

**United States Department of Labor
Employees' Compensation Appeals Board**

C.S., Appellant)

and)

DEPARTMENT OF THE NAVY, MARE)
ISLAND NAVAL SHIPYARD, Vallejo, CA,)
Employer)

**Docket No. 06-1612
Issued: February 27, 2007**

Appearances:
Norman R. McNulty, Jr., Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 3, 2006 appellant filed a timely appeal of the May 23, 2006 merit decision of the Office of Workers' Compensation Programs which determined that he had failed without good cause to participate in vocational rehabilitation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant failed without good cause to participate in vocational rehabilitation.

FACTUAL HISTORY

On August 7, 1989 appellant, then a 49-year-old shipwright, injured himself at work while pulling a 13-foot section of pipe. The Office accepted his claim for right shoulder separation and disc herniation at C5-6. After a brief return to limited duty, appellant stopped work entirely in May 1990. The Office placed him on the periodic compensation rolls effective

August 26, 1990. On November 16, 1990 appellant underwent a cervical discectomy and fusion at C5-6, which the Office authorized. He did not resume work following surgery and consequently, he remained on the periodic rolls.

In February 2004, the Office referred appellant for vocational rehabilitation.¹ The Office based its referral on the December 3, 2003 report of Dr. Howard A. Ballinger who found appellant capable of performing sedentary work eight hours a day while varying his body position.²

Beginning March 1, 2004 and continuing thereafter appellant routinely met with his assigned rehabilitation counselor when requested. He also maintained regular communications with his counselor. Additionally, appellant underwent two days of vocational testing in accordance with his rehabilitation counselor's instructions, but from the outset of the rehabilitation process, he expressed reservations about the accuracy of Dr. Ballinger's December 3, 2003 work restrictions. Appellant felt he was unable to perform any type of work. He was also concerned that he might not be able to participate in vocational rehabilitation due to neck discomfort. When appellant saw Dr. Ballinger again on April 19, 2004, he did not believe there was any objective basis to consider appellant 100 percent disabled. For the next several months he continued to express disagreement with Dr. Ballinger's work restrictions. Appellant believed that he needed to undergo physical therapy before starting either training or work.

On February 22, 2005 the Office authorized a 25-week training program in computer assisted design and drafting (CADD). The training was geared to preparing appellant for employment as either a drafter or assistant drafter. Appellant was expected to attend classes at Martinez Adult Education three hours per day, Monday through Friday, with a recommended start date of May 23, 2005.

Dissatisfied with Dr. Ballinger's assessment, appellant sought a second opinion regarding his work restrictions. In an April 8, 2005 report, Dr. Susan D. Lambert noted her agreement with Dr. Ballinger's December 3, 2003 work restrictions.³

Appellant started that his Drafter-CAD training program on May 23, 2005. He completed the first day of training, but on the second day he stopped after two and a half hours due to increased discomfort. Appellant reportedly sought medical treatment on May 25, 2005

¹ The Office previously considered vocational rehabilitation in 1991 and 2000, but on both prior occasions the Office ultimately concluded that appellant was not a suitable candidate.

² Dr. Ballinger is Board-certified in preventative medicine. In addition to the accepted cervical and right shoulder conditions, he also noted that appellant had low back pain. According to Dr. Ballinger, appellant could sit for 15-minute intervals and he could stand and walk for 30-minute intervals. Appellant was also limited to occasional twisting, bending and stooping. Due to his low back problem, appellant could operate a motor vehicle at work for 1 hour only. Dr. Ballinger also limited his driving to and from work to one hour. While he indicated that appellant was limited in his ability to push, Dr. Ballinger did not specify a time limitation or a particular weight restriction. He did, however, specify only light pulling and occasional lifting of up to 20 pounds.

³ Dr. Lambert is Board-certified in preventative medicine. She is also Chief, Department of Occupational Medicine at Kaiser Permanente's Vallejo, CA Medical Center and a colleague of Dr. Ballinger, who worked at Kaiser's Napa, CA Occupational Health Center.

and the following day he advised his rehabilitation counselor that he had been prescribed ibuprofen and valium, as a muscle relaxant. According to the rehabilitation counselor, appellant stated that he would continue with his training, but when the rehabilitation counselor spoke with appellant on June 3, 2005 he had yet to resume training. Appellant reportedly continued to experience muscle spasms.

The rehabilitation counselor spoke with appellant again on June 7, 2005 at which time appellant reportedly told him that the medication provided some relief with regards to his muscle spasms. Appellant, however, expressed concern about driving while utilizing the prescribed medications. He also reportedly told the counselor that he believed he had already missed too many classes to be able to go back and continue with the training program. Appellant further explained that on the days he attended class he would sit or stand for periods of about 15 minutes and then he would leave the classroom and walk around for several minutes before returning to class. He did not believe that this was conducive to learning. The rehabilitation counselor subsequently spoke with appellant's instructor who indicated that appellant, on a very regular basis, would arise from his chair and leave the classroom for 20 to 30 minutes at a time. Appellant reportedly told the instructor he had to leave class because of pain and discomfort. The instructor indicated that appellant's exiting and entering the classroom was somewhat disruptive to the other students, but nonetheless, appellant was welcome to return. However, the instructor stated that appellant would have to spend more time in class in order to benefit from the training.

On June 9, 2005 the Office advised appellant of the consequences under 5 U.S.C. § 8113(b) for failing without good cause to participate in vocational rehabilitation. Appellant was afforded 30 days to provide justification for his failure to continue participating in the Office-approved training program.

Appellant sought treatment at Kaiser on June 28, 2005 where he was seen by Dr. Kenneth R. Wilkes, a Board-certified neurologist. His chief complaint was that he disagreed with the prior work restrictions because it did not make provision for lying down for extended periods during the course of the workday or while participating in any form of retraining or vocational rehabilitation. Appellant stated that he could not participate in the present vocational rehabilitation program because he needed to lie down for two- to four hours each work shift. Based upon his examination, Dr. Wilkes felt that Dr. Ballinger's prior work restrictions were reasonable and he saw no reason to modify them. Dr. Wilkes did, however, refer appellant for upper extremity electro-diagnostic studies.

In a July 5, 2005 letter to the Office, appellant stated that he was unable to stay in class because of cramping and muscle spasms. He further explained that he participated in training for a few days and had to drive home in bad shape. According to appellant, a Dr. Wilson at Kaiser Permanente put him back on ibuprofen and valium, which he used daily to control the cramping

and spasms.⁴ Appellant also stated that he did not agree with Kaiser's reports regarding his neck and back and that he wanted to see a specialist outside of Kaiser.⁵

Appellant underwent an electromyography and nerve conduction study on August 2, 2005. Dr. Marko Bodor, a Board-certified physiatrist, interpreted the study as revealing mild carpal tunnel syndrome at the left wrist, but no evidence of left upper extremity radiculopathy, plexopathy or other neuropathy. He also noted that appellant's chief complaint of chronic neck pain with infrequent radiation into the left arm was likely related to a chronic myofascial pain syndrome. According to Dr. Bodor, appellant's carpal tunnel syndrome was an incidental finding and not a major cause of his complaint. Dr. Wilkes reviewed the results of appellant's recent electro-diagnostic studies on August 9, 2005. He commented that the mild carpal tunnel syndrome was not related to any issues of disability and he saw no reason to alter Dr. Ballinger's work restrictions.

By decision dated November 16, 2005, the Office reduced appellant's wage-loss compensation because of his refusal to continue with the approved Drafter-CAD training program. Appellant had not resumed training since stopping after the initial week in May 2005 and he did not provide rationalized medical evidence to establish his claimed total disability. The Office found that, had appellant participated in good faith in vocational rehabilitation he would have been able to perform the position of Assistant Drafter, with a median weekly wage of \$491.65. The current weekly wage of appellant's date-of-injury job was \$1,013.00. The Office, therefore, reduced his 4-week compensation to \$1,173.00, effective October 30, 2005.

Dr. Wilkes saw appellant again on November 17, 2005. He diagnosed chronic pain with symptom magnification and recommended participation in a chronic pain program. Dr. Wilkes also indicated that there was no change in appellant's work restrictions.

In a November 18, 2005 report, the Office's rehabilitation counselor indicated that an Assistant Drafter's weekly wage was \$400.00.

Appellant requested an oral hearing, which was held on March 14, 2006. He testified that he lasted in training for only two days. In the morning he would drive 45 minutes to attend class and by the time he arrived he was already in extreme pain. During class appellant would sit at his computer table for 10- 15 minutes and then get up and go outside and walk around for about 30 minutes. He testified that he would then go back in the classroom and try to sit, but he could not get comfortable. Appellant also testified that after class he would worry about having to drive home 45 minutes. He cut short his second day of training because he could not bear it anymore. Additionally, appellant testified that his doctors advised that he could "only sit for 15-to 20 minutes," then "be up walking around for 30 minutes."

⁴ Appellant did not submit any documentary evidence regarding the medical treatment he reportedly received on May 25, 2005.

⁵ On July 25, 2005 the Office advised appellant that it would not authorize a change of physician, but that he was free to arrange an examination by a specialist at his own expense.

In a May 23, 2006 decision, the hearing representative found that appellant did not show good cause for failing to attend the Office-approved training program. The hearing representative noted that, although appellant claimed to have stopped attending class because of pain from his work injury, he did not submit any medical evidence indicating that he was unable to participate in the training due to his injury or due to any other medical condition. Regarding the Office's reduction in compensation, the hearing representative set aside the prior finding because there was a factual discrepancy concerning the weekly earnings of an Assistant Drafter.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides for the prospective reduction of monetary compensation where an individual, without good cause, fails to apply for and undergo vocational rehabilitation when so directed by the Office.⁶ The reduction in compensation will remain in effect until the individual in good faith complies with the Office's directive.⁷ Under certain circumstances monetary compensation may be reduced to zero. If the individual fails or refuses to continue to participate in a vocational rehabilitation effort after a suitable position has been identified, future monetary compensation will be reduced based on the potential earnings of the identified position, as this would likely have been the individual's wage-earning capacity had he or she undergone vocational rehabilitation.⁸ But if the failure or refusal to participate occurred prior to the identification of a suitable job -- during the so-called "early but necessary stages" of a vocational rehabilitation effort -- the Office is not in a position to determine what would have been the individual's wage-earning capacity.⁹ Under this latter scenario, 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 therefore, the individual's prospective monetary compensation is reduced to zero.¹⁰

ANALYSIS

Appellant claimed that he was unable to continue with training because of pain. However, he has not submitted any medical evidence indicating that he was totally disabled or otherwise incapacitated from participating in training on or after May 25, 2005. Appellant disagreed with Dr. Ballinger's December 3, 2003 work restrictions and tried unsuccessfully to have them revised in accordance with his own assessment of his physical capabilities. Two other qualified physicians reviewed Dr. Ballinger's restrictions and found no reasonable basis to alter them.

⁶ 5 U.S.C. § 8113(b) (2000). Neither the Act, nor the implementing regulations define or delineate examples of what constitutes "good cause" under section 8113(b).

⁷ *Id.*

⁸ 20 C.F.R. § 10.519(a) (2006).

⁹ 20 C.F.R. § 10.519(b). Examples of the early but necessary stages of the vocational rehabilitation process include meetings with the Office nurse, interviews, testing, counseling, functional capacity evaluations and work evaluations. *Id.*

¹⁰ 20 C.F.R. § 10.519(c).

There is also no basis upon which to conclude that the Drafter-CAD training program was inconsistent with Dr. Ballinger's December 3, 2003 work restrictions. Appellant is mistaken in his belief that his doctors authorized him to walk "around for 30 minutes" after sitting for 15 minutes. While a 30-minute absence from the classroom is clearly not conducive to the learning process, appellant was not medically advised or authorized to leave class after every 15-minute interval of sitting. Dr. Ballinger indicated that he should be allowed to vary his position while working. He also noted that appellant could sit for 15-minute intervals and he could tolerate 30-minute intervals of standing and 30-minute intervals of walking. Contrary to appellant's interpretation, Dr. Ballinger did not indicate that appellant should be excused from work or training after 15 minutes of sitting and be permitted to walk around and stretch for 30 minutes.

Appellant also indicated that the 45-minute commute to Martinez Adult Education caused him extreme pain. According to Dr. Ballinger, he should have been able to tolerate an hour-long commute to work or training in addition to 1 hour of driving while at work. Thus, the 1.5 hour round-trip commute to the training facility is within his restrictions. Aside from the issue of appellant's tolerance level, the means by which he commuted to and from training was solely within his discretion. Whether appellant drove himself, had someone else drive or used some form of public transportation is beyond the scope of the approved training program. Additionally, appellant's concern about driving while on medication is also beyond the scope of the training program. Furthermore, the medical evidence does not substantiate appellant's claim that Dr. Wilson prescribed valium on May 25, 2005. Appellant did not submit any documentary evidence concerning his alleged examination and treatment that day and when Dr. Wilkes saw him on June 28, 2005 he did not mention that appellant was on medication for either pain or muscle spasms.

Appellant has not submitted any medical evidence demonstrating his claimed inability to continue with the approved Drafter-CAD classroom training. Accordingly, there is no basis upon which to conclude that he had good cause to discontinue participation in vocational rehabilitation. We, therefore, affirm the hearing representative's finding. The appropriate amount by which appellant's monetary compensation should be reduced is not currently before the Board because the Office has yet to issue a final decision on the matter.¹¹

CONCLUSION

The Board finds that appellant did not demonstrate good cause for refusing to continue with the Office-approved training program.

¹¹ 20 C.F.R. § 501.2(c); *Karen L. Yaeger*, 54 ECAB 323, 330 (2003).

ORDER

IT IS HEREBY ORDERED THAT the May 23, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 27, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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