United States Department of Labor
Employees' Compensation Appeals Board

L.R., Appellant	)	
and	)	**Docket No. 07-1588**
	)	**Issued: November 14, 2007**
U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Cleveland, OH, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 23, 2007 appellant filed a timely appeal from a February 23, 2007 decision of the Office of Workers' Compensation Programs, which reduced his monetary compensation to zero. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's wage-loss compensation to zero pursuant to 5 U.S.C. § 8113 on the grounds that he failed to participate in vocational rehabilitation efforts without good cause.

FACTUAL HISTORY

On November 18, 2005 appellant, then a 58-year-old supervisor of transportation operations, filed a Form CA-1, traumatic injury claim, alleging that on September 26, 2005 he was assaulted by an employee who threatened him and poked him in the chest. He stopped work that day. Appellant came under the care of Dr. Ravinder K. Brar, a psychiatrist, who diagnosed

an acute stress disorder. The Office initially denied the claim on February 28, 2006 on the grounds that the medical evidence did not establish causal relationship. Following receipt of additional medical evidence, on March 3, 2006 the Office vacated the February 28, 2006 decision and accepted that appellant sustained an employment-related acute stress disorder.

In reports dated May 26, 2006, Dr. Brar diagnosed post-traumatic stress disorder caused by the September 26, 2005 incident and advised that appellant could not return to work due to anxiety, depression, nightmares and fear for his safety. On April 26, 2006 the Office referred appellant to Dr. Magdi S. Rizk, a Board-certified psychiatrist, for a second opinion evaluation. In reports dated May 31 and June 1, 2006, Dr. Rizk noted his review of the history of injury, medical record and a statement of accepted facts. He performed psychiatric examination on May 23, 2006. Dr. Rizk advised that, while appellant suffered an acute stress disorder after the injury on September 26, 2005, at the time of examination the condition had ceased and he suffered no psychiatric condition as a result of the injury. He opined that appellant did not have post-traumatic stress disorder and stated that he was simply very frightened of his attacker. Dr. Rizk advised that appellant could perform his usual job for eight hours a day and that neither restrictions nor vocational rehabilitation were required.

The Office found that a conflict in medical evidence arose between the opinions of Drs. Brar and Rizk. On September 12, 2006 it referred appellant to Dr. Abdon E. Villalba, a Board-certified psychiatrist, for an impartial evaluation.[1] In reports dated September 28, October 16 and November 6, 2006, Dr. Villalba noted his review of the record, appellant's history and complaints and his examination findings. He diagnosed generalized anxiety secondary to a history of post-traumatic stress disorder, dependent personality and hypertension. Dr. Villalba advised that, since the assailant had resigned, appellant could return to work without limitations, beginning at 4 hours a day for 20 hours a week for two months and then full time. He noted that appellant would benefit from continued psychotherapy. Dr. Brar continued to advise that appellant could not work.

By letters dated November 14 and 16, 2006, the Office advised appellant that he was being referred to Mark A. Anderson, a vocational assessment counselor, for vocational rehabilitation. On November 20, 2006 Mr. Anderson advised appellant that an appointment had been scheduled for an initial interview on November 29, 2006. In a December 1, 2006 letter, he advised appellant that several attempts had been made to reach him via telephone regarding the missed appointment on November 29, 2006. Mr. Anderson advised appellant that it was imperative that he reschedule the appointment. In an action report dated December 4, 2006, Mr. Anderson advised the Office that appellant was obstructing rehabilitation efforts because he did not attend the scheduled November 29, 2006 appointment or respond to telephone messages. By letter dated December 5, 2006, the Office informed appellant that vocational rehabilitation was a mandatory requirement and that if he did not make a good faith effort to contact his counselor, sanctions, which included the loss of wage-loss compensation, would be issued. By letter dated December 11, 2006, Kenneth J. Lewis, an attorney, forwarded to Mr. Anderson an October 30, 2006 report in which Dr. Brar stated that it was not in appellant's best interest to

[1] On September 22, 2006 the employing establishment informed the Office that the employee who assaulted appellant had resigned.

attend any function related to postal services because this would cause a major set-back to his mental health.[2]

On December 19, 2006 the employing establishment offered appellant a position based on the restrictions provided by Dr. Villalba, which he refused on December 26, 2006. By letter dated December 28, 2006, the Office informed appellant that, based on reports from his rehabilitation counselor, he had not attended scheduled meetings or responded to attempts to contact him. The Office noted that, the weight of the medical evidence rested with the opinion of the referee examiner, Dr. Villalba, who advised that appellant could return to part-time work for two months and then begin full-time work. The Office informed appellant of the penalty provisions of section 8113(b) of the Federal Employees' Compensation Act[3] and section 10.519 of the Office's regulations.[4] Appellant was given 30 days to make a good effort to participate in vocational rehabilitation or provide a good reason for not participating in the effort.

By report dated January 1, 2007, Dr. Brar advised that appellant's medical leave should be extended until August 10, 2007. In a letter dated January 18, 2007, appellant stated that he did not participate in vocational rehabilitation based on his physician's recommendation. He asserted that Dr. Villalba's opinion should not represent the weight of medical opinion because he asked inappropriate questions of a sexual nature and stated that appellant was still fearful of his assailant.[5] Appellant also submitted progress notes from Dr. Brar dated February 3 to October 30, 2006 who diagnosed depression and anxiety. On October 24, 2006 Dr. Brar opined that appellant's diagnosis had changed from acute stress reaction to post-traumatic stress disorder due to the chronicity of his symptoms. On October 30, 2006 she noted that he reported that he had to appear at the employing establishment for an arbitration hearing and that this gave him nightmares. She diagnosed depression and anxiety. By letter dated January 29, 2007, the Office informed appellant that his reasons given for refusing to participate in vocational rehabilitation were insufficient, noting that the weight of the medical evidence was with the opinion of Dr. Villalba. The Office advised appellant that, if he continued to refuse to cooperate with vocational rehabilitation, his compensation would be terminated in 15 days. On February 6, 2007 appellant again complained about the manner in which Dr. Villalba conducted his examination and stated that both his attorney and physician advised him to continue medical treatment and that he should not return to work at a postal facility.

In a closure report dated February 18, 2007, Mr. Anderson chronicled his attempts to contact appellant and noted his lack of cooperation.

By decision dated February 23, 2007, pursuant to section 8113(b) of the Act and section 10.519 of Office regulations, the Office reduced appellant's wage-loss compensation to zero. The Office found that appellant had not responded to its preparatory effort in vocational

[2] An attorney authorization is not in the case record.

[3] 5 U.S.C. §§ 8101-8193.

[4] 20 C.F.R. § 10.519.

[5] On January 22, 2007 appellant filed a recurrence claim. By letter dated January 29, 2007, the Office informed appellant that a recurrence claim was not appropriate in his case because he had not returned to work.

rehabilitation such that it could not determine what his wage-earning capacity would have been had he undergone testing and the rehabilitation efforts. The Office determined that appellant had failed, without good cause, to undergo vocational rehabilitation as directed. In the absence of evidence to the contrary, the vocational rehabilitation effort would have resulted in his return to work at the same or higher wages than for the position he held when injured.

LEGAL PRECEDENT

Section 8104(a) of the Act provides that the Secretary of Labor may direct a permanently disabled individual whose disability is compensable under the Act to undergo vocational rehabilitation.[6] Additionally, the Act and the implementing regulations provide for sanctions if, an employee without good cause fails to apply for and undergo vocational rehabilitation, when so directed.[7] These sanctions remain in effect until the employee, in good faith complies with the Office's directives.[8]

Section 10.519 of Title 20 of the Code of Federal Regulations details the actions the Office will take when an employee refuses to undergo vocational rehabilitation. The regulations provide in relevant part that, if an employee without good cause fails or refuses to apply for, undergo, participate in or continue to participate in a vocational rehabilitation effort, when so directed, the Office will act as follows:

> "(b) Where a suitable job has not been identified because the failure or refusal occurred in the early, but necessary stages of a vocational rehabilitation effort (that is, meetings with [Office] nurse, interviews, testing, counseling, functional capacity evaluations and work evaluations), [the Office] cannot determine what would have been the employee's wage-earning capacity.
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> "(c) Under the circumstances identified in paragraph (b) of this section, in the absences of evidence to the contrary, [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 [the Office] will reduce the employee's monetary compensation accordingly (that is, 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]."[9]

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

[6] 5 U.S.C. § 8104(a).

[7] 5 U.S.C. § 8113(b); 20 C.F.R. § 10.519; *see Ruth E. Leavy*, 55 ECAB 294 (2004).

[8] *Id.*

[9] 20 C.F.R. § 10.519. *See David L. Maes*, 54 ECAB 727 (2003); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Service*, Chapter 2.813.11(a) (November 1996).

the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[10]

ANALYSIS

The evidence of record establishes that appellant failed to participate in vocational rehabilitation efforts. The issue is whether his failure to participate was for good cause. The weight of medical opinion is based on Dr. Villalba's referee examination. He found that appellant could begin part-time work. On January 16, 2006 the Office properly referred him to a vocational rehabilitation counselor, Mr. Anderson, to begin rehabilitation services. Mr. Anderson made repeated attempts to contact appellant, including letters dated November 20 and December 1, 2006 and telephone calls. He set up an appointment which appellant did not attend and attempted to reschedule this initial appointment in order to begin the rehabilitation process. While appellant complained that Dr. Villalba asked inappropriate questions, there is nothing in the record to support this contention. The Board finds that the weight of the medical evidence regarding appellant's ability to work rests with the opinion of Dr. Villalba who provided comprehensive reports in support of his opinion that appellant cold return to work without restrictions, beginning on a part-time basis for two months and then returning to his regular full-time job. The Office therefore properly referred appellant to Mr. Anderson for vocational rehabilitation.

By letters dated December 28, 2006 and January 29, 2007, the Office informed appellant that it would reduce his compensation to zero unless he evidenced his willingness to participate in vocational rehabilitation or demonstrate good cause for his failure to participate. Appellant's only response was that, based on the recommendation of his attorney and physician, he was unable to work. He continued to complain about Dr. Villalba's evaluation and submitted reports from Dr. Brar who advised that appellant remained totally disabled. In October 30, 2006 reports, Dr. Brar stated that it would not be in appellant's best interest to attend any functions related to the employing establishment as this would set back his mental health, noted that appellant reported that he had to appear at the employing establishment for an arbitration hearing and that this gave him nightmares. She diagnosed depression and anxiety. In a January 8, 2007 report, Dr. Brar merely stated that appellant should extend medical leave until August 10, 2007. While she advised that appellant continued to be fearful and was totally disabled, she did not address whether he could participate in preliminary meetings regarding a return to work and merely stated that he remained fearful of his assailant. Furthermore, Dr. Brar had been on one side of the conflict resolved by Dr. Villalba. Her reports essentially repeat her earlier findings and conclusions and are insufficient to overcome the weight accorded to an impartial medical specialist's report.[11]

The Board finds that Dr. Brar did not provide a rationalized explanation as to why appellant could not participate in the preliminary vocational rehabilitation appointment scheduled by Mr. Anderson. The fear of future injury is not compensable under the Act.[12] This

[10] *Manuel Gill*, 52 ECAB 282 (2001).

[11] *Roger G. Payne*, 55 ECAB 535 (2004).

[12] *See Manuel Gill*, *supra* note 10.

is true even if the employee were to be found medically disqualified to continue in the employment because of the effect that employment facture have on the underlying condition. Appellant's fear of future injury would be self-generated.[13] He therefore did not establish good cause for his failure to participate in the preliminary vocational rehabilitation effort.

Office regulations provide that when an employee fails to participate in the early stages of vocational rehabilitation, it cannot be determined what would have been the employee's wage-earning capacity had there been no failure to participate and it is assumed 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.[14] As appellant failed, without good cause, to participate in preliminary vocational rehabilitation meetings such that he failed to participate in the "early, but necessary stages of a vocational rehabilitation effort,"[15] The Office in its February 23, 2007 decision, had a proper basis to reduce his disability compensation to zero.

CONCLUSION

The Board finds that the Office properly reduced appellant's wage-loss compensation to zero on the grounds that he failed, without good cause, to participate in vocational rehabilitation efforts.

[13] *See Joseph G. Cutrufello*, 46 ECAB 285 (1994).

[14] *David L. Maes, supra* note 9.

[15] *See* 20 C.F.R. § 10.519(b), (c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 23, 2007 be affirmed.

Issued: November 14, 2007
Washington, DC

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

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

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