

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOUIS ANDERSON and DEPARTMENT OF THE NAVY,
MARE ISLAND NAVAL SHIPYARD, Valleja, CA

*Docket No. 00-2602; Submitted on the Record;
Issued September 27, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits to zero on the grounds that he refused to cooperate with vocational rehabilitation efforts.

Appellant, a 40-year-old blacksmith, filed a notice of traumatic injury on August 14, 1986 alleging that he injured his knees and legs in the performance of duty. The Office accepted appellant's claim for subluxation of the third and fifth lumbar vertebra and subluxation of the sacroiliac joint. The employing establishment terminated appellant in September 1987.

The Office initially referred appellant for vocational rehabilitation counseling on May 8, 1995. The Office notified appellant of his obligation to participate on July 3, 1995 and allowed him 30 days to do so. By decision dated August 7, 1995, the Office suspended appellant's compensation benefits for failure to cooperate. The Office vacated the August 7, 1995 decision on March 14, 1996. The Office referred appellant to vocational rehabilitation counseling on April 3, 1996. By letter dated August 13, 1996, the Office informed appellant that he had 30 days to cooperate with rehabilitation counseling by undergoing training or his compensation would be reduced based on the position of cashier.

The Office referred appellant for additional medical testing. By letter dated October 31, 1996, the Office informed appellant of his obligation to undergo testing and allowed him 15 days to reschedule his appointment. By decision dated February 25, 1997, the Office suspended appellant's compensation benefits for failure to cooperate with medical evaluation. Appellant requested a review of the written record and by decision dated June 13, 1997, the hearing representative reversed the Office's February 25, 1997 decision. The Office reentered appellant on the periodic rolls on August 19, 1997.

In a letter dated April 2, 1998, the Office proposed to terminate appellant's compensation benefits. By decision dated June 4, 1998, the Office terminated appellant's benefits. Appellant requested a review of the written record and by decision dated November 9, 1998, the hearing

representative reversed the June 4, 1998 decision and remanded for a supplemental report from the impartial medical examiner. The Office reentered appellant on the periodic rolls.

On March 11, 1999 the Office referred appellant for rehabilitation counseling. In a letter dated April 23, 1999, the Office informed appellant that he had 30 days to cooperate with rehabilitation efforts or his compensation benefits would be reduced to zero. By decision dated June 7, 1999, the Office reduced appellant's compensation benefits to zero based on his failure to cooperate with rehabilitation efforts. Appellant requested a review of the written record on July 1, 1999. By decision dated November 9, 1999, the hearing representative affirmed the Office's June 7, 1999 decision.

The Board finds that the Office properly reduced appellant's compensation benefits to zero for failing to cooperate in the vocational rehabilitation process.

Section 8113(b) of the Act provides:

“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.”¹

Section 10.519(b) and (c) of the Office's regulations provided that if a suitable position is not identified because of the failure or refusal to cooperate in the early but necessary stages of a vocational rehabilitation effort *i.e.*, meeting with nurse, interviews, testing, counseling, functional capacity evaluations or work evaluations, then 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 will reduce compensation 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.²

In this case, the vocational rehabilitation counselor attempted to contact appellant on April 14, 1999 by certified letter. The Office informed appellant of his obligation to cooperate by letter dated April 23, 1999. Appellant responded to the counselor by telephone on Saturday April 24, 1999. The vocational rehabilitation counselor returned appellant's call on Monday, April 26, 1999 and requested an appointment on Wednesday, April 28, 1999.

In a letter dated May 18, 1999, appellant stated that he had provided his attending physician with the counselor's letter, and that Dr. Clarence Brooks, a family practitioner, responded on appellant's behalf. In a report dated April 14, 1999, Dr. Brooks diagnosed chronic lower back pain, degenerative disc disease as well as anxiety and depression due to appellant's

¹ 5 U.S.C. § 8104.

² 20 C.F.R. § 10.519(b) and (c).

pain resulting from his employment injuries and stated that appellant was totally disabled due to his physical and emotional conditions.

The weight of the medical opinion evidence rests with Dr. Richard Wilson, a Board-certified orthopedic surgeon, selected as the impartial medical specialist to resolve the conflict of medical opinion evidence between Dr. Brooks who opined that appellant was totally disabled due to his employment injuries, and Dr. Joseph Gaines, a Board-certified orthopedic surgeon, and Office second opinion physician who opined that appellant could work eight hours a day with restrictions.

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.³

As the hearing representative properly found on November 9, 1998, Dr. Wilson's November 4, 1997 report was not sufficiently well rationalized to constitute the weight of the medical opinion evidence. However, Dr. Wilson clarified this report on December 8, 1998 noting that appellant's employment had permanently aggravated his degenerative disc disease and that appellant could work eight hours a day with restrictions.

Dr. Brooks' April 14, 1999 report is not sufficiently detailed and lacks the necessary medical rationale to establish that appellant's physical limitations render him totally disabled. Furthermore, he did not provide sufficient medical reasoning to establish that appellant has developed a consequential emotional condition as a result of his employment injuries. As Dr. Brooks was on one side of the conflict that Dr. Wilson resolved, the additional report from Dr. Brooks is insufficient to overcome the weight accorded Dr. Wilson's report as the impartial medical specialist or to create a new conflict with it.⁴

The Board finds that appellant has not established good cause for his failure to cooperate with vocational rehabilitation efforts and that therefore, the Office properly reduced his compensation benefits to zero for failure to participate in the early stages, *i.e.*, his failure to establish personal contact with the rehabilitation counselor.

³ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

⁴ *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

The November 9, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
September 27, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member