United States Department of Labor
Employees' Compensation Appeals Board

D.A., Appellant	)	
and	)	**Docket No. 14-375**
	)	**Issued: May 28, 2014**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS & BORDER PROTECTION, Jamaica, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 4, 2013 appellant, through her attorney, filed a timely appeal from an October 1, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) 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 OWCP properly reduced appellant's compensation pursuant to 5 U.S.C. § 8113(b) for failure to continue vocational rehabilitation without good cause.

FACTUAL HISTORY

On April 11, 1994 appellant, then a 38-year-old import specialist, filed a traumatic injury claim (Form CA-1) alleging that on March 28, 1994 she sustained injuries while lifting heavy

[1] 5 U.S.C. § 8101 *et seq.*

stereo equipment in the performance of duty. She underwent a cervical discectomy with C5-6 and C6-7 fusion on May 10, 1994. OWCP accepted the claim for cervical herniated disc at C5-6 and C6-7. Appellant stopped working and received compensation for total disability on the periodic compensation rolls.

In a report dated April 27, 2012, the attending physician, Dr. Susan Aull, a Board-certified physiatrist, provided results on examination. The diagnoses included probable recurrent cervical herniated nucleus pulposus above and below the area of stabilization vs instability, cervical radiculopathy right C6-7, cervical degenerative joint disease, myofascial pain syndrome of the cervical paravertebrals, shoulder girdle and interscapular musculature. Dr. Aull stated that appellant was disabled due to limited range of motion of the cervical spine with radiculopathy and appellant should also avoid lifting.

OWCP referred appellant to Dr. Jonathan Black, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated May 1, 2012, Dr. Black provided a history and results on examination. He opined that the accepted cervical herniated discs had resolved, but appellant continued to have employment-related residuals, noting that appellant had signs of ongoing cervical radiculopathy with C7 nerve involvement. Dr. Black opined that appellant could not work as an import specialist due to lifting restrictions, although appellant could work in a limited capacity for eight hours per day. He indicated on a work capacity evaluation form (OWCP-5) that appellant was limited to 10 pounds lifting at three hours per day.

On May 8, 2012 OWCP accepted a right cervical radiculopathy with C7 nerve involvement.[2] An OWCP rehabilitation specialist determined that vocational rehabilitation was appropriate in view of Dr. Black's medical report. Appellant was referred to a vocational rehabilitation counselor to develop a rehabilitation plan.

The record indicates that the vocational rehabilitation counselor met with appellant at her home on June 18, 2012 and appellant underwent a vocational evaluation on July 2, 2012. In a report dated July 11, 2012, the vocational rehabilitation counselor indicated that the rehabilitation plan was to enroll appellant in a customer assistance technology program, a 15-week program that prepared students for positions such as a receptionist. The vocational rehabilitation counselor prepared a CA-66 job classification form for the position of Receptionist, Department of Labor's *Dictionary of Occupational Titles*, DOT No. 237.367-038. The position was described as sedentary with occasional lifting of 10 pounds, at weekly wages of $400.00 based on state employment information.

In a report dated August 15, 2012, the vocational rehabilitation counselor indicated that appellant had reported that she would not register for the technology program based on her physician's opinion. By letter dated August 17, 2012, OWCP advised appellant of the provisions of 5 U.S.C. § 8113(b). It stated that appellant was directed to undergo the technology program and if she had reasons for not participating, she should submit evidence within 30 days.

[2] OWCP terminated compensation for the accepted herniated cervical discs by decision dated July 17, 2012. That decision is not before the Board on this appeal. Appellant did appeal an October 7, 2013 nonmerit decision in this regard, which is adjudicated under a separate appeal.

On August 24, 2012 appellant submitted an August 14, 2012 report from Dr. Aull, who indicated that appellant was seen on August 7, 2012 and provided results on examination. Dr. Aull stated in an addendum dated August 14, 2012, "Can [appellant] medically and, physically attend such [a] course? No, as the patient cannot be seated with neck flexed for any period of time without exacerbating her symptoms of pain, spasm of the neck and intermittent pain and numbness in the arms." He further stated that attendance at a class for six hours per day would cause increased pain in appellant's neck, headaches, muscle spasms of the neck and shoulder girdle and may cause neurologic symptom worsening in her arm. Dr. Aull concluded that appellant's "ADL's [activities of daily living] are impairment due to limited ROM [range of motion] of her neck due to injury and prior fusion from that injury. She is limited in movement, position, [and] what she is able to lift and carry. The patient is unable to take a 450[-]hour course, 30 hours per week for 15 weeks."

By decision dated September 25, 2012, OWCP found that appellant had failed, without good cause, to continue participation in vocational rehabilitation. It found that Dr. Aull's report was not sufficiently rationalized. OWCP stated that it was reducing appellant's compensation based on the ability to earn $400.00 per week as a receptionist, until she participated in vocational rehabilitation.

In a letter dated June 29, 2013, appellant requested reconsideration. She argued that OWCP had improperly reduced compensation under 5 U.S.C. § 8113(b). Appellant submitted a July 15, 2013 report from Dr. John Moor, a Board-certified orthopedic surgeon, who provided a history and results on examination.

By decision dated October 1, 2013, OWCP denied modification. It found the evidence was insufficient to warrant modification.

LEGAL PRECEDENT

FECA provides that the Secretary of Labor may direct a permanently disabled individual whose disability is compensable to undergo vocational rehabilitation.[3] According to 5 U.S.C. § 8113(b), if an individual without good cause fails to apply for an undergo vocational rehabilitation when so directed under 5 U.S.C. § 8104, OWCP may, after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, reduce prospectively the monetary compensation of the individual. The reduction of compensation is performed 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 to undergo vocational rehabilitation. It is OWCP's burden of proof with respect to any reduction of compensation, including the reduction of compensation pursuant to 5 U.S.C. § 8113(b).[4]

[3] 5 U.S.C. § 8104(a).

[4] *See R.C.*, Docket No. 10-1845 (issued April 6, 2011).

ANALYSIS

In the present case, OWCP directed appellant to undergo vocational rehabilitation after receiving a May 1, 2012 report from the second opinion physician, Dr. Black. The rehabilitation plan developed required appellant to attend a 15-week course in customer assistance technology, with a goal to return appellant to work as a receptionist or similar position. Appellant did not attend the program and the issue is whether appellant's failure to attend was "without good cause." If she did not continue vocational rehabilitation without good cause, then the issue is whether OWCP properly reduced compensation based on wage-earning capacity of $400.00 per week in a receptionist position.

The May 1, 2012 report from Dr. Black provided that appellant could work with a 10-pound lifting restriction at three hours per day. No restrictions were provided for sitting or standing. This report would support a finding that appellant was physically capable of attending the proposed training program and was also in accord with the rehabilitation plan of returning her to a sedentary position such as receptionist. On the other hand, she submitted an April 14, 2012 report from attending physician, Dr. Aull, who provided a conflicting opinion. Dr. Aull opined that appellant had restrictions with respect to sitting and specifically opined that she could not perform the training program. This opinion would also clearly impact the determination that a sedentary position as receptionist would represent appellant's wage-earning capacity if she completed the training course.

Both the opinions of Dr. Black and Dr. Aull were unequivocal and based on an accurate factual background. It is well established that, when there are opposing medical reports, of virtually equal probative value, between an attending physician and a second opinion physician, 5 U.S.C. § 8123(a) requires that OWCP refer the case to a referee physician to resolve the conflict.[5] OWCP had a responsibility to resolve the issues regarding appellant's specific physical restrictions to properly adjudicate the claim.

The Board notes that OWCP did not acknowledge that it has the burden of proof to reduce compensation. Since there was an unresolved conflict as to whether appellant was physically capable of performing the proposed customer assistance technology program, OWCP cannot be found to have met its burden in this case.[6]

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to reduce appellant's compensation pursuant to 5 U.S.C. § 8113(b).

[5] *William C. Bush*, 40 ECAB 1064 (1989).

[6] *See L.C.*, Docket No. 12-972 (issued November 9, 2012).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 1, 2013 is reversed.

Issued: May 28, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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