United States Department of Labor
Employees' Compensation Appeals Board

J.W., Appellant	)	
and	)	**Docket No. 06-1874**
	)	**Issued: March 22, 2007**
DEPARTMENT OF THE AIR FORCE, STRATEGIC AIR COMMAND, CASTLE AIR FORCE BASE, CA, Employer	)	

Appearances:
Michael D. Culy, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 9, 2006 appellant filed a timely appeal from the May 12, 2006 merit decision of the Office of Workers' Compensation Programs, which found that he failed, without good cause, to undergo vocational rehabilitation as directed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the appeal.

ISSUE

The issue is whether the Office properly reduced appellant's compensation for failing, without good cause, to undergo vocational rehabilitation as directed.

FACTUAL HISTORY

On June 1, 1973 appellant filed claims for injuries which occurred on November 17, 1972 and January 12, 1973 in the performance of his federal duties as a meat cutter. The Office accepted his claims for low back strain. Appellant received compensation benefits from June 30, 1973 through July 19, 1978. In July 1978, he accepted a position as a sales person for United

Bedrooms and Water Works, where he worked through 1988. Appellant has not worked since that time.

This is the second time this case has been before the Board. By decision dated February 2, 1999, the Board reversed the Office's November 4, 1996 decision terminating appellant's compensation benefits.[1] The Board found that the Office had failed to meet its burden to establish that appellant's accepted employment injuries had resolved. The findings of facts and conclusions of law are hereby incorporated by reference.

On February 4, 2004 the Office referred appellant, together with the medical record and statement of accepted facts, to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for examination and an opinion as to work tolerance restrictions related to appellant's accepted condition. In a February 25, 2004 report, Dr. Swartz concluded that appellant was capable of vocational rehabilitation. His examination revealed a normal range of motion of the lumbar spine, no relevant neurological findings and no atrophy in his lower extremities. Imaging studies revealed degenerative changes from L4-S1. Dr. Swartz found no evidence of low back strain. Stating that there were no objective clinical findings in his examination of the low back, Dr. Swartz opined that appellant had no residual injury factors of disability. He indicated that appellant had chronic degenerative disc disease at L4-5 and L5-S1, which would not be disabling, but could result in some reasonable restrictions. In an accompanying work capacity evaluation, Dr. Swartz indicated that appellant could work full time, provided that he was not required to push, pull or lift more than 50 pounds, squat or climb for more than two hours or kneel for more than three hours.

On May 12, 2004 the Office referred appellant to vocational rehabilitation services. In a July 2, 2004 report, the vocational rehabilitation counselor, George Meyers, indicated that appellant wanted to explore employment opportunities available to him in a position where he would be using his hands, such as a cook or a janitor. An October 6, 2004 report reflected that appellant disagreed with the medical restrictions provided by Dr. Swartz. In a letter dated October 7, 2004, the vocational consultant informed appellant that, pursuant to a labor market survey, the position of cook was the best option for him. An appointment was made for him with the director of admissions of the cooking program at Central Valley Occupational Center (CVOC). In a November 17, 2004 report, Mr. Meyers stated that appellant failed to attend the scheduled meeting at CVOC. He stated that he was developing a plan to prepare appellant for the position of cook, but experienced difficulty reaching appellant, due to the fact that he did not own a telephone. By letter dated December 10, 2004, Mr. Meyers informed appellant that he was proceeding with plan development, using the goal objective of cook. Noting that appellant had failed to attend the previously-scheduled appointment with CVOC, Mr. Meyers indicated that the proposed 12 weeks of training would begin January 24, 2004. On December 27, 2004 appellant signed the proposed plan. Pursuant to the plan, he agreed to participate full time in job search activities, with the goal of obtaining the position of cook or cook helper, at the rate of $14,040.00 per year. In a report dated January 24, 2005, Mr. Meyers stated that he had contacted 22 employers in furtherance of documenting reasonable availability of the positions of cook and cook helper in appellant's geographical area. He noted that the Merced Employment

[1] Docket No. 97-1131 (issued February 2, 1999).

Development Department indicated that those positions were among the occupations with the fastest job growth, and would likely increase by 15.8 percent and 20 percent respectively by the year 2008.

In a memorandum to the file, Mike Hooker, rehabilitation specialist, recommended approval of the rehabilitation plan. He noted that the positions of cook and cook helper were in the "medium" strength category, as defined by the Department of Labor, *Dictionary of Occupational Titles*, and therefore accommodated appellant's medical restrictions.[2] These positions were also felt to be appropriate, given appellant's limited literacy and educational background. The proposed plan documented that a viable labor market existed in appellant's geographical area for these positions. The proposed training would enable appellant to successfully compete in his local labor market.

On February 7, 2005 Mr. Meyers, the vocational consultant, informed appellant that the vocational rehabilitation plan to attend the cooking program at CVOC had been approved. He advised appellant that training would begin on February 14, 2005, and would continue, from 8:00 a.m. to 3:30 p.m., every Monday through Friday for 12 weeks. A February 8, 2005 vocational rehabilitation report reflected that appellant had decided that he would rather build cabinets or furniture, than attend cooking classes. Appellant expressed concern that a cooking position would be detrimental to his health. On March 14, 2005 Mr. Meyers reported that appellant had left class early on February 23, 2005, having "taken too much medicine" and did not attend school on February 25, 2005, "due to pain." On February 28, 2005 appellant informed his instructor that he would only be able to attend class for three to four hours per day, due to "anxiety/pain/medication." On that date, appellant informed Mr. Meyers' assistant that he was experiencing pain in his back, numbness in his right leg and shooting pain in his left leg. On March 1, 2005 appellant informed Mr. Meyers that he was unable to perform the duties of a cook. He indicated that he had not seen a doctor for his pain and was obtaining his pain medication from Mexico. Appellant did not attend class on March 1, 2005. He attended class on March 2, 2005 from 8:00 a.m. until 11:00 a.m. On March 4, 2005 appellant informed Mr. Meyers that, although the work involved in the cooking class is "light," he was unable to function at the level suggested by Dr. Swartz. On March 7, 2005 appellant informed Mr. Meyers that he would not be returning to school, as he was unable to function for more than two to four hours at a time. Mr. Meyers counseled appellant that it was his responsibility to provide medical documentation substantiating that he was unable to participate in training. On April 27, June 22, and July 26, 2005 Mr. Meyers stated that appellant discontinued the training due to self-reported pain.

Appellant submitted a July 20, 2005 report from Dr. Don Williams, a treating physician,[3] who provided diagnoses of lumbar disc protrusion, L5-S1, history of dyslexia and attention deficit disorder, high blood pressure and borderline diabetes. Physical examination of the lumbar spine showed that appellant was able to walk on his heels and tiptoes, but had slight

[2] Pursuant to the *Dictionary of Occupational Titles*, the physical demands of the "medium" strength category include strength levels of less than 50 pounds, and no squatting, climbing or kneeling.

[3] Dr. Williams' stationary indicates that he is a Board-certified orthopedic surgeon. However, his credentials cannot be verified.

weakness in dorsiflexion. Dr. Williams had decreased flexion to 45 degrees at the waist. Patellar reflexes were a little brisk at 3+ bilaterally. Achilles reflex was diminished at 1+. The right extensor halluces was 5/5 on the left, and was a little weaker [on the left] at 4/5. Supine straight leg raise test was positive at 45 degrees on the right, and 50 degrees on the left. Appellant was able to squat 75 percent of normal, holding on. He had normal motion of the hips and knees. Subjective complaints included slight pain in his lower back, which becomes moderate to severe with lifting, bending, twisting and sneezing. Dr. Williams opined that appellant had "a disability precluding heavy work activities."

In a letter dated March 1, 2006, the Office acknowledged appellant's refusal to participate in the approved training program. The Office directed appellant to undergo training according to the approved plan, or to show good cause for not undergoing the training program, within 30 days. 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 his probable wage-earning capacity, had he completed the training program.

An April 14, 2006 closure memorandum from rehabilitation specialist, Mr. Hooker, capsulized appellant's participation in the approved rehabilitation plan. Mr. Hooker stated that appellant's failure to complete his training and subsequently obtain employment, was directly attributable to his own somewhat resistive and "entitlement-oriented mindset." Referencing an April 13, 2006 updated labor market survey, Mr. Hooker concluded that the positions of cook and cook helper were reasonably available in sufficient numbers in appellant's local labor market, and that these positions remained medically and vocationally appropriate, had appellant completed the approved rehabilitation plan. In an April 17, 2006 vocational rehabilitation report, Mr. Meyers stated that, since appellant had stopped participating in training altogether, he was not successful in obtaining employment. However, he opined that appellant would have acquired the skills to become employable as a cook or cook helper, had he participated in the training.

In a decision dated May 12, 2006, the Office reduced appellant's compensation for failing, without good cause, to undergo vocational rehabilitation as directed. The Office found that, if he had participated in vocational rehabilitation efforts, he would have been able to perform the position of a cook or cook helper. Based upon the rehabilitation counselor's closure memorandum, the Office determined that these positions were suitable in that: the medical evidence established that the required duties were within appellant's work restrictions; the jobs identified were reasonably available in sufficient numbers in appellant's local labor market and general commuting area and public transportation was available. The Office reduced appellant's compensation under 5 U.S.C. § 8113(b) based on the difference between his pay rate for compensation purposes and what his wage-earning capacity would have been had he cooperated with vocational rehabilitation efforts. The Office found that appellant's date-of-injury salary was $193.20 per week; that the current pay rate for the date-of-injury position was $724.03 per week; that his wage-earning capacity was $270.00 per week; that he had a 37 percent wage-earning capacity; that his adjusted wage-earning capacity was $71.48 (.37 x $193.20) per week; and that his loss of wage-earning capacity was $121.72 per week. The Office found that appellant's new

net compensation rate, increased by applicable cost-of-living adjustments, was $1,312.00 every four weeks.

LEGAL PRECEDENT

Section 8104(a) of the Federal Employees' Compensation 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 have probably been his 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]

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.

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[4] 5 U.S.C. § 8104(a).

[5] 5 U.S.C. § 8113(b).

[6] 20 C.F.R. § 10.519(a) (1999).

[7] 5 ECAB 376 (1973); 20 C.F.R. § 10.403(d)-(e).

ANALYSIS

The Board finds that the Office properly determined that appellant's benefits should be reduced based on his ability to earn wages as a cook or cook helper. Appellant failed, without good cause, to participate in rehabilitation efforts. The Office's May 12, 2006 decision will be affirmed.

The Office found that appellant could perform the duties of a cook or cook helper. In making this determination, the Office properly relied on the medical report of Dr. Swartz, a Board-certified orthopedic surgeon, who opined that appellant could participate in a vocational rehabilitation program, and could work full time, provided that he was not required to push, pull or lift more than 50 pounds; squat or climb for more than two hours or kneel for more than three hours. Dr. Swartz's examination revealed a normal range of motion of the lumbar spine, no relevant neurological findings and no atrophy in his lower extremities. He found no evidence of low back strain and opined that appellant had no residual injury factors of disability. Dr. Swartz indicated that appellant had chronic degenerative disc disease at L4-5 and L5-S1, which would not be disabling. The Board has carefully reviewed the opinion of Dr. Swartz and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Swartz's opinion is based on a proper factual and medical history, in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Appellant subsequently submitted a July 20, 2005 report from Dr. Williams who opined that appellant had "a disability precluding heavy work activities." However, Dr. Williams did not adequately explain the basis for his stated conclusion. He did not provide a full history or discuss the physical nature of the class activities required under the rehabilitation program. Dr. Williams' preclusion of heavy work activities is not explained. His report does not create a conflict with the opinion of Dr. Swartz.[8] Dr. Williams' report failed to offer any opinion regarding appellant's ability to participate in vocational rehabilitation. As such this report is of limited probative value.

The Board finds that appellant failed, without good cause, to participate in vocational rehabilitation efforts. On May 12, 2004 the Office referred him to vocational rehabilitation services. On December 27, 2004 appellant signed the proposed plan and agreed to participate full time in job search activities, with the goal of obtaining the position of cook or cook helper, at the rate of $14,040.00 per year. On February 7, 2005 Mr. Meyers informed appellant that the vocational rehabilitation plan to attend the cooking program at CVOC had been approved, advised appellant that training would begin on February 14, 2005 and would continue, from 8:00 a.m. to 3:30 p.m., every Monday through Friday for 12 weeks. The record reveals that appellant attended training sporadically and ultimately refused to participate in vocational rehabilitation program altogether, contending that he was physically unable to do so. Although Mr. Meyers advised him of the necessity of submitting medical evidence substantiating his inability to participate, appellant failed to do so. Rather, appellant indicated that he had not visited a doctor, but was self-administering medication for pain obtained in Mexico. The rehabilitation specialist

[8] The Board notes that, pursuant to the *Dictionary of Occupational Titles*, the physical demands of the "heavy" strength category include strength levels of greater than 50 pounds occasionally.

opined that appellant's failure to complete his training, and subsequently obtain employment, was directly attributable to his own resistive mindset.

The Office advised appellant in a letter dated March 1, 2006 that failure to participate in vocational rehabilitation efforts when he had not established that his medical condition justified such failure, would result in penalties; he had 30 days to participate in such efforts or provide good cause for not doing so; and his compensation would be reduced if he did not comply within 30 days with the instructions contained in the letters. In spite of the Office's notice, appellant did not participate in the vocational rehabilitation efforts or provide good cause for not doing so within 30 days of the Office's letter.

The Office reduced appellant's compensation under 5 U.S.C. § 8113(b) based on the difference between his pay rate for compensation purposes and what his wage-earning capacity would have been had he cooperated with vocational rehabilitation efforts. Applying the principles set forth in *Shadrick*,[9] codified at 20 C.F.R. § 10.403, the Office found that appellant's date-of-injury salary was $193.20 per week; the current pay rate for the date-of-injury position was $724.03 per week; his wage-earning capacity was $270.00 per week, based on the position of cook or cook helper; his adjusted wage-earning capacity was $71.48 (.37 x $193.20) per week; and that his loss of wage-earning capacity was $121.72 per week. The Office found that appellant's new net compensation rate, increased by applicable cost-of-living adjustments, was $1,312.00 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 for failing, without good cause, to undergo vocational rehabilitation as directed.

[9] *See Albert C. Shadrick, supra* note 7

ORDER

IT IS HEREBY ORDERED THAT the May 12, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 22, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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