United States Department of Labor
Employees' Compensation Appeals Board

B.C., Appellant	)	
and	)	**Docket No. 07-851**
	)	**Issued: August 17, 2007**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Springfield, MO, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 6, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated September 26, 2006 and January 9, 2007 reducing her compensation due to her refusal to cooperate with vocational rehabilitation efforts. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation benefits on the grounds that she refused to cooperate with vocational rehabilitation efforts.

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated July 13, 2005, the Board set aside the Office's March 24, August 6 and November 2, 2004 decisions which found

that appellant did not sustain an injury in the performance of duty on April 14, 2003.[1] It found that the medical reports of Dr. Salim Rahman, an attending Board-certified neurosurgeon, generally supported that an April 14, 2003 employment incident aggravated appellant's preexisting back condition. The case was remanded for further development. The facts and the circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.[2] The facts and the history relevant to the present issue are hereafter set forth.

On July 27, 2005 an Office medical adviser reviewed the case record. He opined that appellant's claim should be accepted for permanent aggravation of multi-level spinal stenosis due to the April 14, 2003 employment incident. The medical adviser also approved the back surgery performed by Dr. Rahman on May 21, 2003.

By letter dated August 31, 2005, the Office accepted appellant's claim for permanent aggravation of multi-level spinal stenosis of the lumbar spine with arthrodesis of posteriolateral L2-3, L3-4 and L4-5. It authorized a decompressive laminectomy at L2-3, L3-4, L4-5 and L5-S1, pedical screw fixation at L2-5 and autograft/allograft.

On September 18, 2005 appellant accepted the employing establishment's job offer for a limited-duty position. This offer was based on Dr. Rahman's September 15, 2005 medical report which found that she could work eight hours per day, four days per week. Appellant could lift up to 40 pounds, sit, kneel, bend, stoop, twist, pull, push, engage in fine manipulation, reach above the shoulder, operate a machine, handle chemicals and solvents, work in fumes, dust and noise on an intermittent basis, eight hours per day. She could stand, walk and perform simple grasping on a continuous basis, eight hours per day.

On January 23, 2006 appellant filed a claim for wage-loss compensation for the period January 10 through 21, 2006. On January 27, 2006 the employing establishment advised the Office that it could no longer accommodate her physical restrictions.

On February 24, 2006 the Office authorized vocational rehabilitation services. In an April 1, 2006 report, a vocational rehabilitation consultant, Jeffrey F. Magrowski, stated that he met with appellant and her husband. Appellant stated that she was interested in receiving disability retirement benefits from the Office of Personnel Management (OPM) and that she had been referred to Dr. Ted A. Lennard, an attending Board-certified physiatrist, for a disability determination. She was advised to provide Dr. Lennard's work restrictions. Mr. Magrowski determined that appellant had transferable skills for light and sedentary employment but, indicated that she was not interested in participating in vocational rehabilitation services.

On April 11, 2006 Mr. Magrowski advised the Office that on April 10, 2006 appellant refused to accept his job placement plan. He reiterated that she was not interested in vocational rehabilitation services and that she wished to receive disability retirement benefits from OPM. Mr. Magrowski conducted a labor market survey which identified several jobs, including a

[1] Docket No. 05-422 (issued July 13, 2005).

[2] On April 19, 2003 appellant, then a 69-year-old lead security screener, filed a traumatic injury claim. She alleged that on April 14, 2003 she twisted her back when she picked up a large bag.

customer service representative position and wages based on appellant's vocational skills and within her geographical area. Appellant advised him that she wanted to cooperate but, that the restrictions of Dr. Lennard and Dr. Rahman prevented her from working. In work capacity evaluations dated April 4 and 10, 2006, Dr. Lennard and Dr. Rahman, respectively stated that, appellant was limited to sitting, walking and standing 30 minutes, operating a motor vehicle at work 2 hours and to and from work 1 to 2 hours and performing repetitive movements of the wrists and elbows 6 to 8 hours a day. She could not reach, reach above the shoulder, twist, bend, stoop, squat, kneel or climb. In addition, appellant could not push, pull or lift more than 10 pounds. Both physicians stated that she must change her positions frequently.

By letter dated April 13, 2006, the Office advised appellant that it had been informed that she had refused to participate in the vocational rehabilitation program. It stated that the factual and medical evidence of record established that she could perform light-duty work. The Office advised that the April 2006 work capacity evaluations failed to provide medical rationale for the change in her restrictions. It further advised that this evidence demonstrated that appellant could perform sedentary work. The Office stated that since appellant's physicians had failed to provide rationalized medical evidence, it would proceed with placement efforts based on the restrictions set forth in Dr. Rahman's September 15, 2005 report. Appellant was advised that failure to comply with the Office's instructions would result in termination of the rehabilitation effort and initiation of action to reduce compensation to reflect her wage-earning capacity in a job which her rehabilitation counselor had found to be within her restrictions and abilities.

In a May 4, 2006 report, Mr. Magrowski again identified the position of customer service representative as being within appellant's restrictions, vocational abilities and geographical area.[3] The physical requirements of this position included sedentary strength. It did not require climbing, balancing, stooping, kneeling, crouching, crawling, feeling, tasting, smelling, far acuity, depth perception, color vision or field of vision. Mr. Magrowski stated that this position was appropriate, given appellant's past work experience and educational background. He indicated that the proposed plan documented that a viable labor market existed in appellant's geographical area for the customer service representative position. Mr. Magrowski stated that appellant refused to be placed in the identified position based on Dr. Lennard's April 4, 2006 and Dr. Rahman's April 10, 2006 restrictions.

In a May 8, 2006 treatment note, Dr. Lennard opined that appellant would have difficulty with gainful employment due to her L2 to L5 fusion, residual pain, loss of motion and weakness. He stated that her prognosis was poor for additional improvement.

By letter dated July 26, 2006, the Office referred appellant, together with the case record, a statement of accepted facts and a list of questions, to Dr. Arthur S. Daus, a Board-certified neurosurgeon, for a second opinion medical examination.

In an August 10, 2006 report, Dr. Daus provided a history of appellant's April 14, 2003 employment injury, medical treatment and family background. On physical examination, he reported essentially normal findings with the exception of mild tenderness in appellant's neck

[3] The Board notes that Mr. Magrowski also identified the position of sales clerk as being within appellant's physical restrictions, vocational skills and geographical area.

and mild to moderate tenderness in her back. Dr. Daus opined that appellant would be able to meet most of the requirements of the customer service representative position, which he characterized as a predominantly sedentary job that required only occasional lifting. He stated that she had to predominately use her arms which might cause her to frequently finger, handle or reach for things that were ordinarily at her level in height and not really above her head. Dr. Daus further stated that appellant was not exposed to any extreme temperatures, unusual noise or vibration level or cold weather in her environment. He indicated that, although she had some physical limitations, she was capable of performing a predominantly sedentary job with changes in her position as she deemed necessary which included standing to sitting, sitting to standing, occasional walking and frequent breaks.

In an August 8, 2006 work capacity evaluation, Dr. Daus stated that appellant could work eight hours per day. Appellant was restricted to sitting and walking 6 hours, standing 4 to 6 hours, reaching and engaging in repetitive movements of the wrist and elbow 8 hours, reaching above the shoulder 1 to 2 hours, operating a motor vehicle at work from 0 to .50 hour and to and from work 0 to 1 hour and lifting up to 15 pounds 2 to 3 hours per day. Appellant was also restricted to pushing and pulling up to 15 pounds 0 to .50 hour per day. She could not twist, bend, stoop, squat, kneel or climb. Dr. Daus recommended that appellant take 10 to 30 minute breaks, every 2 to 3 hours per day.

By decision dated September 21, 2006, the Office reduced appellant's compensation for failing, without good cause, to cooperate with vocational rehabilitation efforts. It found that appellant was capable of performing the duties of a customer service representative based on Dr. Daus's August 10, 2006 report. The Office found that she had failed to submit any objective evidence to support the medical restrictions set forth by her attending physician. It reduced appellant's compensation under section 8113(b) of the Federal Employees' Compensation Act, based on the difference between her pay rate for compensation purposes and what her wage-earning capacity would have been had she cooperated with vocational rehabilitation efforts. The Office found that appellant's former date-of-injury position currently paid $779.41 per week. It determined that she had a wage-earning capacity as a customer service representative of $459.85 per week. The Office further determined that appellant's loss in earning capacity was $319.56 per week and that her new net compensation rate every four weeks was $958.68.

On September 30, 2006 Mr. Magrowski reported that appellant did not want to participate in rehabilitation services. Consequently, vocational rehabilitation services were closed.

By letter dated September 28, 2006, appellant requested reconsideration of the Office's September 21, 2006 decision. She submitted diagnostic and laboratory test results from Dr. Michael J. Workman, a Board-certified radiologist, Dr. William D. Sharpe, a Board-certified radiologist, and Dr. Vito LaFata, an internist. A May 21, 2003 operative report from Dr. Steven M. Otto, a Board-certified neurologist, addressed preincision data regarding appellant's posterior spinal decompression and fusion at L2-5 that were performed by Dr. Rahman. In a July 5, 2006 report, Dr. Lennard provided a history of appellant's April 14, 2003 employment injury and medical treatment. He diagnosed spinal stenosis of the lumbar region and lumbago. Dr. Lennard opined that appellant's condition was permanent. He further opined that her current condition would remain unchanged and it was unlikely that future

physical therapy would benefit her. Dr. Lennard reiterated his April 4, 2006 restrictions and recommendation that appellant change her positions frequently. He concluded that appellant's restrictions were a direct result of her work-related employment injuries and subsequent lumbar fusion.

By decision dated January 7, 2007, the Office denied modification of its prior decision reducing appellant's compensation. It found that Dr. Lennard's July 5, 2006 report was insufficient to establish that appellant could not perform the duties of a customer service representative.

LEGAL PRECEDENT

Section 8104(a) of the Act provides that the Office may direct a permanently disabled individual whose disability is compensable under this subchapter to undergo vocational rehabilitation. The Office shall provide for furnishing the vocational rehabilitation services.[4]

Section § 8113(b) of the 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 [her] wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary."[5]

Section 10.519(a) of the implementing regulations provides in pertinent 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) 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 meeting 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]."[6]

[4] 5 U.S.C. § 8104(a).

[5] *Id.* at § 8113(b).

[6] 20 C.F.R. § 10.519(a) (1999).

Application of the principles set forth in *Albert C. Shadrick*[7] will result in the percentage of the employee's loss of wage-earning capacity.

ANALYSIS

The Board finds that the Office properly reduced appellant's compensation benefits based on her ability to earn wages as a customer service representative. Appellant failed, without good cause, to comply with the Office's vocational rehabilitation program.

The Office was informed by Mr. Magrowski, a vocational rehabilitation consultant, that appellant refused to accept his job placement plan due to the restrictions set forth by Dr. Lennard and Dr. Rahman, her attending physicians. The Office, however, found that appellant could perform the duties of a customer service representative based on the August 10, 2006 report and August 8, 2006 work capacity evaluation of Dr. Daus, an Office referral physician, who opined that appellant could perform the requirements of the customer service representative position which he characterized as sedentary in nature, provided that she was not required to sit and walk more than 6 hours, stand more than 4 to 6 hours, reach and perform repetitive movements of the wrist and elbow more than 8 hours, reach above the shoulder more than 1 to 2 hours, operate a motor vehicle at work more than 0 to .50 hour and to and from work more than 1 hour, lift more than 15 pounds 2 to 3 hours per day, push and pull more than 15 pounds 0 to .50 hour and not twist, bend, stoop, squat, kneel or climb. Dr. Daus noted that appellant had to predominately use her arms which might cause her to frequently finger, handle or reach for things that were ordinarily at her level in height and not really above her head. He reported essentially normal findings on physical examination with the exception of tenderness in appellant's neck and mild to moderate tenderness in her back. Dr. Daus opined that, although appellant had physical limitations, she could perform a sedentary position that allowed her to change her position from standing to sitting, sitting to standing, occasional walking and frequent breaks when she deemed necessary. The Board finds that his opinion is detailed, well rationalized and based upon a complete and accurate history. Dr. Daus' opinion represents the weight of the medical evidence in finding that appellant did not have good cause for failing to continue participation in the Office's rehabilitation efforts commencing February 24, 2006.

The medical evidence submitted by appellant is insufficient to establish good cause for her failure to continue participation in rehabilitation training. Dr. Lennard's May 8, 2006 treatment note found that appellant would have difficulty with gainful employment due to her L2-5 fusion, residual pain, loss of motion and weakness. He stated that her prognosis was poor for additional improvement. However, the physician did not address sedentary work in a modified-duty capacity. In a July 5, 2006 report, Dr. Lennard found that appellant sustained spinal stenosis of the lumbar region and lumbago. He stated that her current condition was permanent and that it would remain unchanged. Dr. Lennard indicated that it was unlikely that appellant would benefit from future physical therapy. He reiterated the restrictions set forth in his April 4, 2006 work capacity evaluation that appellant was limited to sitting, walking and standing 30 minutes, operating a motor vehicle at work 2 hours and to and from work 1 to 2 hours and perform repetitive movements of the wrists and elbows 6 to 8 hours a day. In addition,

[7] 5 ECAB 376 (1953); 20 C.F.R. § 10.403(d)-(e).

appellant could not reach, reach above the shoulder, twist, bend, stoop, squat, kneel or climb and push, pull or lift more than 10 pounds. She was instructed to change her positions frequently. Dr. Lennard opined that her restrictions were a direct result of her work-related employment injury and resultant lumbar fusion. Dr. Rahman's April 10, 2006 work capacity evaluation provided the same restrictions set forth in Dr. Lennard's April 4, 2006 work capacity evaluation and July 5, 2006 report. Neither Dr. Lennard nor Dr. Rahman addressed the nature of the customer service representative position and appellant's physical ability to perform the duties of this position based on limitations resulting from the accepted employment injury. Further, Dr. Rahman's restrictions revised his prior restrictions set forth in his September 15, 2005 report. However, he did not provide any medical rationale explaining the change in his opinion. The Board finds that Dr. Lennard's May 8, 2006 treatment note, July 5, 2006 report and his April 4 and 10, 2006 work capacity evaluations are insufficient to establish that appellant's refusal to continue with vocational rehabilitation efforts was with good cause.

Based on the position of customer service representative and application of the principles set forth in *Shadrick*,[8] codified at 20 C.F.R. § 10.403, the Office determined that appellant's loss of wage-earning capacity was $958.56, based on a current date-of-injury weekly pay rate of $779.41, minus the adjusted earning capacity of the new position of $459.85, resulting in a loss of wage-earning capacity of $319.56. Utilizing the correct compensation rate of three-fourths, the Office determined that appellant was entitled to a compensation rate of $239.67 per week, which equaled a net compensation rate of $958.56 every four weeks. The Board has reviewed these calculations and finds that they appropriately represent appellant's loss of wage-earning capacity.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation benefits on the grounds that she refused to cooperate with vocational rehabilitation efforts.

[8] *See supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the January 9, 2007 and September 26, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 17, 2007
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board