U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEON VASQUEZ and DEPARTMENT OF THE NAVY, MARINE CORPS -- MIRAMAR, San Diego, CA

Docket No. 00-101; Submitted on the Record;
Issued September 6, 2001

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 compensation effective May 24, 1998 under 5 U.S.C. § 8113(b) on the grounds that he failed to demonstrate a good faith effort in the vocational rehabilitation process.

This case is before the Board for a second time. By decision dated September 7, 1995, the Board found that the Office had improperly determined that the position of construction estimator fairly and reasonably represented appellant's wage-earning capacity effective February 6, 1994. The record reflects that appellant, then a 51-year-old mechanical work inspector, injured his back while in the performance of duties on October 19, 1988 and stopped work the following day. The Office accepted the claim for a back strain, herniated disc at L4-5, L5-S1, and authorized an April 1989 discectomy.

In a June 25, 1996 report, Dr. Jerald P. Waldman, a Board-certified orthopedic surgeon and appellant's treating physician, noted that results of appellant's recent electromyography (EMG) studies and myelogram computerized tomography studies and provided the results of his clinical examination. Dr. Waldman stated that there was evidence of moderately severe spinal stenosis at L4-5 and L5-S1 with evidence of L5 radiculopathy on EMG. Surgical intervention was discussed. Dr. Waldman stated that barring surgery, appellant was at a permanent and stationary status. He opined that appellant could do light-duty work for approximately three to four hours per day with proclusion from prolonged standing, sitting, bending, twisting, squatting or kneeling.

In a September 2, 1997 report, Dr. Russell Compton, a Board-certified orthopedic surgeon and Office referral physician, reviewed the medical records and a statement of accepted facts, conducted an evaluation, and opined that appellant continued to suffer residuals of the October 19, 1988 work injury. He noted that appellant's subsequent motor vehicle accident of July 1, 1991 did not involve his employment-related low back or radicular left lower extremity symptoms as appellant's complaints did not involve the low back. Dr. Compton stated that,

based on the medical records evidence, appellant would have reached a level of maximum medical improvement approximately six to eight months from the date of his lumbar discectomy, by December 1989. He further opined that appellant could work an eight-hour day within limitations. Based on appellant's current level of low back and lower extremity symptomatology, restrictions were rendered for repetitive twisting, bending, climbing, crawling, stooping, squatting or kneeling along with limitations on lifting, sitting, standing and walking. Dr. Compton further noted that other nonindustrial factors which would limit appellant's employability were his nonindustrial cervical spine and right upper extremity symptomatology and appellant's diagnosis of diabetes mellitus and hypertension.

In October 1997 appellant was referred to a vocational rehabilitation counselor.

The record contains reports commencing December 26, 1997 from a vocational rehabilitation counselor. In a report dated January 29, 1998, the rehabilitation counselor indicated that appellant was not fully participating in vocational rehabilitation during the month of January. She indicated that appellant canceled all appointments and had indicated that he would no longer be able to attend meetings. The rehabilitation counselor noted that as appellant was no longer living in Yucca Valley, California and had relocated to Bakersfield, California he should be reassigned another counselor at the Bakersfield location. By letter dated February 2, 1998, appellant was referred to a new vocational rehabilitation counselor within Bakersfield, California.

In a February 18, 1998 letter, the rehabilitation counselor advised appellant that the Office had suggested that appellant keep his scheduled appointment which he had cancelled. It was further noted that appellant had indicated that he would not be able to participate in the rehabilitation process until after March 26, 1998. A new appointment for February 26, 1998 was scheduled. A February 23, 1998 disability slip from Dr. Morris Platt, a Board-certified orthopedic surgeon, advised that appellant was seen for a lumbar radiculopathy condition and was unable to work for three weeks.

By letter dated March 2, 1998, appellant was rescheduled for a March 17, 1998 appointment. In a March 9, 1998 report, Dr. Platt noted that appellant was in physical therapy and under medications and was instructed to remain off work until March 23, 1998. By letter dated March 6, 1998, appellant was scheduled for a March 24, 1998 appointment. A March 23, 1998 report from Dr. Platt indicated that appellant was attending physical therapy and would remain off work until April 6, 1998.

In a March 25, 1998 telephone call to the Office, appellant advised the Office that he would be moving to Norway in June. The Office explained that appellant had not been cooperating with rehabilitation efforts and that the medical evidence indicates that he could work with restrictions. Appellant was advised to meet with his rehabilitation counselor and notified that a warning letter would be sent. An internal memorandum from the Office dated March 25, 1998 indicated that appellant was moving back to his original residence.

In a March 25, 1998 letter, the Office advised appellant that it proposed to terminate his compensation because he refused to cooperate with his vocational rehabilitation counselor. The Office noted that appellant canceled every appointment with the rehabilitation counselor in

Bakersfield and, prior to this, had failed to keep appointments with the rehabilitation counselor in Yucca Valley. The Office stated that both rehabilitation counselors noted that appellant expressed an unwillingness to participate in a possible rehabilitation effort due to his belief that he was too severely disabled to work. The Office advised appellant that section 8113(b) of the Federal Employees' Compensation Act stated that, if an individual without good cause fails to undergo vocational rehabilitation when so directed, the Office may reduce prospectively the compensation based on what probably would have been the individual's wage-earning capacity had he not failed to undergo vocational rehabilitation. The Office further advised appellant that 20 C.F.R. § 10.124(f) provides that, if an individual without good cause fails or refuses to participate in the vocational rehabilitation, the Office 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 would be reduced accordingly. The Office indicated that this would result in the reduction of appellant's compensation to zero and would remain in effect until appellant in good faith complied with Office directions concerning rehabilitation. The Office directed appellant to contact it within 30 days and informed him that, if he believed he had a good reason for not participating, he should so advise the Office within 30 days. It further informed appellant that, if he did not comply, his compensation would be reduced as described.

In a March 25, 1998 report, the rehabilitation counselor noted that appellant had called to say that although he was still in Yucca Valley, he wished to participate in rehabilitation in San Bernardino where he started. In an April 2, 1998 letter, the rehabilitation counselor noted that as appellant was still in Yucca Valley, an appointment has been set up for April 9, 1998. Telephone contact could not be established.

Dr. Platt continued to submit reports indicating that appellant should remain off work while undergoing physical therapy. In an April 3, 1998 report, Dr. Platt stated that appellant would sustain a loss of wage-earning capacity as a result of his vocational rehabilitation and would miss work as a consequence of his low back condition. Dr. Platt further stated that appellant was a poor candidate for vocational rehabilitation.

In an April 10, 1998 report, the rehabilitation counselor indicated that appellant appeared at the April 9, 1998 scheduled meeting. Appellant expressed that he only desired to attend the training program for international marketing. He further indicated that he was not medically able to participate in any other type of employment as he was participating in an authorized physical therapy program. The rehabilitation counselor noted that appellant's voice tone seemed hostile and that he was adamant in his decision. A transferable skill analysis was conducted and appellant was informed of his transferable skills. The rehabilitation counselor reported that appellant indicated that he had a legal representative and then exhibited an aggressive and inappropriate demeanor by calling the counselor a name. In reports dated April 17 and April 30, 1998, the rehabilitation counselor outlined suitable positions for appellant as contained in the Department of Labor's *Dictionary of Occupational Titles* (DOT) and provided results of a labor market study.

By decision dated April 30, 1998, the Office reduced appellant's compensation benefits to zero effective May 24, 1998 on the grounds that he failed to cooperate with the vocational

rehabilitation process pursuant to section 8113(b) of the Act. In so doing, the Office noted that appellant's claim was open to vocational rehabilitation based on Dr. Compton's medical report indicating that appellant was capable of returning to work in a limited-duty capacity eight hours per day with restrictions. The Office noted that Dr. Platt's opinion that appellant was not a viable candidate for vocational rehabilitation services was not well reasoned. The Office further noted that appellant was advised by letter dated March 25, 1998 that his failure to continue good faith cooperation with the rehabilitation counselor constituted noncooperation with the vocational rehabilitation process. Further, the Office noted that appellant's letters to the Office failed to demonstrate a good faith effort to continue the rehabilitation process. The Office then found that appellant's actions consistently demonstrated that he was unwilling to participate in the vocational rehabilitation process.

Appellant requested a hearing before an Office representative and submitted several letters outlining his contentions that he was unable to participate in vocational efforts as he was under going medical treatment. No medical evidence was received supporting appellant's contentions.

In a decision dated July 12, 1999, an Office hearing representative affirmed the decision of April 30, 1998. The hearing representative found that both rehabilitation counselor's provided detailed reports noting that appellant was either uncooperative, rude, exhibiting unbecoming behavior, not returning telephone calls, not interviewing and canceling appointments. Additionally, a rehabilitation counselor was available to assist appellant, regardless of what area appellant was in. The hearing representative found that the Office appropriately warned appellant of his obligation to cooperate and participate in these early but necessary stages of rehabilitation efforts and informed him of the actions which would be taken should appellant not cooperate and participate. The hearing representative found that the Office appropriately reduced appellant's compensation to zero under its regulatory procedures.[1]

In an August 3, 1999 letter, appellant requested reconsideration. Submitted with his reconsideration request was a July 30, 1999 medical report from Dr. Platt in which the physician continued to support his opinion that appellant could not perform any kind of work.

In an August 17, 1999 decision, the Office denied modification of the July 12, 1999 decision. The Office found the medical evidence from Dr. Platt to be of no probative value. The Office found that there had been no medical evidence submitted which refuted Dr. Compton's report or provided a medically rationalized opinion regarding how appellant's diagnosed condition, supported by objective findings, prohibited him from participating in vocational rehabilitation.

The Board finds that the Office improperly reduced appellant's monetary compensation to zero for failure to cooperate with vocational rehabilitation.

Section 8113(b) of the Act provides as follows:

[1] The Office hearing representative properly stated that the current regulations are 20 C.F.R. § 10.519.

> "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."[2]

The Office has promulgated federal regulations under section 8113(b) of the Act concerning the obligation of employees to participate in vocational rehabilitation efforts as directed by the Secretary. Section 10.519(b) of the federal regulations further provides in pertinent part:

> "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 monetary compensation based on what would probably have been the employee's wage-earning capacity had there not been such failure or refusal."[3]

Section 10.519(b) further provides that, if any employee without good cause fails or refuses to apply for, undergo, participate in, or continue participation in the early but necessary stages of a vocational 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 provisions of this paragraph shall continue until the employee in good faith complies with the direction of the Office.[4] (Emphasis added.)

In this case, the Office reduced appellant's compensation to zero under 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

[2] 5 U.S.C. § 8113(b).

[3] 20 C.F.R. § 10.519(b).

[4] *Id.*

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.

The record supports that appellant exhibited uncooperative, rude, and other unbecoming behavior, did not return telephone calls, cancelled appointments, and failed to submit any medically rationalized opinion regarding how his diagnosed condition, supported by objective findings, prohibits him from participating in vocational rehabilitation. However, the Board finds that the assumption, that appellant's wage-earning capacity would probably have substantially increased in the absence of these failures, 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 his rehabilitation counselor on April 9, 1998, participated in a vocational evaluation and cooperated with his counseling to the point that his rehabilitation counselor was able to integrate the psychological and functional capacities information and identify appropriate employment opportunities. In reports of April 18 and April 30, 1998, the rehabilitation counselor identified positions available within appellant's physical limitations and aptitude which were also available within his commuting area.

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 his 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.[5]

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

The decisions of the Office of Workers' Compensation Programs dated August 17 and July 19, 1999 are hereby reversed.

Dated, Washington, DC
September 6, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member