United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 10-1526**
	)	**Issued: December 2, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Suitland, MD, Employer	)	

Appearances:
Appellant, pro se
No appearance, for the Director

Oral Argument October 12, 2010

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 18, 2010 appellant filed a timely appeal from a January 14, 2010 decision of the Office of Workers' Compensation Programs. 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 on the grounds that she failed, without good cause, to cooperate with vocational rehabilitation efforts.

FACTUAL HISTORY

This case has previously been before the Board.[1] In a decision dated April 20, 1998, the Board set aside a September 11, 1995 Office decision with respect to appellant's pay rate for compensation purposes.[2] By decision dated May 6, 1998, the Board found that an Office overpayment decision was not in posture for decision until the issue of her pay rate had been resolved.[3] In a decision dated February 20, 2001, the Board found that the Office properly determined that appellant's pay rate for compensation purposes was as of the date of injury, March 20, 1985. The Board further found that she was not entitled to waiver of an overpayment in compensation in the amount of $1,206.22 and that the Office properly denied her request for merit review. On July 31, 2001 the Board denied appellant's request for reconsideration.[4] By decision dated May 15, 2006, the Board stated that the Office properly refused to reopen her case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) and that the Office properly computed her retroactive compensation.[5] The facts of the claim as set forth in the Board's decision are incorporated herein by reference.

Appellant remained on the compensation rolls.[6] She submitted a July 25, 2007 work capacity evaluation form in which Dr. Robert J. Neviaser, an attending Board-certified orthopedic surgeon, advised that she had been permanently disabled since November 1998 due to bilateral carpal tunnel syndrome and musculoskeletal problems. Dr. Neviaser did not submit any report providing findings on examination or a narrative explaining the basis for his opinion.

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[1] Appellant was employed as a distribution clerk. She sustained a right shoulder injury on March 20, 1985 while throwing mail. The claim was accepted for right shoulder strain, chronic tendinitis, right acromioclavicular arthrosis, arthritis, traumatic arthropathy and right upper extremity mononeuritis. Appellant had shoulder surgery in December 1985 and worked intermittently until May 15, 1989. She has not worked since. On August 8, 1992 the Office accepted that appellant sustained employment-related right carpal tunnel syndrome and she had a right carpal tunnel release on September 25, 2001.

[2] Docket No. 96-460 (issued April 20, 1998).

[3] Docket No. 97-776 (issued May 6, 1998).

[4] Docket No. 99-2221 (issued February 20, 2001). The record also contains schedule award decisions dated September 28, 1988 and May 14, 1996, that awarded appellant a total 20 percent impairment of her right upper extremity. By decision dated June 18, 2003, Docket No. 02-2350, the Board found that appellant did not have more than a 20 percent permanent impairment of her right upper extremity.

[5] Docket No. 05-832 (issued May 15, 2006). The decision on Docket No. 05-832 (issued May 15, 2006) had initially been issued on January 6, 2006. The Director filed a petition for reconsideration, that was granted by order dated May 15, 2006 and the decision on Docket No. 05-832 (issued May 15, 2006) was reissued that day. In the interim, the Office issued a March 3, 2006 decision in response to the Board's January 6, 2006 decision. Appellant filed an application for review with the Board of the March 3, 2006 decision. In an order dated April 27, 2007, Docket No. 06-971, the Board dismissed the appeal. The Board noted that the Office and the Board may not have concurrent jurisdiction over the same case and found that, as the Director had filed a petition for reconsideration of the January 6, 2006 Board decision, the Board retained jurisdiction over the matter until after it issued the May 15, 2006 decision.

[6] Appellant filed an appeal from a May 7, 2009 decision that denied her February 23, 2009 request for reconsideration on the grounds that that it was untimely filed and failed to establish clear evidence of error. That appeal will be adjudicated separately under Docket No. 10-419.

On October 2008 the Office referred appellant to Dr. J. Richard Wells, a Board-certified orthopedic surgeon, for a second opinion evaluation. In an October 17, 2008 report, Dr. Wells noted his review of the medical record, her employment and history of injury and that she was in a motor vehicle accident in 2004 when she injured her shoulders. He advised that appellant did not cooperate with assessing the carpal tunnel condition or with examination of her right arm and shoulder, noting that when he tried to touch the shoulder she had an exaggerated pain response. However, when taking the right shoulder through range of motion below 90 degrees, there was no limitation, pain or crepitus and that grip, wrist, biceps and triceps seemed strong on the right with no atrophy or fasciculations in the upper extremity or hands. Dr. Wells stated that, when he tried to examine appellant's neck, she would pull away but she had no difficulty getting on and off the examining table or in taking her jacket off. During his interview, she used her hands appropriately and did not seem to have any limitation with the extremities or the hand when observed. Dr. Wells opined that there was a huge amount of malingering and supratentorial override of symptomatology with exaggerated pain and that appellant had recovered from carpal tunnel symptoms but had mild evidence of right shoulder problems that were not totally disabling. He concluded that she had reached maximum medical improvement and no further medical treatment was required for the accepted conditions. In an attached work capacity evaluation, Dr. Wells advised that appellant could work eight hours of light duty daily with permanent restrictions that she could not climb or reach above the shoulder and could reach 33 percent of the time with a 40-pound restriction on pushing, pulling and lifting.

The Office noted Dr. Wells' opinion that appellant could work light duty eight hours a day with limitations and on November 13, 2008 referred her for vocational rehabilitation with Fortuna Scheige, a rehabilitation counselor, who conducted an initial assessment on December 4, 2008. Ms. Scheige referred appellant to Mary Billingsley for vocational evaluation, and Ms. Billingsley scheduled appointments on three occasions in February 2009, which appellant did not attend. Appellant met with Ms. Scheige on April 29, 2009. When asked by Ms. Scheige when appellant would meet the vocational evaluator for testing, appellant expressed anger and left the meeting. The Office requested that Ms. Scheige identify appropriate positions and proceed with a labor market survey. Ms. Scheige identified the positions of dispatcher and information clerk and conducted labor market surveys.

By letter dated May 12, 2009, the Office proposed to suspend appellant's monetary compensation on the grounds that she failed to cooperate in rehabilitation efforts. Appellant was notified of the penalty provisions of section 8113(b) of the Federal Employees' Compensation Act.[7] She was afforded 30 days to respond. Other than telephoning the Office and expressing disagreement, appellant did not respond to the proposed suspension.

By decision dated June 16, 2009, the Office reduced appellant's compensation, based on her capacity to earn wages as an information clerk, because she failed to cooperate with vocational rehabilitation efforts.

On June 23, 2009 appellant requested a hearing that was held on October 28, 2009. At the hearing, she testified that she disagreed with the reduction.

[7] 5 U.S.C. §§ 8101-8193.

In a January 14, 2010 decision, an Office hearing representative found that appellant, without good cause, failed to cooperate with the Office's vocational rehabilitation program and affirmed the June 16, 2009 decision.

LEGAL PRECEDENT

Section 8113(b) of the Act provides that, if an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104, the Secretary, on review under section 8128 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.[8]

Section 10.519(a) of the implementing regulations provide 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]."[9]

Application of the principles set forth in *Albert C. Shadrick*[10] will result in the percentage of the employee's loss of wage-earning capacity.[11]

ANALYSIS

The Board finds that the Office properly reduced appellant's compensation benefits based on her ability to earn wages as an information clerk because she failed, without good cause, to participate in rehabilitation efforts.

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[8] *Id*. at § 8113(b); *J.W.*, 58 ECAB 419 (2007).

[9] 20 C.F.R. § 10.519(a).

[10] 5 ECAB 376 (1973). The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision, has been codified at 20 C.F.R. § 10.403. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.

[11] 20 C.F.R. § 10.403(d), (e).

In finding that appellant could perform the duties of an information clerk, the Office properly relied on the opinion of Dr. Wells, a Board-certified orthopedic surgeon and Office referral physician, who provided an October 17, 2008 report, in which he described physical examination findings, noting that there was no limitation, pain or crepitus noted when taking the right shoulder through range of motion below 90 degrees and that grip, wrist, biceps and triceps strength seemed strong with no atrophy or fasciculations in the upper extremities or hands. Dr. Wells also noted her lack of cooperation with the examination and opined that there was a huge amount of malingering and supratentorial override of symptomatology with exaggerated pain. He advised that appellant had reached maximum medical improvement, had recovered from carpal tunnel symptoms, had mild evidence of right shoulder problems that were not totally disabling and could work eight hours of light duty daily with permanent restrictions that she not climb or reach above the shoulder and could reach 33 percent of the time with a 40-pound restriction on pushing, pulling and lifting. Dr. Wells concluded that and no further medical treatment was required for the accepted conditions.

The Board has carefully reviewed Dr. Wells' opinion and notes that it has reliability, probative value and convincing quality with respect to his conclusions regarding the relevant issue in this case. Dr. Wells' opinion is based on a proper factual and medical history in that he reviewed the medical record and statement of accepted facts, provided a thorough and factual medical history and accurately summarized the relevant medical evidence.[12] Appellant submitted a July 25, 2007 work capacity evaluation form in which Dr. Neviaser advised that she had been permanently disabled since 1988 due to bilateral carpal tunnel syndrome and musculoskeletal problems. Dr. Neviaser, however, did not provide any accompanying medical report detailing the recent examination of appellant or that otherwise explained the basis for his conclusion that she remained totally disabled. The deficiencies in the medical evidence from him prompted the Office to obtain an updated evaluation from Dr. Wells in 2008. Dr. Neviaser's report is, therefore, insufficient to establish that appellant continued to be totally disabled or to establish a conflict in medical opinion.[13]

Based on Dr. Wells' opinion that appellant was not totally disabled, the Office referred her to Ms. Scheige, a rehabilitation counselor, for vocational rehabilitation services on November 13, 2008 and Ms. Scheige, in turn, referred appellant to Ms. Billingsley for vocational evaluation. While Ms. Billingsley scheduled three appointments with appellant in February 2009, appellant did not attend the scheduled appointments and when appellant finally met with Ms. Scheige on April 29, 2009, she would not agree to proceed with a vocational evaluation, expressed anger and left the meeting. Ms. Scheige then identified the position of information clerk.

A vocational rehabilitation specialist is an expert in the field of vocational rehabilitation and the Office may rely on his or her opinion as to whether the job is reasonably available and

[12] *J.W., supra* note 8.

[13] In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight. *Manuel Gill*, 52 ECAB 282 (2001).

vocationally suitable.[14] The Board finds that, in this case, the Office properly made a medical determination of partial disability and of specific work restrictions and referred appellant's case to Ms. Scheige who properly selected the information clerk position as within appellant's capabilities as outlined in the Department of Labor, *Dictionary of Occupational Titles* with regard to her limitations, education, age and prior experience. Ms. Scheige determined that appellant was able to perform the position of information clerk.

By letter dated May 12, 2009, the Office advised appellant that failure to participate in vocational rehabilitation efforts when she had not established justification for such failure, would result in penalties. Appellant was informed of the penalty provisions of section 8113(b) of the Act and given 30 days to respond. She did not participate in vocational rehabilitation efforts or provide good cause for not doing so within 30 days of the May 12, 2009 notice, merely expressing her disagreement in a telephone call. In a June 16, 2009 decision, the Office reduced appellant's compensation under section 8113(b) of the Act, based on the difference between her pay rate for compensation purposes and what her wage-earning capacity would have been as an information clerk had she cooperated with vocational rehabilitation efforts. Applying the principles set forth in *Shadrick*,[15] codified at section 10.403 of the Office's regulations,[16] the Office found that she had a 46 percent loss and adjusted her compensation rate to $1,535.00 every four weeks.[17] By decision dated January 14, 2010, an Office hearing representative affirmed the June 16, 2009 decision. The Board has reviewed these calculations and finds that they properly represent appellant's loss of wage-earning capacity.

At oral argument appellant asserted that she did not have to participate in vocational rehabilitation because she was totally disabled. As noted, the weight of the medical evidence rests with the opinion of Dr. Wells, who advised that she could return to full-time light duty. Dr. Neviaser's July 15, 2007 work capacity evaluation form is of diminished probative value for the reason stated. Appellant did not provide medical evidence substantiating her inability to participate in vocational rehabilitation.[18] While she stated that she had been on social security disability since 1985; her entitlement to benefits under that statue does not establish entitlement to benefits under the Act. The Board has long held that the findings of other administrative agencies have no bearing on proceedings under the Act, which is administered by the Office and the Board.[19]

[14] *W.D.*, 60 ECAB ____ (Docket No. 09-188, issued August 21, 2009).

[15] *Albert C. Shadrick*, *supra* note 10.

[16] 20 C.F.R. § 10.403.

[17] The Office found that appellant's date-of-injury salary was $499.07 per week with a current pay rate of $1,039.42. Appellant's wage-earning capacity based on the position of information clerk $481.00, with a loss of wage-earning capacity of $269.50.

[18] *J.W.*, *supra* note 8.

[19] *James E. Norris*, 52 ECAB 93 (2000).

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation under section 8113(b) of the Act for failing, without good cause, to cooperate with vocational rehabilitation.

ORDER

IT IS HEREBY ORDERED THAT the January 14, 2010 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: December 2, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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