United States Department of Labor
Employees' Compensation Appeals Board

E.P., Appellant	)	
and	)	**Docket No. 10-1869**
	)	**Issued: May 23, 2011**
DEPARTMENT OF THE NAVY, CHARLESTON NAVAL SHIPYARD, Charleston, SC, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On July 2, 2010 appellant filed a timely appeal from a January 6, 2010 decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act[1] and 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 December 21, 2008, on the grounds that she failed, without good cause, to cooperate with vocational rehabilitation efforts.

On appeal appellant asserts that she did not receive notification of the scheduled September 25, 2008 appointment until September 29, 2008 and was not told that transportation for the testing was authorized.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On December 5, 1990 appellant, then a 31-year-old insulator, sustained an employment-related injury to her left knee when her leg fell through a grating. The claim was accepted for meniscus tear of the left knee. Appellant began working limited duty. On August 1, 1991 Dr. James J. McCoy, a Board-certified orthopedic surgeon, performed left knee arthroscopic surgery. The postoperative diagnosis was chronic left knee sprain superimposed on preexisting chondromalacia. Appellant returned to limited duty. On May 3, 1993 she was granted a schedule award for a 13 percent impairment of the left lower extremity.[2] Appellant transferred from the insulator position to that of supply clerk; but was separated from the employing establishment effective March 10, 1995 because her restrictions could not be accommodated. The Office accepted that she sustained a recurrence of disability and she was placed on the periodic compensation rolls.[3]

In a September 4, 2001 report, Dr. Gerald D. Schuster, a Board-certified orthopedic surgeon and Office referral physician, provided examination findings and diagnosed internal derangement of both knees with evidence of chondromalacia patellae, especially on the left. He advised that a September 10, 2001 magnetic resonance imaging (MRI) scan of the left knee was unremarkable and showed no evidence of a tear of the medial meniscus. Dr. Schuster advised that appellant could work eight hours a day with restrictions to her physical activity.

Appellant came under the care of Dr. Bright McConnell, III, Board-certified in orthopedic surgery. In reports dated October 3, 1997 to July 31, 2002, Dr. McConnell noted her symptoms of bilateral knee pain. He diagnosed mild persistent patellofemoral malalignment, more consistent for enthesopathy. In an October 26, 2007 report, Dr. McConnell noted that he had last seen appellant in September 2005 for mild degenerative changes of her knees.[4] He noted her current complaint of multiple foci joint pain involving both knees, hands, ankles and spine, exacerbated by activity. Physical examination findings included a mild antalgic gait with full hip and knee range of motion and no knee instability and no knee effusion. Appellant had diffuse medial and lateral joint line tenderness and minimal patellofemoral crepitus. Neurovascular examination was unremarkable. Dr. McConnell diagnosed mild degenerative arthritis of the left knee with varus malalignment and patellofemoral syndrome, rule-out polyarthropathy, with possible rheumatologic source. On November 12, 2007 he reported that appellant's laboratory studies ruled out rheumatologic involvement. Regarding her work activities, Dr. McConnell advised that appellant should avoid repetitious kneeling, squatting and lifting weights in excess of 20 pounds.

[2] By decision dated August 27, 1993, an Office hearing representative affirmed the May 3, 1993 schedule award decision. Appellant also has a closed claim, adjudicated under file number xxxxxx955, for bilateral carpal tunnel syndrome.

[3] The March 15, 1995 letter notifying appellant that the recurrence was accepted contains a typographical error, noting that a right knee meniscal tear was accepted, not the left. Appellant was referred for vocational rehabilitation in August 1995 and services were discontinued in October 1996.

[4] A copy of a September 2005 report from Dr. McConnell is not found in the case record.

By report dated February 20, 2008, Dr. Dowse D. Rustin, a Board-certified orthopedic surgeon, who provided a second opinion evaluation for the Office.[5] He noted the history of left knee injury and appellant's report that she also injured her right knee on December 5, 1990. Dr. Rustin described her medical treatment and provided findings on physical examination. He advised that appellant was ambulating independently and able to get on and off the examining table without difficulty. Dr. Rustin reported full flexion and extension of both knees with only trace fluid. The patella appeared to track well in both knees without significant crepitus, and she had good mediolateral stability, a negative anterior drawer test and a good Lachman test. Dr. Rustin stated that there was no indication of internal derangement of the left knee and only minimal findings of chondromalacia, and advised that appellant could return to her previous position with restrictions of no stooping, squatting or kneeling. A March 18, 2008 left knee MRI scan demonstrated minimal joint effusion, minimal patellar chondromalacia, minimal chondromalacia involving the medial femoral condyle and no meniscus tear.

In March 2008 appellant was referred for vocational rehabilitation. By letter dated May 5, 2008, Tonetta Watson-Coleman, a vocational consultant, noted that appellant had not responded to her April 18, 2008 letter or to messages left at her home regarding appellant's referral for vocational rehabilitation services.[6] She asked that appellant telephone her, and again contacted appellant by letter on May 14, 2008. On June 20, 2008 the Office confirmed that appellant had not responded to any of Ms. Watson-Coleman's attempts to reach her.

By report dated June 20, 2008, Dr. McConnell advised that appellant had an episode of falling and aggravation of neck and back pain with weakness in her left leg. He stated that physical examination demonstrated no demonstrable effusion in either knee, with mild patellofemoral crepitus, left more than right and quadriceps weakness on wall slide test. Dr. McConnell advised that he would not recommend intervention for her post-traumatic chondromalacia and that she could have mild neuropathy on the left.

Ms. Watson-Coleman telephoned the Office on June 26, 2008, stating that appellant called her and reported that she had been ill since April 23, 2008 and that she had no telephone. Appellant met with the rehabilitation counselor on July 2, 2008. She stated that appellant maintained that she needed left knee surgery and had many physical complaints. On July 11, 2008 Ms. Watson-Coleman telephoned the Office reporting that she had met with appellant, but it did not appear that the vocational rehabilitation process would be successful. By letter dated August 4, 2008, she informed appellant that an appointment had been scheduled on August 25, 2008 with L. Randolph Waid, Ph.D., for vocational evaluation. On August 14, 2008 appellant advised that she had another appointment on August 25, 2008 and asked that the appointment with Dr. Waid be rescheduled. She also asked that transportation services be provided because she could not drive due to medication.

[5] Appellant was initially referred to Dr. James Bethea. She did not attend the appointment scheduled for November 16, 2007, stating that it was inconvenient to attend an appointment in Columbia, South Carolina, so far from her home in Charleston, South Carolina. An appointment was rescheduled with Dr. Rustin, in Charleston, South Carolina.

[6] The record does not contain a copy of April 18, 2008 correspondence.

In an August 25, 2008 treatment note, Dr. McConnell noted appellant's complaint of knee pain. Examination demonstrated no effusion and mild patellofemoral crepitus with no instability. Dr. McConnell noted that appellant was having similar problems with her right knee.

By letter dated August 25, 2008, Ms. Watson-Coleman informed appellant that the appointment with Dr. Waid had been rescheduled, and to please call to discuss the appointment. In a letter dated September 10, 2008, the rehabilitation counselor advised appellant the transportation could be provided for the scheduled appointment, and stated that, since she did not have a telephone number where appellant could be reached or a street address where the service could pick her up, appellant should telephone her.[7] In an October 3, 2008 rehabilitation action report, Ms. Watson-Coleman noted that appellant had declined to provide a telephone number and had not cooperated with vocational rehabilitation efforts. The report stated that certified letters had been mailed to appellant on August 25 and September 10, 2008 informing her of the September 25, 2008 appointment with Dr. Waid, that transportation could be provided and that appellant had not contacted her.[8]

In an October 16, 2008 letter, 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 Act[9] and section 10.519 of the Office's regulations.[10] The Office informed her that it was assumed that vocational rehabilitation would have resulted in a return to work with no loss of wage-earning capacity and, accordingly, compensation would be reduced to zero. Appellant was directed to make a good faith effort to participate in vocational rehabilitation and given 30 days in which to respond.

On November 11, 2008 appellant requested a copy of Dr. Schuster's report and all vocational rehabilitation files. In a November 13, 2008 letter, she stated that she did not impede vocational rehabilitation efforts, and contended that she did not receive correspondence regarding a September 25, 2008 appointment until September 29, 2008. Appellant noted that she could not drive due to medication and had no means of transportation. In addition to injuries to both knees, she had cervical and lumbar injuries and bilateral carpal tunnel syndrome caused by her federal employment.[11] Appellant stated that, because the meeting with Ms. Watson-Coleman on July 2, 2008 lasted more than an hour, she was in excruciating pain from sitting, and reported that she needed cervical, lumbar, knee and bilateral carpal tunnel surgery. She asserted that all her injuries should be addressed.

In a decision dated December 4, 2008, the Office found that appellant did not provide any medical documentation to support her contentions regarding other medical conditions that prevented her participation in vocational rehabilitation efforts. It determined that her failure to undergo the essential preparatory effort of vocational testing did not permit an assessment of her

[7] Appellant changed her address of record to a post office box in 1995.

[8] The record indicates that the letters were sent certified mail and one was picked up on September 29, 2008 and the other returned as not picked up, but contains contradictory information regarding which was picked up.

[9] 5 U.S.C. § 8113(b).

[10] 20 C.F.R. § 10.519.

[11] The record indicates that appellant has a closed claim for bilateral carpal tunnel syndrome.

wage-earning capacity, had she undergone the testing and rehabilitation effort, and 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 held when injured. The Office reduced appellant's compensation to zero on the grounds that she failed to cooperate with vocational rehabilitation efforts. Appellant was informed that the reduction would continue until she, in good faith, participated in directed vocational testing, or showed good cause for not complying, at which time the reduction of compensation would cease.

On January 6, 2009 appellant requested a review of the written record. She stated that she had not timely received notice of the September 25, 2008 appointment for testing, and asserted that the Office should have medical evidence regarding her employment injuries. Appellant submitted additional evidence including a May 2, 2008 lumbar spine MRI scan that demonstrated degenerative changes, worse at L3-4 through L5-S1, and an extruded disc at L3-4. A June 10, 2008 cervical MRI scan demonstrated multilevel cervical spondylosis, and a November 28, 2008 right knee MRI scan demonstrated a small tear involving the anterior horn of the lateral meniscus with minimal associated parameniscal cyst and areas of minimal chondromalacia. A November 28, 2008 brain MRI scan was unremarkable.

By decision dated August 13, 2009, an Office hearing representative denied appellant's request for a written review of the record on the grounds that the request was not timely filed.

On December 4, 2009 appellant requested reconsideration, noting that she had several employment-related injuries including bilateral carpal tunnel syndrome, and reiterating that she also injured her right knee on December 5, 1990. She submitted a June 25, 2008 electromyographic (EMG) study that had no summary or interpretation report. By report dated July 29, 2009, Dr. McConnell noted seeing appellant for complaints of her left knee. He provided examination findings and diagnosed effusion of the lower leg, lateral meniscus tear and Baker's cyst. On September 2, 2009 Dr. McConnell reported that appellant was still having anterior left knee pain, aggravated by steps and sitting for prolonged periods of time. He stated that he had been following her for several years for a right knee condition. Dr. McConnell diagnosed patella tendinitis and chondromalacia patella. On November 11, 2009 he injected the left knee patellar tendon.[12]

In a merit decision dated January 6, 2010, the Office denied modification of the December 4, 2008 decision.

LEGAL PRECEDENT

Section 8113(b) of the Act provides:

> "If an individual without good cause fails to apply for or 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 probably have been his wage-

[12] Appellant also submitted duplicates of medical evidence previously of record.

earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary."[13]

20 C.F.R. § 10.519 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:"

* * *

> "(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 [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 direction of [the Office]."[14]

The Office's procedure manual states that specific instances of noncooperation include a failure to appear for the initial interview, counseling sessions, a functional capacity evaluation, other interviews conducted by the rehabilitation counselor, vocational testing sessions and work evaluations, as well as lack of response or inappropriate response to directions in a testing session after several attempts at instruction.[15]

ANALYSIS

Appellant's claim was accepted for a left knee meniscus tear for which she underwent surgery. The Office developed the medical evidence regarding her work restrictions. Appellant's attending orthopedic surgeon, Dr. McConnell, advised on November 12, 2007 that appellant should avoid repetitious kneeling, squatting and climbing and should not repetitiously lift weight in excess of 20 pounds. Dr. Rustin, an Office referral physician, advised in a February 20, 2008 report that she could return to her previous job with restrictions of no stooping, squatting or kneeling. He noted that appellant was an insulin-dependent diabetic and

[13] 5 U.S.C. § 8113(b).

[14] 20 C.F.R. § 10.519; *see R.H.*, 58 ECAB 654 (2007).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11(a) (November 1996); *see Sam S. Wright*, 56 ECAB 358 (2005).

had a past medical history of carpal tunnel syndrome and hypertension. Dr. Rustin advised that she could return to work.

The Office referred appellant to Ms. Watson-Coleman for vocational rehabilitation services, to develop a vocational plan and assist appellant in returning to gainful employment within her physical limitations.

After an initial interview, held more than two months after Ms. Watson-Coleman first attempted to contact appellant, the rehabilitation counselor scheduled a vocational testing appointment with Dr. Waid on August 25, 2008. That appointment was rescheduled at appellant's request. Appellant reasonably should have been aware at that time that the appointment would be rescheduled. She did not provide a telephone number to Ms. Watson-Coleman. Appellant was notified by certified letters dated August 25 and September 10, 2008 of the rescheduled appointment for September 25, 2008 and that transportation would be provided. The record indicates that the letters were sent to her address of record, a post office box, and that one was picked up on September 29, 2008 and the other returned.

Office procedures recognize that failure to attend a vocational testing session is a specific instance of noncooperation in vocational rehabilitation.[16] The issue is whether appellant's failure to participate was "without good cause" under section 8113(b) of the Act and section 10.519 of the Office's regulations. There is no evidence that her failure to exercise a reasonable standard of cooperation was based on good cause. Appellant changed her address of record to a post office box in 1995.[17] It was her responsibility to pick up her mail, especially since she did not provide a telephone number to Ms. Watson-Coleman. The Board finds that the rehabilitation counselor properly provided appellant notice of the appointment scheduled for September 25, 2008, that appellant did not attend.

Moreover, appellant submitted no probative evidence to establish "good cause" for her failure to participate in vocational rehabilitation. Ms. Watson-Coleman had scheduled vocational testing, and none of the medical reports indicated that appellant was physically unable to attend the testing session. If a suitable job was subsequently identified, appellant would have an opportunity to submit relevant evidence as to the medical or vocational suitability of the position.

In this case, the failure to participate was clearly in the early but necessary stage of vocational rehabilitation, prior to the identification of a suitable job. Under this circumstance the Office will assume, in the absence of contrary evidence that the rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity. Pursuant to section 10.519, the Office will reduce compensation to zero until such time as appellant in good faith complies with the direction of the Office. The Board finds the Office properly applied the provisions of the Act and the implementing regulations in reducing appellant's compensation to zero effective

[16] *Id*.

[17] *Supra* note 7.

December 21, 2008 because she failed to participate in the early and necessary stages of vocational rehabilitation was "without good cause."[18]

The Board also finds that appellant has not demonstrated a willingness to undergo vocational testing or provide good cause for not complying since that time. Appellant has asserted that she needs surgery on her neck, back, knees and for carpal tunnel syndrome, and has generally argued that her several medical conditions prevent her from working. The medical evidence submitted is, however, insufficient to establish good cause for failure to participate in vocational rehabilitation services. There is no medical report specifically discussing appellant's claimed carpal tunnel syndrome, degenerative cervical and lumbar condition, or other medical conditions, and there is no medical evidence that indicates that she needs surgery of any sort. The MRI scan studies submitted were either unremarkable or demonstrated degenerative changes, and the EMG study did not include a medical interpretation. In reports submitted by Dr. McConnell subsequent to the December 21, 2008 suspension of wage-loss compensation, Dr. McConnell merely noted appellant's continued complaints of bilateral new pain. Thus, none of the evidence submitted demonstrates that appellant could not participate in vocational rehabilitation services and she has not established good cause for her failure to participate.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation to zero on the grounds that she failed to cooperate with the early stages of vocational rehabilitation efforts.

[18] *Supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the January 6, 2010 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: May 23, 2011
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