U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACQUELYN V. PEARSALL and DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

Docket No. 98-111; Submitted on the Record;
Issued December 6, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's monetary compensation to zero on the grounds that she failed to cooperate with vocational rehabilitation efforts without good cause.

The Office accepted that appellant sustained a right knee strain and a meniscus tear of the left knee on March 17, 1993. The Office authorized arthroscopic surgery for both knees, a patellectomy of the right knee, paid appropriate compensation for all relevant periods and placed appellant on the periodic compensation rolls for temporary total disability.

On February 24, 1994 the Office authorized appellant's referral for vocational rehabilitation. The record indicates that appellant was actively participating with the rehabilitation process. On November 20, 1996 the Office placed the case in interrupted status based on the rehabilitation counselor's recommendation that appellant was still recovering from surgery and was attending a physical therapy program.

In a medical report dated January 7, 1997, Dr. Andrew J. Collier, Jr., appellant's treating Board-certified orthopedic surgeon, stated that appellant was three months status postarthroscopy of the right knee and noted that appellant was having trouble with her low back. He indicated that appellant was attending physical therapy and that she could drive short periods of time for about 10 to 15 minutes. Dr. Collier noted his examination results and indicated that appellant was in mild discomfort. He stated that he was going to keep her in physical therapy and noted that appellant went to a chiropractor about her back. Dr. Collier opined that appellant can "return back to work in a sedentary position as long as she can get to and from. The major problem, again, will be commuting. Limited time on her feet." Dr. Collier additionally noted that appellant had not reached maximum medical improvement. In a OWCP-5 form dated January 22, 1997, Dr. Collier reiterated that appellant could work with restrictions and recommended that appellant would need vocational rehabilitation services.

On January 29, 1997 the Office changed the status of appellant's case to "placement new employer" based on rehabilitation counselor recommendation that appellant had recovered from surgery and had been released by her physician to return to work eight hours per day with restrictions. It was noted that vocational testing was previously performed, individual rehabilitation placement plan had been developed and job categories had been identified and selected which were within appellant's physical restrictions and available in the geographic area.

In a rehabilitation action report dated February 5, 1997, the rehabilitation counsel indicated that on February 4, 1997 appellant advised that she would not participate in vocational rehabilitation because of back pain. Appellant stated that her back condition prevented her from returning to work. Appellant was advised that Dr. Collier had released her to return to work. Appellant responded that she was not physically able to work, would not sign the individual rehabilitation placement plan and would not participate in job placement efforts.

In a letter dated February 6, 1997, the Office advised appellant of the provisions of 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.124(f) regarding failure or refusal to participate in vocational rehabilitation. The Office advised appellant that she had 30 days to provide her reasons for noncompliance together with any evidence supporting her position and that, if she did not comply with the terms of the letter, the rehabilitation effort would be terminated and action taken to reduce her compensation under the described provisions.

In a note dated March 3, 1997, appellant wrote that she was not able to return to work at this time. She indicated that a doctor's note would be forthcoming.

In a report dated March 5, 1997, the rehabilitation specialist summarized the rehabilitation action report of March 4, 1997 which indicated that appellant was not cooperating with rehabilitation efforts. Appellant was not responding appropriately to the counselor's directions and was not available or responsive to the counselor's calls. The counselor was experiencing difficulty reaching appellant at her home and refused to give out another number where she could be reached. Appellant refused to sign the Individual rehabilitation placement plan since she felt that she was unable to work. Also appellant had advised the counselor that she had reinjured her knee while traveling on public transportation to make a job application at a local job center. Appellant further advised her back problem was secondary to her accepted bilateral knee problem.

By letter dated March 7, 1997, an Office claims examiner advised appellant that her benefits would be reduced to zero, for failure to cooperate in rehabilitation efforts, because she failed to cooperate in the rehabilitation process despite the previous notification. The Office noted that appellant refused to sign the rehabilitation plan which was prepared by the counselor, refused to provide a telephone number where she could be reached, and misrepresented her experience and qualifications to a prospective employer. Appellant was advised that as of March 30, 1997, her compensation would be reduced to zero and this reduction would continue until she, in good faith, underwent the directed vocational testing or showed good cause for not complying with the rehabilitation process.

In a letter dated March 11, 1997, appellant responded to the Office's March 7, 1997 letter. Appellant stated that she had called the jobs her counselor sent her and that they preferred

someone with experience. Appellant stated that she tried to get interviews even though her doctor said she was disabled and could not work at this time. Appellant stated that she tried using public transportation and was injured getting off the bus because her knee buckled under her. She stated she had four operations on her right knee and three operations on her left knee that she walks with a cane and lives in pain, but still tries to get interviews. She stated that she did refuse to sign the rehabilitation plan as her signature would indicate that she could drive to and from employment and she was not able to drive yet. Appellant refuted that she misrepresented her experience and qualifications to a prospective employer as they were telemarketing jobs and she did not have that type of job experience. Appellant indicated that the counselor had her home telephone number (they had spoken several times) and her telephone has an answering machine where she can retrieve messages.

Appellant also submitted several medical reports with her letter. In a January 29, 1997 letter, Dr. Collier clarified his letter of January 7, 1997 and physical capacities of January 22, 1997. He wrote:

> "As stated in my letter of January 7, 1997 I released her to sedentary[-]type position. However, in my capacities of January 22, 1997 I gave her a lifting restriction of 20 pounds and stated that she could not sit for more than six hours per day. This is due to the fact that she has back problems. I would not put her at a strictly sedentary position where she would have to sit six to eight hours a day. This would be very difficult for her to do. She should mainly be at a sedentary-type position, but allowed to lift up to 20 pounds, if necessary, on occasion but giving her the opportunity to change positions and get up from her chair or seat as necessary and her back demands. Again, as stated in my January 7, 1997 letter, the major consideration also would be her commuting to and from work. She will have difficulty driving or taking public transportation for any prolonged period of time due to her knee and we should try to minimize her commuting time, etc."

A March 3, 1997 medical note from Dr. Ronald J. Parente[1] stated that appellant was totally disabled. He indicated that appellant was unable to sit, stand or bend for more than 15-minute intervals.

In a March 4, 1997 medical report, Dr. Collier indicated that appellant got off a bus and she buckled on the right, since then, she has had a lot of difficulty with buckling. The examination showed that she was in moderate discomfort, right knee, mild synovitis, mild effusion, fair range of motion, tender aneriorly and anterior medically, questionable McMurray and that the left knee still had some patellofemoral crepitus, a little tender anteriorly, not as much as the left. Dr. Collier recommended some medicine, phonophoresis and ultrasound anteriorly.

A March 25, 1997 note from Dr. Collier stated:

> "[Appellant] was having troubles with both of her knees, pain, decreased range of motion, tender along the proximal tibia. Therapy was hurting her. She cannot get

[1] The Board notes that no credentials could be found regarding Dr. Parente.

around. Evidently she is going to be cut off by comp[ensation] because she did not participate in the program, the program being that she has to drive around the different job situations and sites. She cannot do that. She was not allowed to do that before and now it has been a problem, commuting and getting around. It is sort of a dumb idea to cut her off for something that she cannot do and was not allowed to do. She is tender along the joint lines, bilaterally, with positive McMurray's.

"X-rays of her knees show no fracture or dislocation. There are some degenerative changes."

Dr. Collier noted that he was sending appellant for an MRI and was going to stop physical therapy.

Appellant requested review of the written record and, by decision dated August 13, 1997, an Office hearing representative found that appellant's reason (driving restriction) was not good cause for refusing to cooperate with the Office's rehabilitation program. The hearing representative noted that appellant had access to public transportation. Moreover, he stated that appellant's reason for refusal to cooperate did not justify or mitigate the other actions (or lack thereof) being taken by appellant as outlined in the rehabilitation status reports.

The Board finds that the Office did not properly reduce appellant's monetary compensation to zero on the grounds that she failed to cooperate with vocational rehabilitation efforts without good cause.

Section 8113(b) of the Federal Employees' Compensation Act[2] provides as follows:

"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 probably have been his wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary."

Section 10.124(f) of Title 20 of the Code of Federal Regulations, the implementing regulation of 5 U.S.C. § 8113(b), further provides as follows:

"Pursuant to 5 U.S.C. § 8104(a), the Office may direct a permanently disabled employee to undergo vocational rehabilitation. If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue participation in a vocational rehabilitation effort when so directed, the Office will, in accordance with 5 U.S.C. § 8113(b), reduce prospectively the employee's

[2] 5 U.S.C. § 8113(b); *see also* 20 C.F.R. § 10.124(f).

> monetary compensation based on what would have been the employee's wage-earning capacity had there not been such failure or refusal. If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue participation in the early but necessary stages of a vocation rehabilitation effort (*i.e.*, interviews, testing, counseling and work evaluations) the Office cannot determine what would have been the employee's wage-earning capacity had there not been such failure or refusal. *It will be assumed, therefore, 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 the Office will reduce the employee's monetary compensation accordingly.* Any reduction in the employee's monetary compensation under the provision of this paragraph shall continue until the employee in good faith complies with the direction of the Office."[3] (Emphasis added.)

The Office reduced appellant's compensation to zero on the assumption, noted in section 10.124(f) of the implementing regulations, that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity. It is important to note, however, that this assumption does not apply in every instance involving a failure or refusal to continue participation in a vocational rehabilitation effort. The regulation expressly makes this assumption applicable to failure or refusal in "the early but necessary stages of a vocational rehabilitation effort," involving such activities as interviews, testing, counseling and work evaluations. In such a situation, "the Office cannot determine what would probably have been his wage-earning capacity in the absence of the failure," and so the Office may 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.

Although the record supports that appellant without good cause failed or refused to continue participation in a vocational rehabilitation effort when so directed and that in the absence of this failure her wage-earning capacity would probably have substantially increased, the Board finds that the assumption relied upon by the Office to reduce appellant's monetary compensation to zero does not apply in this case. The record on appeal shows that appellant participated in the early and necessary stages of the vocational rehabilitation effort. Appellant 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. Although appellant believed that her condition prevented her from performing any type of work, the medical evidence of record establishes that the requirements of the positions identified by the rehabilitation counselor fall within appellant's physical restrictions. Dr. Collier did not support appellant's contention of total disability for work. Although Dr. Parente stated that appellant was totally disabled, he did not provide an opinion as to the causal relationship of appellant's disability and whether it was due to her accepted knee conditions or something else. Thus, there is no evidence of record that appellant can not work.

[3] 20 C.F.R. § 10.124(f).

It is apparent, therefore, that this is not a case in which the employee refused to continue participation in the early but necessary stages of a vocational rehabilitation effort such that the Office could not determine what would have been the employee's wage-earning capacity had there been no failure or refusal. The Board finds that the Office had sufficient information to determine under section 8113(b) of the Act "what would probably have been [appellant's] wage-earning capacity" in the absence of her failure to continue participation in the vocational rehabilitation effort when so directed. The Board therefore finds that the Office has not met its burden of proof to justify reducing appellant's monetary compensation to zero.[4]

The decisions of the Office of Workers' Compensation Programs dated August 13 and March 7, 1997 are hereby reversed.

Dated, Washington, D.C.
December 6, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[4] *Compare Asline Johnson*, 41 ECAB 438 (1990).