U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN DILUBERTO and DEPARTMENT OF JUSTICE, MARSHALS SERVICE, Los Angeles, CA

Docket No. 00-1489; Submitted on the Record;
Issued March 7, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to a zero percent loss of wage-earning capacity based on failure to cooperate with vocational rehabilitation and a determination that he could perform the duties of a chief guard.

On September 6, 1977 appellant, then a 46-year-old deputy marshal, filed a claim for nervous tension and gastrointestinal problems which he related to the stress and pressure of his job, including irregular hours and inconsistent working conditions. The Office accepted appellant's claim for aggravation of an active duodenal ulcer and paid appropriate medical benefits through July 12, 1979. Appellant subsequently sought additional medical benefits for an aggravation of his condition. In a December 29, 1983 decision, the Office rejected appellant's claim on the grounds that he had not submitted sufficient medical evidence to meet his burden of proof that his current condition was causally related to his employment. In a June 18, 1984 decision, the Office denied appellant's request for reconsideration as *prima facie* insufficient to warrant review. Appellant appealed to the Board. In a November 16, 1984 decision, the Board found that appellant had not submitted sufficient medical evidence to show that his medical expenses were causally related to his employment-related conditions.[1] Appellant subsequently submitted additional medical evidence. In a March 20, 1985 decision, the Office vacated its decisions of December 29, 1983 and June 18, 1984 and proceeded with further development of appellant's claim. The Office subsequently paid additional medical expenses.

On January 14, 1986 appellant was sitting in his chair when it rolled out from under him, causing appellant to fall to the floor. He reported injuries to his left buttocks, left wrist, neck, and low back. Appellant indicated that, despite continuous neck pain, he continued to work. On March 6, 1986 he pursued a suspect and complained of increased neck pain. Appellant stopped working on March 10, 1986 and received continuation of pay from March 18 through

[1] Docket No. 84-1829 (issued November 16, 1984).

May 2, 1986. Appellant did not return to work. The Office accepted appellant's claim for cervical strain, lumbar traumatic syndrome and a blow to the left wrist. It began payment of temporary total disability effective May 3, 1986.

In a July 10, 1997 decision, the Office reduced appellant's compensation to zero on the grounds that he failed to put forth a good faith effort to fully participate in the vocational rehabilitation process and was capable of performing the duties of a chief guard. Appellant requested a hearing before an Office hearing representative, which was conducted on October 20, 1999. In a January 5, 2000 decision, the Office hearing representative found that the position of chief guard fairly and reasonably represented appellant's wage-earning capacity. She therefore affirmed the Office's July 10, 1997 decision. However, the hearing representative also found that, subsequent to the reduction of appellant's compensation, appellant had submitted medical evidence that created a conflict in the medical evidence on whether appellant was disabled for work due to an employment-related psychological condition. She therefore remanded the case for referral of appellant, together with a statement of accepted facts and the case record, to an appropriate impartial medical specialist for an examination and opinion on whether appellant was disabled for work after July 1997 due to an employment-related psychological condition.

The Board finds that the Office properly reduced appellant's compensation to zero, based on his ability to perform the duties of a chief guard.

Section 8113(b) of the Federal Employees' Compensation Act[2] provides that, if an individual, without good cause, fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of the Act, the Office, "after finding that in the absence of the failure the wage-earning capacity of the individual probably would substantially increased, may reduce prospectively the monetary compensation of the individual in accordance of what probably would have been his wage-earning capacity in the absence of the failure," until the individual in good faith complies with the direction of the Office.

In an August 10, 1995 report, Dr. Robert W. Hammatt, a Board-certified orthopedic surgeon, noted that x-rays showed a moderate diminished C5-6 disc space with minimal arthritic changes and significant disc space narrowing at L4-5 and L5-S1 with almost bone to bone contact. Dr. Hammatt diagnosed musculoligamentous cervical and lumbosacral spine strain, cervical disc disease at C5-6 and degenerative disc disease moderately advanced at L4-5 and L5-S1.

The Office referred appellant to several physicians for examination and a second opinion from each of them on appellant's ability to work. In a February 15, 1996 report, Dr. Sirus Farivar, a Board-certified gastroenterologist, stated that appellant had a history of peptic ulcer disease in 1976 but an upper gastrointestinal endoscopy performed in 1986 was normal. He noted appellant's symptoms included heartburn, cramps and diarrhea. Dr. Sirus stated that the symptoms were not suggestive of peptic ulcer disease but commented that a duodenal ulcer could not be ruled out. He stated that duodenal ulcer disease is a recurrent disease, not a chronic disease and could be aggravated by stress. Dr. Farivar indicated that appellant's symptoms of

[2] 5 U.S.C. § 8113(b).

gas, cramps and occasional diarrhea might be related to his diagnosed diverticulosis. He commented that a diagnosis of irritable bowel syndrome was possible, which could be aggravated by stress. Dr. Farivar stated, however, that the diagnosis of irritable bowel syndrome was difficult because no specific test was available to make the diagnosis. He stated that appellant's symptoms of heartburn and gastroesophageal reflux disease were not stress related.

In a February 26, 1996 report, Dr. Irwin I. Rosenfeld, a Board-certified psychiatrist, diagnosed dysthymic disorder, currently under control with medication, and psychological factors affecting physical condition. He indicated that, because appellant's dysthymic disorder was under control with medication, it did not preclude his ability to work.

In a March 13, 1996 report, Dr. Benjamin G. Cox, Jr., a Board-certified neurosurgeon, diagnosed a cervical strain, resolved with residuals, cervicalgia, cephalgia, a blow to the left wrist that resolved without residuals, right supraspinatus syndrome, lumbar traumatic syndrome which had resolved with residuals of lumbar and lumbosacral spondylosis, and right sacroiliac joint anterior torsion strain. Dr. Cox stated that there was no objective evidence of a cervical condition. He noted that appellant had minimal degeneration at the C5-6 level which had persisted. Dr. Cox indicated that there was no underlying pathological condition persisting in appellant's posterior cervical pain. He reported that appellant had a supraspinatus syndrome or rotator cuff syndrome on the right of four to five years duration. Dr. Cox concluded that the right shoulder condition did not appear to be related to the neck or to the January 14, 1986 employment injury. He stated that appellant continued to be orthopedically disabled from the low back injury which preexisted the employment injury and was permanently aggravated by it due to progressive degeneration of the L4-5 and L5-S1 discs. Dr. Cox indicated that the condition had produced a mild instability of the low back which continued to create appellant's low back discomfort. He concluded that appellant could return to his duties as an investigator but, if he was unable to return to his prior employment, he was capable of performing light-duty or part-time work. In an accompanying work restriction evaluation, Dr. Cox indicated that appellant could sit, stand, walk, lift or squat intermittently for eight hours a day. He reported that appellant could lift up to 50 pounds. Dr. Cox concluded that appellant could work eight hours a day.

The Office referred appellant to a rehabilitation counselor to consider vocational rehabilitation. In a September 4, 1996 report, the rehabilitation counselor indicated that appellant was angry and frustrated with the Office because he believed he needed additional physical therapy and psychological counseling. He reported that appellant felt he was incapable of working due to his other conditions such as diverticulitis and chronic diarrhea which would prevent him from being a reliable, consistent employee. In a September 23, 1996 letter, the Office warned appellant that failure to participate in vocational rehabilitation when directed by the Office without good cause, could result in a prospective reduction of his compensation, based on what probably would have been appellant's wage-earning capacity had he completed vocational rehabilitation. The Office further noted that, if an employee failed to participate in the early essential preparatory stages of vocational rehabilitation, the Office would assume that vocational rehabilitation would have resulted in a return to work with no loss of wage-earning capacity and reduce compensation accordingly.

In a November 8, 1996 report, the rehabilitation counselor indicated that appellant had been referred for vocational testing and he had discussed the results with appellant. He noted that appellant had again complained that he was physically unable to participate in vocational rehabilitation. The rehabilitation counselor informed appellant that he had to submit a report from his treating physician to substantiate his claim that he was unable to participate in vocational rehabilitation.

In a January 13, 1997 report, the rehabilitation counselor indicated that appellant had been informed on December 17, 1996 that he needed to meet with the counselor on December 24, 1996 to review the results of appellant's research assignment to peruse the transferable skills analysis test. The counselor reported that appellant refused to meet on December 24, 1996 because he would be "too busy." Appellant further stated that he did not want to come in for a meeting but he knew he was required to do so. The counselor noted that appellant presented his research in an unscheduled January 6, 1997 visit to the counselor's office, but had discussed how he was unable to perform the jobs he had reviewed, which was contrary to the purpose of the exercise. The Office thereupon reduced appellant's compensation to zero for failure to cooperate with vocational rehabilitation efforts.

Under section 10.519 of regulations,[3] the Office has the power to reduce an employee's compensation for failure to cooperate with vocational rehabilitation. Under section 10.519(a), the Office can select a suitable job for the employee and reduce his compensation based on the amount he would earn for that position when compared to the current wage of his former position. Under section 10.519(c), where an employee has not cooperated with the early stages of vocational rehabilitation and a position cannot be identified, the Office has the authority to presume that vocational rehabilitation would have resulted in a return to work with no loss of wage-earning capacity and thereby reduce appellant's compensation to zero. Under both provisions, the reduction remains in effect until the employee acts in good faith to comply with the direction of the Office. In this case, the Office often referred to the provisions of section 10.519(c) in warning appellant about his failure to cooperate with vocational rehabilitation efforts. However, at the time of the decision, the Office relied on the provisions of section 10.519(a) to reduce appellant's compensation to zero by selecting the position of chief guard.

The Office had found that appellant would be able to work as a chief guard. This action was taken in accordance with section 8113(b). The position of chief guard requires the ability to lift up to 20 pounds and had few physical demands. The report of Dr. Cox showed that appellant's physical restrictions fell within the physical requirements of the position. The Office found that appellant's experiences in his federal employment provided him with the vocational preparation to perform the position. The Office reported that an official with the state employment service indicated the position of chief guard was reasonably available full time within appellant's commuting area. The state official also noted that the weekly wage for the position of chief guard was $1,041.85. The Office noted that the current wage of appellant's former position was $44,395.00 a year or $853.75 a week. The evidence therefore shows that appellant has no loss of wage-earning capacity because he is physically and vocationally capable of working as chief guard and earning more in that position than he could earn in his former

[3] 20 C.F.R. § 10.519.

position. The Office therefore properly determined that appellant was not entitled to compensation.

The decision of the Office of Workers' Compensation Programs dated January 5, 2000 is hereby affirmed.

Dated, Washington, DC
March 7, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member