

medial epicondylitis. Appellant underwent a right elbow arthroscopy on June 9, 2000 and a right ulnar nerve decompression with submuscular anterior transposition on March 20, 2001.

On November 23, 2004 the Office referred appellant for a second opinion evaluation by Dr. Jonathan C. Thatcher, a Board-certified orthopedic surgeon, who conducted an examination on January 5, 2005. Following a physical examination of appellant's upper extremities and a review of the medical history, Dr. Thatcher diagnosed cumulative trauma disorder or overuse syndrome developed by the repetitive use of his elbows, wrists and ulnar and median nerves. He stated that appellant's elbow and nerve entrapment were related to his federal employment, but that his shoulder symptoms were not. Dr. Thatcher noted that appellant continued to have symptoms that would restrict him from using his upper extremities to work. He reported that appellant would be "happy to return to work if he had a job such as a supervisor that would not require any use of his upper extremities" but felt that he was unemployable in the type of work he had always done, which required use of his arms in a very physical manner. Dr. Thatcher noted that appellant "seemed to amplify symptoms during the course of the interview." He could not explain appellant's poor clinical response to the cubital tunnel release given the normal findings of electromyography (EMG) scans done after the surgery. On the attached work capacity evaluation form, Dr. Thatcher provided restrictions completely restricting the use of appellant's arms but allowing up to eight hours per day of walking, sitting, standing, twisting, bending, squatting, kneeling and climbing. He based the restriction against using the arms on appellant's opinion of his own capacity.

On May 17, 2005 the Office requested a clarification from Dr. Thatcher to determine which of his findings were based on his own medical opinions and which came from appellant. In a June 2, 2005 supplemental report and revised work capacity evaluation form, Dr. Thatcher noted that the objective findings were usually scant with this type of condition because pain is the predominant symptom and it is completely subjective. He also stated that the usual objective tests, including grip strength and trigger points on palpation, are essentially subjective and can be modified by a patient's efforts. Dr. Thatcher stated that appellant could use his hands for some limited work. He stated that appellant could perform tasks such as handling paper and the telephone, but could not lift more than 5 or 10 pounds infrequently and could not use his hands or arms repetitively. On the work capacity evaluation form, Dr. Thatcher limited appellant to one-hour-per day of repetitive use of his wrists and elbows and minimal pushing, pulling and lifting up to 5 to 10 pounds.

On August 23, 2005 the Office provided the employing establishment with Dr. Thatcher's work restrictions and inquired whether a light-duty position was available. On December 19, 2005 the employing establishment advised that it was unable to find a medically suitable position for appellant and recommended that he be referred to a vocational rehabilitation program. The Office referred appellant to the vocational rehabilitation program on March 20, 2006.

On March 28, 2006 Vocational Counselor Susan Delf contacted appellant and made arrangements for an initial interview on April 6, 2006. Appellant told Ms. Delf that he considered himself to be totally disabled. During the initial interview, he stated that he was totally disabled from any type of work because the problems with his upper extremities bothered him during walking, writing, computer use, driving and all activities involving use of the hands.

Appellant contended that his fine motor skills were affected by his symptoms, making it easier to carry a log than tear a paper towel off of the roll. He reported that at home he mowed the lawn with a riding mower with some difficulty, drove short distances, used the telephone, took care of laundry and cooking and maintained the wood stove. Appellant stated that he wore elbow pads to keep his elbows from contacting surfaces, which caused pain. He could no longer do household painting, heavy chores or basketball coaching. Ms. Delf stated that appellant was obviously impaired, but was able to do many activities and walk briskly.

Ms. Delf reported that career options were not discussed because appellant “was adamant that he [was] not interested in vocational rehabilitation services.” Appellant told her that he was disabled and was going to stay disabled. He stated that he was anticipating surgery on his left elbow and that his symptoms would interfere with maintaining employment. Appellant explained that if he began working he would lose his workers’ compensation and Social Security disability payments and medical benefits, which he needed to care for his sight and hearing impaired twin daughters. He also stated that he had difficulty opening doors and driving and that employers did not want to hire people with disabilities. When Ms. Delf asked appellant to consider the option of a new career direction, he said that he could not undergo training because he was not “academic” and had always worked with his hands.

By letter dated May 3, 2006, the Office informed appellant that his failure to cooperate in the vocational rehabilitation process could result in the reduction of his compensation to zero. It found that the medical evidence provided by Dr. Thatcher did not support the contention that appellant was totally disabled for work. The Office stated that if he continued to obstruct the “essential preparatory efforts” of interviewing, testing, counseling, guidance and work evaluations, it would assume that the vocational rehabilitation would have resulted in a return to work with no loss of wage-earning capacity. Under 20 C.F.R. § 10.519, this would result in a reduction of appellant’s compensation to zero for all periods of noncompliance and would affect his health benefits and optional life insurance premiums. The Office directed appellant to contact Ms. Delf within 30 days and make a good faith effort to participate in the rehabilitation process. It allowed him 30 days to provide a good reason for not participating in rehabilitation and informed him that following review of such materials, it would take appropriate action without providing further notice.

On May 24, 2006 appellant responded to the Office. He contended that he could not participate in vocational rehabilitation because of his physical condition. Appellant challenged the use of Dr. Thatcher’s report to find that he was only partially disabled. He noted that, in the January 5, 2005 report, Dr. Thatcher stated: “The patient continues to have symptoms that would restrict him from using his upper extremities in the workplace.” Appellant stated that his condition had worsened since January 2005, noting that he had undergone surgery on his left elbow on April 26, 2006. He stated that he had been disabled for six years and that both his doctors and the Social Security Administration found him to be disabled.

Appellant submitted medical reports and documentation from January 2002 to May 2006. On January 23, 2002 Dr. Richard L. Uhl, a Board-certified orthopedic surgeon, stated that, despite nerve tests that showed no specific abnormalities, appellant had not improved following surgery. He suspected that appellant had neuritis and recommended that he be evaluated for pain management treatment. Dr. Uhl stated that appellant was disabled and unable to use his arms in

any capacity. He opined that appellant was unable to work “based on the jobs that [were] available to him.” On June 5, 2002 Dr. Uhl reported that appellant continued to have difficulties with severe pain in his wrist, elbows and shoulders that was related to his employment. He stated that there had been some improvement in the right elbow, but that appellant still had considerable discomfort. Dr. Uhl noted numbness, burning and tingling in both of appellant’s hands and the development of impingement, arthritis and spurring in his right shoulder. On November 20, 2002 he reported that the Office had approved pain management and carpal tunnel releases. Dr. Uhl stated that appellant’s shoulder condition, which had not been accepted by the Office, was his major problem. He opined that appellant continued to be disabled and unable to work.

Dr. Paul J. Donovan, an osteopath, reported on April 27, 2005 that appellant had increasing pain and swelling in his left elbow. He stated that appellant had been using his arms minimally, but that he had done some recent yard work. Dr. Donovan noted tenderness and swelling of the lateral epicondyle and diagnosed left lateral epicondylitis, which he treated with injections. On June 3, 2005 he reported that the shots had not been very successful and prescribed physical therapy.

Appellant included a March 7, 2003 letter from the Social Security Administration accepting his disability. A May 9, 2006 slip from Dr. Suk Namkoong, a Board-certified orthopedic surgeon, indicated that appellant had surgery on April 26, 2006 and was in a cast until May 9, 2006. A May 17, 2006 letter from Dr. Uhl’s office indicated that it no longer participated in federal workers’ compensation claims.

On June 21, 2006 Ms. Delf closed appellant’s vocational rehabilitation case, with the possibility of future reopening, because of his refusal to participate in the process. On July 28, 2006 the Office requested that Dr. Namkoong provide an opinion, based on objective medical findings, of appellant’s work capacity. It informed him that this determination would be used as part of the attempt to return appellant to work. The Office also requested copies of all relevant operative reports and progress notes.

On August 7, 2006 Dr. Namkoong responded that he was unable to provide any part of appellant’s medical record that was not related to the workers’ compensation claim because he had not received permission to release that information. He stated that the Office already had notes related to treatment of the workers’ compensation claim. Dr. Namkoong stated that he would conduct the requested work capacity examination only if appellant agreed to it and the Office submitted prepayment.

By decision dated November 11, 2006, the Office reduced appellant’s compensation because of his refusal to participate in vocational rehabilitation. It stated that, in light of the information that appellant provided about his recent surgery, it had requested an updated work capacity evaluation from Dr. Namkoong. The Office found that, because Dr. Namkoong did not provide the requested information, there was no medical evidence in the record to outweigh Dr. Thatcher’s rationalized opinion that appellant was only partially disabled. It found that appellant had not shown good cause for his refusal to comply with the vocational rehabilitation effort. The Office reduced appellant’s compensation to zero under the provisions of 5 U.S.C.

§ 8113(b) and 20 C.F.R. § 10.519 for the duration of his noncompliance or until he showed good cause for not complying.

LEGAL PRECEDENT

Section 8104(a) of the Federal Employees' Compensation Act¹ pertains to vocational rehabilitation and provides: "The Secretary of Labor may direct a permanently disabled individual whose disability is compensable under this subchapter to undergo vocational rehabilitation. The Secretary shall provide for furnishing the vocational rehabilitation services."² Under this section of the Act, the Office has developed procedures that emphasize returning partially disabled employees to suitable employment and determining their wage-earning capacity.³ If it is determined that the injured employee is prevented from returning to the date-of-injury job, vocational rehabilitation services may be provided to assist returning the employee to suitable employment.⁴ Such efforts will be initially directed at returning the partially disabled employee to work with the employing establishment.⁵ Where reemployment at the employing establishment is not possible, the Office will assist the claimant to find work with a new employer and sponsor necessary vocational training.⁶

In section 8113(b) 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 his wage-earning capacity in the absence of the failure, until the individual in good faith complies" with the direction of the Office.⁷ 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

¹ 5 U.S.C. §§ 8101-8109.

² 5 U.S.C. § 8104(a).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.2 (August 1995).

⁴ *Id.* The Office's regulation provides: "[i]n determining what constitutes 'suitable work' for a particular disabled employee, [the Office] considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors." 20 C.F.R. § 10.500(b).

⁵ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.3 (August 1995). The Office's regulation provides: "The term 'return to work' as used in this subpart is not limited to returning to work at the employee's normal worksite or usual position, but may include returning to work at other locations and in other positions. In general, the employer should make all reasonable efforts to place the employee in his or her former or an equivalent position, in accordance with 5 U.S.C. § 8151(b)(2)." 20 C.F.R. § 10.505.

⁶ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.3 (August 1995).

⁷ 5 U.S.C. § 8113(b).

reduction of monetary compensation.⁸ 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].

(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 circumstances 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). This reduction will remain in effect until such time as the employee acts in good faith to comply with the directions of [the Office]."⁹

ANALYSIS

The Office referred appellant to vocational rehabilitation on March 28, 2006 on the basis of the January 5 and June 2, 2005 medical opinions of Dr. Thatcher, a Board-certified orthopedic surgeon. In his initial meeting with Ms. Delf, his assigned vocational counselor, appellant stated that he would not participate in rehabilitation because he believed himself to be totally disabled.

Appellant contended that Dr. Thatcher's January 5, 2005 report was not indicative of his current work capacity as his physical condition worsened, necessitating surgery in April 2006. The record establishes that Dr. Namkoong operated on appellant's left elbow on April 26, 2006

⁸ See *Wayne E. Boyd*, 49 ECAB 202 (1997) (the employee failed to cooperate with the early and necessary stage of developing a training program).

⁹ 20 C.F.R. § 10.519.

and that he was in a cast until May 9, 2006. The Office requested information from Dr. Namkoong about the operation and appellant's current work capacity in order to determine the appropriateness of vocational rehabilitation. When Dr. Namkoong did not respond the Office took no further steps to make a determination as to appellant's postoperative work capacity. The Office based its November 2006 decision of reducing appellant's compensation on Dr. Thatcher's January and June 2005 reports.

The Board finds that Dr. Thatcher's reports, which were based on an examination conducted in January 2005, are not sufficiently probative to support the Office's reduction of compensation. The change in appellant's condition from January 2005, notably his April 2006 surgery, diminished the relevance of Dr. Thatcher's reports as to appellant's current work capacity. The examinations by Dr. Thatcher were over one year old by that time. The Board has held that the Office must obtain reasonably current medical evaluations to make wage-earning capacity decisions.¹⁰ Dr. Thatcher's reports were no longer indicative of appellant's current physical condition. The Office should have referred appellant for another physical examination to determine his current work capacity prior to reducing his compensation for failure to participate in vocational rehabilitation. The Board finds that appellant's arguments based on his changed condition, evidenced by his April 2006 surgery, were supportive of his claim that he had good cause to refuse to participate in vocational rehabilitation.

CONCLUSION

The Board finds that the Office did not properly reduce appellant's compensation under 5 U.S.C. § 8113 for failure, without good cause, to participate in vocational rehabilitation.

¹⁰ See *Carl Green*, 47 ECAB 737 (1996); *Anthony Pestana*, 39 ECAB 980 (1988).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 17, 2006 is reversed.

Issued: September 18, 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