United States Department of Labor
Employees' Compensation Appeals Board

S.F., Appellant	)	
and	)	**Docket No. 08-426**
	)	**Issued: July 16, 2008**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, Dublin, CA, Employer	)	

Appearances:
Dean Albrecht, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 23, 2007 appellant through her representative filed a timely appeal from the October 15, 2007 merit decision of the Office of Workers' Compensation Programs' hearing representative, which affirmed the reduction of her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation under 5 U.S.C. § 8113(b) for failing to cooperate with vocational rehabilitation.

FACTUAL HISTORY

On August 29, 2002 appellant, then a 49-year-old medical records technician, injured her low back in the performance of duty.[1] The Office accepted her claim for aggravation of intervertebral disc disease with lumbar myelopathy and lumbosacral sprain/strain. Unable to accommodate her medical limitations, the employing establishment removed her from her

[1] OWCP File No. 06-2067905.

position as a medical records technician effective June 17, 2005. Appellant received compensation for temporary total disability on the periodic rolls.[2]

On November 15, 2005 Dr. Mohinder Nijjar, a Board-certified orthopedic surgeon and Office referral physician, examined appellant and reported that she was able to work eight hours a day with restrictions.[3] He added that she was able to participate in vocational rehabilitation. The Office referred appellant to vocational rehabilitation services. After vocational testing and assessing transferable skills, the rehabilitation counselor developed a plan to train appellant for the position of accounting clerk or general office clerk. Appellant voiced concern that she could not perform such duties due to her neck and back. She noted that she had physical therapy every day and might need shoulder surgery. On May 16, 2006 the Office reviewed the vocational rehabilitation plan and notified appellant that the duties were within her work limitations. The Office informed appellant that she was expected to cooperate fully so that she might return to work in the specified job or one similar to it. The Office advised that there was a penalty for not cooperating with vocational rehabilitation efforts.

On May 16, 2006 Dr. Walter E. Afield, a Board-certified psychiatrist, examined appellant and diagnosed, among other things, stress-produced anxiety and depression. He stated that appellant needed to have some psychological testing in order to determine the degree of her depression and anxiety, which appeared very great. Dr. Afield advised that she was not able to engage in gainful employment "at this point." Appellant's representative asked the Office to develop this as a consequential injury to the physical claim.

On May 26, 2006 Dr. Patrick N. Rhoades, a Board-certified physiatrist and appellant's attending physician, recommended psychological counseling: "I think it is important that she have a psychologist right now who can determine when she is ready to start vocational rehabilitation. I think accounting would be a bad field for her as the number thing with the first problem being because of counting inmates and problem with that has been really difficult for her [to] deal with."

On May 30, 2006 the school at which appellant was to take her vocational training classes advised that she refused to take the entrance examination or complete any of the enrollment forms. Appellant indicated that it would be a waste of time because she was going to have shoulder surgery and was not going to be in school long. She also indicated that she was going to get an attorney to sue everyone who was making her go to school because it was both physical and emotional abuse. Appellant refused to take any classes with math. She indicated that she could not go to school in the morning because she had physical therapy. Appellant also wanted to be in a classroom with only women and no men. The school advised that it could not allow appellant to stay in class if she did not take a 12-minute entrance examination and if she

[2] Appellant had another claim open for medical treatment of a chest wall contusion and cervical/thoracic and shoulder injuries. OWCP File No. 06-2122391. She also filed a claim for an emotional condition, with a date of injury on April 22, 2005. OWCP File No. 13-2129674. The record indicates that the Office accepted one of appellant's claims for hyperventilation and panic disorder as a result of a work incident on March 6, 2003. OWCP File No. 06-2081817.

[3] Dr. Nijjar imposed limitations against repetitive bending, prolonged sitting (more than seven hours a day), prolonged standing (more than seven hours a day) and heavy lifting.

did not complete the enrollment paperwork. On May 21, 2006 the school advised that appellant did not come to school. The rehabilitation counselor reported: "[Appellant] did not make it to her second day of training. As documented above, she continues to provide a litany of excuses why she cannot participate."

On May 31, 2006 the Office interrupted vocational services pending medical clarification. On August 9, 2006 it informed appellant that the medical evidence did not support her refusal to undertake vocational training:

> "In support of your contention that you are unable to participate due to an emotional condition, you submitted a Neuropsychiatric Evaluation, dated May 16, 2006, from Dr. Walter E. Afield. Although Dr. Afield has diagnosed stress-produced anxiety and depression, he offers no objective findings or medical rationale to support his diagnoses. His conclusions appear to be based solely upon allegations made by you, which, although serious in nature, are largely uncorroborated.
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> "It has been established that you were subjected to an incident of harassment at work on March 6, 2003, which resulted in hyperventilation and panic disorder. This incident and the resulting conditions were accepted as work related by [the Office], however, that case has been closed for lack of current medical documentation. It is also noted that you have not filed a notice of recurrence in that case, and there is no evidence in file to support that you have sought continuing medical treatment for the emotional conditions.
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> "Our office also received a [p]rogress [r]eport from your treating physician Dr. Patrick Rhoades, in which he diagnosed [p]ost[-t]raumatic [s]tress [d]isorder. This diagnosis appears to be based solely upon your uncorroborated allegations, and he offers no objective findings or medical rationale to support his conclusion. There is also no indication that you have previously sought medical intervention from Dr. Rhoades for this condition."

The Office notified appellant of the penalty under 5 U.S.C. § 8113(b) and directed her to commence the approved training program for accounting clerk within 30 days. The rehabilitation counselor performed a labor market survey and reported that appellant would meet the specific vocational preparation requirements for the position of accounting clerk and would have the skills necessary to compete in the labor market upon completion of the training program. He confirmed that the job of accounting clerk was being performed in sufficient numbers so as to make it reasonably available to appellant within her commuting area.

In a decision dated October 5, 2006, the Office reduced appellant's compensation to reflect what would have been her wage-earning capacity had she cooperated with vocational rehabilitation efforts. On October 15, 2007 an Office hearing representative reviewed the written record and affirmed the reduction of appellant's compensation. The hearing representative noted that it appeared appellant had no interest working in the accounting area and essentially disagreed with the labor market analysis.

LEGAL PRECEDENT

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[4] "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.[5] Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.[6]

The Office may direct a permanently disabled employee to undergo vocational rehabilitation.[7] If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed, the Office, on review under 5 U.S.C. § 8128 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 or her wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Office.[8]

Where a suitable job has been identified, the Office will reduce the employee's future monetary compensation based on the amount which would likely have been his or her wage-earning capacity had he or she undergone vocational rehabilitation. The Office will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with the Office nurse and the employer. The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of the Office.[9]

ANALYSIS

Upon receiving medical evidence that appellant was not totally disabled for all work, but was capable of working eight hours a day with restrictions, the Office properly referred her to vocational rehabilitation services. Appellant did not agree with the restrictions reported, but she generally cooperated with the early and necessary stages of the vocational rehabilitation effort; she met with the rehabilitation counselor and underwent vocational testing. It was when the rehabilitation counselor identified accounting clerk as a suitable job for appellant and developed a vocational training plan that she voiced her concerns in earnest. She complained that she could not perform the duties of such a position because of her neck and back, and she had to go to physical therapy everyday and might need shoulder surgery. However, she did not submit any

[4] 5 U.S.C. § 8102(a).

[5] 20 C.F.R. § 10.5(f) (1999).

[6] *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984).

[7] 5 U.S.C. § 8104(a).

[8] *Id*. at § 8113(b).

[9] 20 C.F.R. § 10.519(a).

medical evidence to establish that she had a physical condition that disabled her for the selected position, which was sedentary, or that prevented her from enrolling in school and attending class.

Appellant submitted two medical reports that pertain to the selected position or training plan. Both relate to her emotional state. On May 26, 2006 Dr. Rhoades, a Board-certified physiatrist and appellant's attending physician, reported that he thought psychological counseling would be important to determine whether she was ready to start vocational rehabilitation. However, appellant saw Dr. Afield, a Board-certified psychiatrist, only 10 days earlier, and he gave no indication that she was incapable of attending class. Dr. Afield did not address the selected position of accounting clerk and offered no opinion on whether it would be an unsuitable position for appellant. Dr. Rhoades ventured to report that he thought accounting would be a bad field because of some problem appellant had counting inmates, but this lies outside his field of expertise.

Appellant has not met her burden to show good cause for failing to cooperate with vocational rehabilitation efforts. The Office addressed appellant's arguments on August 9, 2006 and gave her another opportunity to cooperate without penalty. The Office directed her to cooperate with vocational rehabilitation efforts within 30 days. When she did not, the Office properly reduced her compensation prospectively under 5 U.S.C. § 8113(b) by what would probably have been her wage-earning capacity had she completed the training. The Office based its reduction on the labor market survey and wage information provided by the rehabilitation counselor.

The Board will affirm the hearing representative's October 15, 2007 decision. The Office has met its burden of proof to reduce appellant's compensation. This reduction shall remain in effect until appellant in good faith complies with the direction of the Office.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation under 5 U.S.C. § 8113(b) for failing to cooperate with vocational rehabilitation.

ORDER

IT IS HEREBY ORDERED THAT the October 15, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 16, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board