeded her work restrictions.[16] As discussed above, appellant has failed to submit such evidence.[17]

Appellant's attorney further contended that appellant's advanced age, coupled with her lack of experience, training and education, disqualified her from both of the positions selected by the vocational rehabilitation counselor, database administrator and computer systems hardware analyst, and with any of the employers identified by the labor market survey, even if she had completed the training program developed by the Office. This contention, however, is not relevant to the issue in this case, whether the Office properly found in its September 12, 2001 decision that appellant refused to cooperate with vocational rehabilitation efforts. The Office reduced appellant's compensation because it found that appellant -- over a more than two-year period -- engaged in a pattern of noncooperation with her vocational rehabilitation counselor. It was therefore unnecessary for the Office to consider whether the positions for which appellant was supposed to engage in training were not actually available to her based on her alleged advanced age and inadequate experience, training and education.

Finally, with regard to counsel's contention that the Office erred in finding that appellant engaged in a pattern of noncooperation with her vocational rehabilitation counselor, he has submitted no contentions or evidence establishing that the Office erred in its September 12, 2001 decision. Appellant's attorney asserted that although appellant had demonstrated her cooperation by either rescheduling the missed appointments or completing them telephonically, the vocational rehabilitation counselor had never informed the Office that appellant had done these things. This assertion, however, is contradicted by the instant record. As discussed above, appellant has an extensive track record, from July 1999 to September 2001, of engaging in a

[16] On this note, the Office properly rejected counsel's contention that the objective to train appellant as a database operator was beyond her physical limitations and his assertion that "it is common knowledge that to become a database administrator appellant needed to continuously engage in "repetitive use of her arms and hands" and therefore, the intended goal of the vocational rehabilitation program ignored appellant's physical and medical disabilities and the work restrictions placed upon her by Dr. Lembert and Dr. Clague, and the selected position was therefore beyond appellant's established medical restrictions and limitations. Appellant's attorney is not a physician and his opinion on medical issues carries no weight. For the same reason, his assertion that appellant was unable to attend appointments with the vocational rehabilitation counselor because her upper extremity disabilities rendered her unable to drive was also properly rejected by the Office. Further, appellant's attorney also made a misstatement when he asserted that Dr. Clague approved positions which exceeded appellant's work restrictions because they required her to lift up to 10 pounds. Dr. Lembert's April 15, 1999 work capacity evaluation states that appellant should not lift more than 5 to 10 pounds.

[17] The Board rejects contentions by appellant's attorney that because Dr. Lembert had admitted to operating on the wrong body part, the Office was under an obligation to assist appellant with developing medical evidence as to whether or not she suffered injury or damage to the body part on which Dr. Lembert wrongly operated, and that the claim must be accepted for surgery on a lateral epicondyle of the right elbow due to malpractice by Dr. Lembert was a consequence of the accepted conditions and the accepted surgeries in this case. None of these contentions are relevant to the instant issue, which was whether the Office properly found in its September 12, 2001 decision that appellant refused to cooperate with vocational rehabilitation efforts based on the medical evidence of record. Whether Dr. Lembert may or may not have committed malpractice is not before the Board in this case. The Board notes that there is nothing in the record to undermine the credibility of Dr. Lembert's April 12, 1999 report and April 15, 1999 work capacity evaluation outlining appellant's work restrictions, upon which the Office properly relied.

pattern of noncooperation with vocational rehabilitation efforts. This pattern consisted of unreturned telephone calls, blocked telephone calls, missed appointments, failure to reschedule appointments, and failure to contact her vocational rehabilitation counselor. The Office properly relied on this track record of noncooperation in its September 12, 2001 decision, and it properly denied reconsideration in its July 23, 2004 decision.[18] The Board therefore affirms the July 23, 2004 Office decision affirming the September 12, 2001 decision reducing appellant's compensation to zero.

LEGAL PRECEDENT -- ISSUE 2

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury, and who supports that conclusion with sound medical reasoning.[19]

ANALYSIS -- ISSUE 2

In the instant case, appellant has failed to submit any medical opinion containing a rationalized, probative report which relates her disability for work as of December 5, 2003 to her accepted bilateral carpal tunnel and epicondylitis conditions. For this reason, she has not discharged her burden of proof to establish her claim that she sustained a recurrence of disability as a result of her accepted employment conditions.

In support of her recurrence claim, appellant submitted the reports dated March 7 and 27 and May 23, 2002 from Dr. Bajwa and the January 29, 2003 nerve conduction study report and May 28, 2003 report from Dr. Mehdi. As indicated above, Dr. Bajwa stated findings on examination and concluded that appellant remained totally disabled and unable to work due to severe epicondylitis and severe tendinitis in her hands, wrists and elbows.

Dr. Bajwa's reports, however, do not constitute sufficient medical evidence demonstrating a causal connection between appellant's employment-related condition and her alleged recurrence of disability on December 5, 2003. Causal relationship must be established by rationalized medical opinion evidence. Dr. Bajwa's reports failed to provide a rationalized, probative medical opinion indicating that her condition as of December 5, 2003 was caused or aggravated by her accepted bilateral carpal tunnel and epicondylitis conditions.[20] The May 28, 2003 report from Dr. Mehdi, as stated earlier, indicated that he in fact did not believe that appellant was totally disabled based on his examinations of her, and had recommended that she

[18] With regard to counsel's contention that the Office was required to develop a claim based on a psychological component to appellant's chronic bilateral hand and wrist conditions, the Board notes that the Office has not accepted and appellant has never filed such a claim based on an alleged psychological condition.

[19] *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.121(a).

[20] *William C. Thomas*, 45 ECAB 591 (1994).

at least try to return her to at least light duty or modified duties before he declared her totally disabled.

As there is no probative, rationalized medical evidence addressing and explaining why the claimed condition and disability as of December 5, 2003 was caused or aggravated by her accepted employment conditions, appellant has not met her burden of proof in establishing that she sustained a recurrence of disability.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation benefits to zero on the grounds that she refused to cooperate with vocational rehabilitation efforts. The Board finds that appellant has not met her burden to establish that she was entitled to compensation for a recurrence of disability as of December 5, 2003 causally related to her accepted bilateral carpal tunnel and epicondylitis conditions.

ORDER

IT IS HEREBY ORDERED THAT the August 25 and July 23, 2004 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: November 14, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board