United States Department of Labor
Employees' Compensation Appeals Board

D.F., Appellant	)	
and	)	**Docket No. 07-1227**
	)	**Issued: September 24, 2007**
DEPARTMENT OF THE AIR FORCE, TRAVIS AIR FORCE BASE, CA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 10, 2007 appellant, through her attorney, filed a timely appeal of the Office of Workers' Compensation Programs' hearing representative's merit decision dated March 12, 2007 and the Office merit decision dated October 12, 2006 reducing her compensation benefits to zero for failing to cooperate with vocational rehabilitation efforts. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation benefits to zero for failing to cooperate with the initial stages of vocational rehabilitation efforts.

FACTUAL HISTORY

On March 30, 1994 appellant, then a 38-year-old orderly room clerk, filed a traumatic injury claim alleging that she strained her left shoulder moving a file cabinet to search for paperwork on March 16, 1994. The Office accepted her claim for cervical disc herniation on June 22, 1994. Appellant underwent a cervical discectomy at C5-6 on June 28, 1994. The

Office entered appellant on the periodic rolls on March 13, 1996. On March 27, 1996 she underwent a left C6 radiculopathy secondary to stenosis and recurrent herniated disc.

Appellant's physician, Dr. Alan T. Hunstock, a Board-certified neurosurgeon, opined on July 22, 1997 that appellant could work two to four hours a day avoiding clerical work. He stated that she should limit bending, neck motion and lifting. Dr. Hunstock stated that appellant's head and neck should be maintained in a neutral position with side rotation but she should flex and extend her neck only 10 minutes per hour or 1 hour a day. He indicated that she could lift 10 pounds or less.

In a report dated October 28, 1999, Dr. John Lavorgna, a Board-certified orthopedic surgeon, noted appellant's history of injury and performed a physical evaluation diagnosing persistent cervical radiculopathy following repeat surgeries. He noted that appellant had subjective complaints of neck pain radiating in the left upper extremity together with objective findings of limited range of motion of the neck, tenderness upon palpation and healed surgical incisions. Dr. Lavorgna described appellant's work restrictions as lifting, pushing and pulling up to 10 pounds, working four hours a day with no climbing. He stated, "She would be able to work four hours a day at the present time, with increase to eight hours a day over eight weeks within the limits of her neck range of motion and her subjective complaints."

On August 29, 2000 the Office found a conflict of medical opinion evidence between Dr. Hunstock, appellant's attending physician, who found that she should not perform clerical work and Dr. Lavorgna, the second opinion physician, who did not restrict appellant's ability to perform clerical work. The Office referred appellant for an impartial medical examination with Dr. Vatche Cabayan, a Board-certified orthopedic surgeon, to resolve the conflict. In a report dated August 31, 2000, Dr. Cabayan reviewed the factual and medical records. On September 28, 2000 he examined appellant and diagnosed cervical disc disease with radiculopathy, impingement of the right shoulder, thoracic outlet syndrome on the right and possible carpal tunnel syndrome bilaterally. Dr. Cabayan also diagnosed epicondylitis of the right elbow. He recommended additional testing and found that appellant's condition was not permanent and stationary. Dr. Cabayan listed her work limitations as:

> "[S]itting up to four hours a day with interruptions and gradually increasing to eight hours of work a day over three months from the standpoint of [appellant's] neck condition and left shoulder condition. [Appellant] should take a break every hour for about 10 minutes from any activities. Preferentially she might even get up every 30 minutes to do other chores. Intermittent sitting, standing [and] walking, might be helpful. After a couple of hours [appellant] might need to take a break and lay down for a few minutes. No lifting over five pounds is reasonable…. [Appellant] should not have to look overhead or reach overhead."

In a letter dated January 16, 2001, the Office informed appellant that it had determined not to pursue vocational rehabilitation efforts.

On December 15, 2003 the Office referred appellant for a second opinion evaluation with Dr. Aubrey Swartz, a Board-certified orthopedic surgeon, for an update examination. In a report dated January 26, 2004, Dr. Swartz noted appellant's history of injury and listed his findings on

physical examination. He found that her examination was unremarkable with only minimal tenderness in the posterior cervical spine and mild tenderness at the base of the neck. Dr. Swartz noted that appellant's cervical range of motion was limited to a mild to moderate degree as expected, based on her surgeries, that her grip strength was normal and that she had no atrophy of the upper extremities. He concluded that her subjective complaints outweighed her objective findings and that appellant exhibited only "very mild residuals" of the accepted employment injury. Dr. Swartz stated that appellant was capable of vocational rehabilitation and reemployment. He provided her work restrictions within an eight-hour day as: sitting, walking, standing, twisting, squatting, kneeling and reaching each eight hours a day, reaching above the shoulder six hours a day, operating a motor vehicle five hours a day and climbing four hours a day. Dr. Swartz indicated that appellant could push, pull and lift up to 20 pounds for six hours a day.

The Office referred appellant for vocational rehabilitation services on March 31, 2004. Appellant met with the vocational rehabilitation counselor on April 23, 2004. The rehabilitation counselor recommended a work hardening program as appellant stated that she did not feel she was capable of any employment activities. On May 3, 2004 the Office informed appellant that she was required to participate in vocational rehabilitation efforts and that the failure to do so could result in monetary penalties. The Office also denied the work hardening program recommended by the vocational rehabilitation as appellant's physical limitations were established by Dr. Swartz.

The vocational rehabilitation counselor informed the Office on April 29, 2004 that appellant refused to participate in vocational rehabilitation services until contacted directly by her claims examiner. In a letter dated May 12, 2004, the Office directed appellant to cooperate in the vocational rehabilitation process within 30 days or to provide good cause for her failure to do so. The Office informed appellant that, if it determined that she failed to apply for and undergo vocational rehabilitation without good cause, her compensation benefits could be reduced to zero for the period that she failed to cooperate.

In a report dated June 23, 2004, the vocational rehabilitation counselor noted that appellant was out of town for several weeks due to a family emergency. However, she continued to report that appellant was not able to participate in rehabilitation efforts. Appellant did not report for academic testing scheduled for June 21, 2004 and did not contact the testing center. She informed the counselor that she was attempting to obtain medical evidence supporting her claim of total disability. The vocational rehabilitation counselor completed a report on July 19, 2004 and noted that appellant had not yet rescheduled her academic testing or reported to the testing center. On August 30, 2004 the rehabilitation counselor noted that appellant had not contacted her, had not begun the academic testing, did not answer her telephone and did not respond to letters regarding her participation in rehabilitation efforts. No further action was taken.

On April 5, 2006 the Office referred appellant for a second opinion evaluation with Dr. Matthew Mitchell, a Board-certified orthopedic surgeon. In a report dated May 15, 2006, Dr. Mitchell noted appellant's history of injury and medical history. He performed a physical examination noting diminished range of motion of the cervical spine and diminished strength in her upper extremities and diagnosed "status post anterior cervical discectomy and fusion at C5-6

and status postposterior cervical spine decompression." Dr. Mitchell opined that appellant could work eight hours a day with restrictions such as reaching above the shoulder for four hours. He noted that she could push, pull and lift up to 20 pounds for four hours a day.

The Office again referred appellant for vocational rehabilitation services on June 6, 2006. Appellant met with the vocational rehabilitation counselor on June 13, 2006. She disagreed with Dr. Mitchell's assessment of her activity level and noted that she spent most of her day sitting on the couch or lying down watching television or listening to the police scanner. The counselor scheduled a vocational assessment on June 21, 2006. Appellant attended the testing at 8:45 a.m. on June 21, 2006. At 9:06 a.m. she stated that she could not complete any more testing. Appellant reported that she was "starting to freeze up" and would "pay dearly for it later" if she continued and left the testing center. The testing official noted that she did not take any breaks during the 21-minute period and did not attempt to adjust her workstation after the initial adjustment.

In a letter dated June 27, 2006, the Office noted that appellant failed to complete her testing on June 21, 2006. The Office informed her of her obligation to cooperate with vocational rehabilitation efforts and of the penalty provisions if she failed to cooperate without good cause. The Office allowed appellant 30 days to resume cooperating or to provide good cause for her failure to do so.

Appellant did not appear at the appointment scheduled with the vocational rehabilitation counselor on July 17, 2006. She telephoned the counselor and left a message that she was unable to attend the appointment due to medical issues. Appellant also failed to cancel or appear for an appointment scheduled for July 24, 2006. She did not respond to repeated telephone calls from the rehabilitation counselor.

In a report dated August 17, 2006, Dr. Hunstock found on examination that appellant had severe restriction of range of motion in her neck, normal tone, bulk, strength and coordination in both the lower and upper extremities. He diagnosed presumptive postherpetic neuralgia in the thoracic area. Dr. Hunstock recommended a magnetic resonance imaging scan of the cervical spine.

By decision dated October 12, 2006, the Office reduced appellant's compensation to zero effective October 29, 2006 based on her refusal to cooperate with the early stages of vocational rehabilitation efforts.

Appellant requested a review of the written record on November 10, 2006. She objected to Dr. Mitchell's assessment of her physical abilities and stated that she complied with the rehabilitation counselor's directive to report for testing. Appellant stated that the second opinion physicians failed to consider that both of her ankles were fused, that her neck was not stable and that she had undergone two neck surgeries. She contended that she was homebound and bed ridden for 10 years with severe pain. Appellant submitted a report dated November 3, 2006 from Dr. Mark Ellis, an internist, who stated:

> "I am writing this letter on behalf of [appellant], who reports a history of being unable to sit more than one and a half hours because of symptoms related to her

left intercostals neuralgia that she has had since November 2001. This causes significant pain and discomfort to where she has to lie down. Because of the symptoms, [appellant] has become essentially housebound."

By decision dated March 12, 2007, the hearing representative affirmed the October 12, 2006 decision finding that appellant had failed to establish "good cause" for her failure to cooperate with vocational rehabilitation efforts.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of proof to support that the disability has ceased or lessened before it may terminate or modify compensation benefits.[1]

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 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.[2]"

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…. 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) Under the circumstance identified in paragraph (b) of this section, 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

[1] *Howard L. Miller*, 56 ECAB ___ (Docket No. 04-2183, issued August 19, 2005).

[2] 5 U.S.C. § 8113(b).

> 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]."[3]

ANALYSIS

The Office referred appellant for a second opinion evaluation with Dr. Mitchell, a Board-certified orthopedic surgeon, on April 5, 2006. In his May 15, 2006 report, Dr. Mitchell found that appellant was capable of working eight hours a day within specified restrictions. Based on this report, the Office referred appellant for vocational rehabilitation services on June 6, 2006. Appellant met with the counselor on June 13, 2006 and reported for testing on June 21, 2006. However, she failed to complete the vocational assessment alleging that she was physically incapable of completing more than 21 minutes of written testing. The Office then informed appellant of her obligation to cooperate with vocational rehabilitation. Appellant did not appear at a meeting scheduled with the vocational rehabilitation counselor on July 17, 2006 citing "medical issues." She again failed to appear at the meeting scheduled for July 24, 2006 and failed to respond to telephone calls from counselor.

Appellant asserts that she was medically incapable of cooperating with vocational rehabilitation services. In support of this claim, she submitted a report from Dr. Hunstock, a Board-certified neurosurgeon, dated August 17, 2006 diagnosing presumptive postherpetic neuralgia in the thoracic area. However, Dr. Hunstock did not state that appellant was totally disabled and did not address whether she was unable to cooperate with rehabilitation efforts. This report does not establish "good cause" for her failure to cooperate with the early stages of vocational rehabilitation.

In a report dated November 3, 2006, Dr. Ellis, an internist, stated that appellant reported that she could not sit for more than an hour and a half. He did not offer his opinion that she was limited in the amount of time she could sit. Generally, findings on examination are needed to support a physician's opinion that an employee is disabled for work. The Board has stated that, when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurts too much to work, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability.[4] Appellant has not submitted sufficient medical evidence to establish that she was medically incapable of cooperating with vocational rehabilitation efforts. She failed without good cause to participate in preliminary vocational rehabilitation screening and meetings such that she failed to participate in the "early but necessary stages of a vocational rehabilitation effort."

The Act's implementing regulations provides that, when an employee fails to participate in the early stages of vocational rehabilitation, it cannot be determined what his or her wage-earning capacity would have been had there been no failure to participate.[5] It is thus, assumed,

[3] 20 C.F.R. § 10.519(a).

[4] *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

[5] 20 C.F.R. § 10.519(b).

absent evidence to the contrary, that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity.[6] Appellant did not submit any evidence to refute this assumption. The Office, therefore, properly found that she had no loss of wage-earning capacity and reduced appellant's monetary compensation to zero.

CONCLUSION

The Board finds that appellant failed to cooperate in the early stages of vocational rehabilitation services and that the Office, therefore, properly reduced her compensation benefits to zero.

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2007 and October 12, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 24, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

[6] 20 C.F.R. § 10.519(c).