United States Department of Labor
Employees' Compensation Appeals Board

C.G., Appellant	)	
and	)	**Docket No. 10-1714**
	)	**Issued: April 5, 2011**
DEPARTMENT OF THE NAVY, MEDICAL COMMAND CENTERS, Bremerton, WA, Employer	)	

Appearances:
John E. Goodwin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 15, 2010 appellant filed a timely appeal from the January 26, 2010 merit decision of the Office of Workers' Compensation Programs reducing her compensation for noncooperation 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 to zero effective January 26, 2010 due to her failure without good cause to cooperate with the early stages of vocational rehabilitation efforts.

FACTUAL HISTORY

In mid 2002, the Office accepted that appellant, then a 56-year-old nurse, sustained a herniated disc at L4-5 due to the repetitive duties of her job over time. It paid compensation for periods of disability.

In a June 16, 2009 report, Dr. Joan Sullivan, a Board-certified orthopedic surgeon who served as an Office referral physician, found that appellant could perform limited-duty work on a full-time basis. Appellant was restricted from lifting, pushing or pulling more than 15 pounds, operating a motor vehicle at work, sitting for more than two hours per day, twisting for more than two hours per day and bending or stooping for more than one hour per day. On July 27, 2007 Dr. James Garrity, an attending osteopath, concurred with Dr. Sullivan's June 16, 2009 opinion.

In an August 20, 2009 letter, the Office advised appellant that she was being referred to vocational rehabilitation to assist her return to work. Appellant was informed that Courtney Sime would serve as her vocational rehabilitation counselor. The Office stated, "You are required by [the Office] to cooperate with the rehabilitation specialist and to undertake rehabilitation activities directed toward suitable employment, or benefits may be terminated or reduced. You are also required to seek suitable work and to accept suitable work if it is offered to you."

Appellant met with Ms. Sime on September 2, 2009 at which time she provided her employment history, education and other vocational-related information. She had worked as a registered nurse since 1971 except for a two-year period in the 1980s when she worked as a sales clerk at a Navy Exchange convenience store. On September 29, 2009 appellant performed a transferable skills analysis as part of her rehabilitation efforts.

On October 6, 2009 Ms. Sime performed vocational research for the position of phlebotomist at the WorkSource job network. The entry-level wage in Bremerton-Silverdale area was listed as $12.94 per hour. The occupation was listed as light duty in the Department of Labor, *Dictionary of Occupational Titles* and lifting was generally in the 20-pound range except when one worked for a mobile unit which moved from place to place setting up equipment for blood draws. It was found that the highest-paid phlebotomists were found in hospitals and medical centers and that the lowest-paid phlebotomists were found in blood banks (where the hourly wage could be as low as minimum wage to $9.00 per hour).[1]

On October 15, 2009 Ms. Sime performed vocational research for the position of pharmacy aide at the WorkSource job network. There was little data available and no wage information for Kitsap County. Ms. Sime stated that the primary responsibility of the position "Pharmacy Tech B" was cashiering and putting labels on prescription bottles, so vocational research was obtained for cashiering, a position which was listed as being in demand in Kitsap County. The entry-level wage for this occupation was $8.81 per hour. During an October 21, 2009 perusal of job listings for phlebotomists and cashiers in Kitsap County, Ms. Sime found one opening for a phlebotomist (with no wage listed) and four openings for cashiers with wages ranging from $8.55 to 9.00 per hour. In an October 22, 2009 report, she stated, "There are some transferable skills not listed in the [Transferable Skills Assessment] that could be considered for employment such as Phlebotomist, Pharmacy Tech B (a glorified cashiering and labeling position), Drugstore Clerk and perhaps Medical Equipment and Supplies Clerk. [Appellant] would also benefit from a short-term computer course…." Ms. Sime noted that she would need

[1] Ms. Sime indicated that appellant could not immediately work as a nurse as her nursing license had lapsed.

to meet with appellant to review transferable skills and select the most realistic occupations based on labor market conditions and physical demands.

In early November 2009, appellant completed an on-line survey regarding her job interests. Ms. Sime recommended that appellant speak to an Office claims examiner about the possible effect of a wage-earning capacity determination on her compensation. She advised that further research was necessary regarding the physical requirements of phlebotomist and cashier positions.

In a November 12, 2009 letter, appellant advised the Office that as of November 14, 2009 she would be residing permanently in the Philippines with her husband because the increasingly cold weather she encountered in Washington State worsened her back condition.[2] She had met twice with Ms. Sime to discuss the possibilities of job hunting. Appellant contended that she was unable to work due to the condition of her back and legs, diabetes, hypertension and dizziness bouts.

On November 19, 2009 the Office responded that it would change her address to the Philippines and her case file would be transferred to another district Office since she would be permanently living outside the United States. As Dr. Garrity agreed with Dr. Sullivan's findings, it would continue to pursue the vocational rehabilitation program. The Office advised appellant that it was enclosing another November 19, 2009 letter explaining why it was proposing to suspend her compensation for noncooperation with the vocational rehabilitation effort.

In the November 19, 2009 letter, the Office advised appellant that it reviewed her November 12, 2009 statement in which she expressed unwillingness to participate in vocational rehabilitation efforts because she felt that she was too disabled for work. It informed her that the medical evidence of record established that she was not totally disabled. The June 16, 2009 report of Dr. Sullivan showed that she was only partially disabled. It informed appellant that, under section 8113(b) of the Federal Employees' Compensation Act, if an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed, it may reduce compensation based on what probably would have been the individual's wage-earning capacity had he or she not failed to apply for and undergo vocational rehabilitation. Office regulations further provide that, if an individual without good cause fails or refuses to participate in the essential preparatory efforts of rehabilitation efforts, it will assume, in the absence of evidence to the contrary, that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity and compensation will be reduced accordingly. It directed appellant to make a good faith effort to participate in the rehabilitation effort within 30 days or, if she believed he had good cause for not participating in the effort, to provide reasons and supporting evidence of such good cause within 30 days. The Office stated that if these instructions were not followed within 30 days action would be taken to reduce her compensation.

In a November 16, 2009 report, Ms. Sime checked a box which indicated, "Claimant obstruction: claimant does not appear at scheduled meetings, fails to carry out agreed upon actions." The phrase "plan development" appeared under the portion of the form for "current

[2] Appellant provided an address in the Philippines. *Via* a telephone call on November 12, 2009, appellant advised Ms. Sime that she would return to the United States in June 2010.

rehabilitation status." In a November 25, 2009 report, Ms. Sime advised that additional information was required about questions such as "which employment settings have the lightest physical requirements" and the names of potential local employers.

In December 9, 2009 letters, appellant advised the Office that she would return to Washington State after the first week in January 2010. In a January 6, 2010 letter to the Office, she stated that "my return to Washington State will be delayed by three weeks more or less (to comply with [the Office's] rules to go through vocational rehab[ilitation]." Appellant had recently learned that her son, who lived in San Francisco, was coming to the Philippines for the latter part of January 2010 and she wished to see him.

In a January 26, 2010 decision, the Office reduced appellant's compensation to zero effective that day under 5 U.S.C. § 8113(b) to reflect her loss of wage-earning capacity had she continued to participate in vocational rehabilitation efforts. It determined that she failed, without good cause, to undergo vocational rehabilitation as directed. The Office found that appellant had not fully participated in the early but necessary stages of the vocational rehabilitation effort and found that in the absence of evidence to the contrary, the vocational rehabilitation effort would have resulted in her return to work at the same or higher wages than for the position she held when injured.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.[3] 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 of the Act, 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 [or her] wage-earning capacity in the absence of the failure," until the individual in good faith complies with the direction of the Office.[4]

Sections 10.519(b) and (c) of Title 20 of the Code of Federal Regulations,[5] the implementing regulations of 5 U.S.C. § 8113(b), further provide as follows:

> "(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.
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> "(c) Under the circumstance identified in paragraph (b) of this section, in the absence of evidence to the contrary, [the Office] will assume that the vocational

[3] *Betty F. Wade*, 37 ECAB 556 (1986).

[4] 5 U.S.C. § 8113(b).

[5] 20 C.F.R. § 10.519(b) and (c).

> 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). The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of [the Office]."

In *Jacquelyn V. Pearsall*,[6] the claimant met with her rehabilitation counselor, participated in a vocational evaluation and cooperated with her counseling to the point that her rehabilitation counselor was able to integrate the psychological and functional capacities information and identify appropriate employment opportunities. The rehabilitation counselor identified positions available within appellant's physical limitations and aptitude which were also available within her commuting area. Under the circumstances of this case, the Board found that the claimant's rehabilitation efforts had extended beyond the preliminary stages and therefore it was improper for the Office to reduce her compensation to zero based on a finding that she failed to cooperate while engaged in the preliminary stages of her rehabilitation efforts.

ANALYSIS

The Office accepted that appellant sustained a herniated disc at L4-5 due to the repetitive duties of her job over time. In a June 16, 2009 report, Dr. Sullivan, a Board-certified orthopedic surgeon who served as an Office referral physician, indicated that appellant could perform limited-duty work on a full-time basis.[7] On July 27, 2007 Dr. Garrity, an attending osteopath, stated that he concurred with Dr. Sullivan's June 16, 2009 report.

Beginning in September 2009, appellant began to participate in an Office-sponsored vocational rehabilitation program with Ms. Sime serving as her rehabilitation counselor. The Board finds that the Office properly reduced appellant's compensation to zero effective January 26, 2010 on the grounds that she failed without good cause to participate in the early stages of vocational rehabilitation efforts.

In a November 12, 2009 letter, appellant advised the Office that as of November 14, 2009 she would be residing permanently in the Philippines with her husband because the increasingly cold weather she encountered in Washington State worsened her back condition.[8] She felt that she was unable to work due to the condition of her back and legs, diabetes, hypertension and dizziness bouts. In December 9, 2009 letters, appellant stated that she would return to Washington State after the first week in January 2010, but in a January 6, 2010 letter, she informed the Office that her return to Washington State would be delayed by three weeks "more or less." She had recently learned that her son, who lived in San Francisco, was coming to the

[6] 51 ECAB 209 (1999).

[7] Appellant was restricted from lifting, pushing or pulling more than 15 pounds, operating a motor vehicle at work, sitting for more than two hours per day, twisting for more than two hours per day and bending or stooping for more than one hour per day.

[8] *Via* a telephone call on November 12, 2009, appellant advised Ms. Sime that she would return to the United States in June 2010. At this point, she had two meetings with Ms. Sime to discuss her work history and employment interests. Appellant completed at least one on-line survey regarding her employment interests.

Philippines for the latter part of January 2010 and she wished to see him during this period. Ms. Sime provided an opinion that these circumstances constituted a failure to cooperate with vocational rehabilitation efforts and the Board finds that it was reasonable for the Office to also make such a determination.

The Office advised appellant in a November 19, 2009 letter that she had failed to participate in the early stages of vocational rehabilitation efforts; that she had 30 days to participate in such efforts or provide good cause for not doing so and that her compensation would be reduced to zero if she did not comply within 30 days with the instructions contained in the letter. Appellant did not, however, participate in vocational rehabilitation efforts or provide good cause for not doing so within 30 days of the Office's November 19, 2009 letter. She alleged that her physical condition prevented her from engaging in rehabilitation efforts and returning to work, but she did not submit medical evidence supporting this position. The most recent reports of Dr. Sullivan and Dr. Garrity showed that appellant could perform limited-duty work on a full-time basis.

Appellant's leaving the country for an extended period constituted a failure without good cause to participate in preliminary vocational rehabilitation efforts. On appeal, counsel argued that appellant's participation in the rehabilitation program had advanced beyond the preliminary stages and therefore it was improper for the Office to reduce her compensation to zero based on a finding that she failed to cooperate while engaged in the preliminary stages of her rehabilitation efforts. He cited the case *Jacquelyn V. Pearsall*[9] in support of this position. The Board finds that the facts of the present case are distinguishable from those of *Pearsall.* The employee in *Pearsall* was subject to a rehabilitation placement plan in that job categories had been identified and selected which were within her physical restrictions and available in her geographic area.[10] Although Ms. Sime had discussed the possibility of searching for certain positions with appellant, such as the positions of phlebotomist or cashier, she advised that further research was required regarding the physical requirements (and other characteristics) of various positions before making a decision about which positions to pursue.[11]

Office regulations provide that, in such a case of noncooperation during the preliminary stages of rehabilitation, it cannot be determined what would have been the employee's wage-earning capacity had there been no failure to participate and it is assumed, in the absence of evidence to the contrary, that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity.[12] Appellant did not submit sufficient evidence to refute such an assumption and the Office had a proper basis to reduce her disability compensation to zero effective January 26, 2010.

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[9] *See supra* note 6.

[10] Moreover, the claimant in *Pearsall* began to contact potential employers for the types of positions identified by her rehabilitation counselor.

[11] On appeal, counsel argued that Ms. Sime undertook Labor Market Surveys for the positions of medical assistant and phlebotomist. However, the record does not contain evidence of such surveys being conducted prior to the issuance of the Office's January 26, 2010 decision.

[12] *See* 20 C.F.R. § 10.519(b) and (c). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11a (December 1993).

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation to zero effective January 26, 2010 due to her failure without good cause to cooperate with the early stages of vocational rehabilitation efforts.

ORDER

IT IS HEREBY ORDERED THAT the January 26, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 5, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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