

vertebra. Following 45 days of continuation of pay, the Office began paying compensation for temporary total disability on December 31, 1995. Appellant's employment was terminated in February 1996.

On March 27, 1998 the Office referred appellant to a private rehabilitation counselor for development of a vocational rehabilitation program. On March 30, 1998 an Office rehabilitation specialist reported that the employing establishment could not accommodate appellant's disabilities. An initial evaluation by the rehabilitation counselor on April 23, 1998 revealed that she completed the 10th grade and had no additional formal education, no special licenses or certificates and no office equipment operation skills, including typing. Testing showed that appellant's reading was at a high school grade equivalency, spelling at a post high school grade equivalency and mathematics at a fifth grade equivalency. She began graduate equivalency degree (GED) classes on August 25, 1998.

In an August 18, 1998 report, appellant's attending physician, Dr. Douglas J. McDonald, a Board-certified orthopedic surgeon, stated that it seemed reasonable to allow her to work two to three hours per day and that it would be helpful for her to vary positions among sitting, standing and walking. In an October 26, 1998 report, Dr. R. Peter Mirkin, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion evaluation, stated that, based on his physical examination and review of her records and an October 20, 1998 functional capacity evaluation with which she was not cooperative, she could perform sedentary work for eight hours per day if she could change positions from sitting to standing as needed.

On October 26, 1998 appellant quit her GED classes, stating that she could not physically tolerate the classroom setting and that her pain made it impossible to concentrate. On April 15, 1999 a physical therapist reported that she had been uncooperative and demonstrated a lack of motivation in therapy. On January 19, 2000 Dr. McDonald stated that appellant could perform sedentary work four to five hours per day.

On October 23, 2000 the rehabilitation counselor identified three sedentary positions that were suitable to appellant's physical limitations and available in her commuting area: ticket seller, telephone solicitor and cashier-checker (retail trade). In response to an Office inquiry, Dr. McDonald stated that he certainly felt that she could perform any of these positions on a part-time basis. Appellant agreed to look for work and on July 9, 2001 was placed as a movie theater ticket seller. She quit after two hours and twenty minutes, complaining that her back pain was too intense.

In a September 24, 2001 report, Dr. John A. Gragnani, a Board-certified physiatrist, to whom the Office referred appellant for a second opinion on her ability to work, concluded that the discomfort she reported was far out of proportion to and unsubstantiated by her objective findings, that she was in a pain behavior pattern that was unlikely to change and that she had no specific restrictions for work. In a December 4, 2001 report, Dr. Ronald L. Fischer, a Board-certified physiatrist, to whom the Office referred appellant and the case record to resolve a conflict of medical opinion on her ability to work, stated that she had ongoing pain from her healed fractures of the coccyx, sacrum and ribs and that malunion of her left hemipelvis seemed to be the triggering mechanism for her low back and pelvic pain which seemed to be mechanical in nature. He stated that she could perform a sedentary position if she varied sitting, standing

and walking every 15 minutes, that these restrictions were based on her subjective complaints of pain rather than on objective medical findings, that she could perform the duties of a ticket seller, telephone solicitor or cashier/checker and that he doubted work hardening would be of any benefit based on her functional capacity evaluation. In response to an Office inquiry of how appellant was disabled in the absence of objective findings, Dr. Fischer stated in an April 5, 2002 report, that her malunion of the hemipelvis created a mechanical dysfunction in her posture, which would be objective physical examination findings, that these findings appeared to be the source of her lumbopelvic pain and that her restricted activity level and work hours would be purely based on her pain level that she had displayed since 1995. In response to a May 22, 2002 Office inquiry, Dr. Fischer stated in a July 30, 2002 report, that appellant could participate in a work-hardening program but would still be limited to sedentary work.

On August 13, 2002 the Office referred appellant to the same private rehabilitation counselor for development of a vocational rehabilitation program. On September 7, 2002 appellant agreed to participate in a job search for a part-time position as a ticket seller, cashier-retail or telephone solicitor. On September 25, 2002 Dr. Fischer prescribed a work-hardening program for one month. A work-hardening entrance evaluation by an occupational therapist on October 14, 2002 showed that she did not meet all essential job demands for sedentary work and that her subjective complaints of pain were out of proportion to her displayed function. In a November 2, 2002 report, this occupational therapist stated that he was discharging appellant from the work-hardening program because of her inability to comply with the prescribed duration of prescribed therapy, her usage of pain medication beyond physician prescription and her refusal to use her right upper extremity due to subjective complaints of pain leading to decreased ability to assess her essential functions such as reaching while sorting mail.

In a November 7, 2002 letter, the Office advised appellant that it appeared that she had discontinued good-faith participation in its approved work-hardening program, that it could terminate her compensation prospectively if she failed to undergo vocational rehabilitation without good cause and that she was directed to give full effort and undergo the work-hardening program or state her reasons for not doing so. In an undated letter received by the Office on November 18, 2002, appellant stated that she did not quit work hardening, that the occupational therapist told her to stop coming, and that she was willing to go back. She submitted an October 31, 2002 report from Dr. Heidi Prather, an osteopath specializing in physical medicine and rehabilitation, stating that she had increasing symptoms when she went to work hardening and was not able to complete the activities. On November 25, 2002 Dr. Fischer prescribed the resumption of work hardening four hours per day for four weeks to increase appellant's tolerance for sitting, standing and walking.

In a December 6, 2002 letter, the occupational therapist stated that appellant arrived on December 5, 2002 for her work-hardening evaluation with a running audiotele recording device, that she was informed that a recording of the evaluation without permission was against company policy, that she refused to cease recording and continue with the evaluation and that the evaluation was not completed because she chose not to comply with the therapist's instructions. On December 10, 2002 the private rehabilitation counselor advised the Office that appellant had informed him that she would not attend work hardening unless she was allowed to tape record every entire session. On December 10, 2002 this rehabilitation counselor again verified that the

positions of ticket seller, telephone solicitor and cashier-checker (retail trade) were within appellant's work limitations and were reasonably available in her commuting area.

In a December 5, 2003 letter, the Office requested that appellant submit medical evidence describing her condition and its relationship to her employment injury, her limitations for work and her treatment plan. In a February 4, 2004 report, Dr. McDonald stated that he was "at a little bit of loss to totally explain her symptoms, other than the residual effects from her injury," but that she had probably reached maximum improvement.

By decision dated August 18, 2004, the Office found that appellant had refused to participate in vocational rehabilitation and that by not responding to its November 7, 2002 letter directing her to make a good-faith effort to participate, she had not shown good cause for not complying. The Office reduced her compensation to zero effective September 5, 2004, continuing until she, in good faith, underwent the directed vocational testing or showed good cause for not complying, based on her failure to undergo the essential preparatory effort of vocational testing thereby not permitting the Office to determine what appellant's wage-earning capacity would have been had she undergone the testing and rehabilitation.

Appellant requested a review of the written record and stated that she did not refuse evaluation but did refuse to turn off her recorder. By decision dated February 22, 2005, an Office hearing representative found that the Office properly reduced appellant's compensation to zero on the basis that she did not fully cooperate with the early but necessary stages of the vocational rehabilitation effort.

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 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

The Office's regulations address failure to undergo vocational rehabilitation, stating:

"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

¹ 5 U.S.C. § 8113(b).

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 [the Office].

“(b) Where a suitable job has not been identified, because the failure or refusal occurred in the early but necessary stages of a vocational rehabilitation effort, (that is, meetings with the [Office] nurse, interviews, testing counseling, functional capacity evaluations, and work evaluations), [the Office] cannot determine what would have been the employee’s wage-earning capacity.

(c) Under the circumstance identified in paragraph (b) of this section, in the absence of evidence to the contrary, [the Office] will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity and [the Office] will reduce the employee’s monetary compensation accordingly (that is, to zero). The reduction will remain in effect until such time as the employee acts in good faith to comply with the directions of [the Office].”²

ANALYSIS

The Board finds that appellant’s action of refusing to continue her work-hardening program unless she was allowed to tape record each session amounted to a failure to undergo vocational rehabilitation when directed by the Office. The occupational therapist made it clear to her that the work-hardening program would not continue under those circumstances, yet appellant refused to comply with the therapist’s instruction to continue the program without the recording device.

The Board further finds that the Office improperly reduced appellant’s compensation to zero, since her refusal of vocational rehabilitation did not occur in the early but necessary stages of vocational rehabilitation. The Office’s regulations clearly state that the “early and necessary” stages occur before a suitable job has been identified. Appellant’s refusal to continue vocational rehabilitation occurred over two years after the Office identified three jobs that were suitable to her physical limitations and were available in her commuting area and three months after she agreed to participate in a job search for these positions. Because appellant’s failure to undergo vocational rehabilitation occurred after suitable jobs had been identified, it was improper for the Office to reduce her compensation to zero. To comply with its regulations, the Office should have reduced her compensation to the amount which likely would have been her wage-earning capacity had she undergone vocational rehabilitation, based on one of the three jobs identified through the vocational rehabilitation process as suitable for her.

CONCLUSION

The Office improperly reduced appellant’s compensation to zero for refusing to participate in vocational rehabilitation.

² 20 C.F.R. § 10.519.

ORDER

IT IS HEREBY ORDERED THAT the February 22, 2005 and August 18, 2004 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: January 24, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board