U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FOY E. THOMAS and TENNESSEE VALLEY AUTHORITY, BROWNS FERRY NUCLEAR PLANT, Decatur, Ala.

Docket No. 96-1317; Submitted on the Record;
Issued October 1, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's monetary compensation by 100 percent on the grounds that he failed to cooperate with vocational rehabilitation efforts without good cause.

The Board has duly reviewed the case record and finds that the Office met its burden of proof to reduce appellant's compensation benefits for refusal to cooperate with vocational rehabilitation.[1]

The Office accepted that appellant sustained an employment-related cervical sprain, anterior ligament tear right knee and contusion of both shins on September 21, 1983. Appellant's last day of work was July 5, 1982 and appellant was terminated by the employing establishment on July 9, 1983. The Office authorized compensation for the period September 8, 1982 to November 20, 1988 and from December 1, 1988 to February 28, 1992. By letter dated April 6, 1992, the Office placed appellant on the periodic compensation rolls for temporary total disability. On April 14, 1992 the Office authorized appellant's referral for vocational rehabilitation. On June 26, 1992 appellant appeared for the scheduled meeting and vocational testing. In a development plan dated October 28, 1992, the rehabilitation specialist noted that appellant agreed to cooperate with the rehabilitation process, but stated he would not consider reemployment outside of the employing establishment. In a letter dated December 30, 1992, the rehabilitation counselor noted that appellant would be directed to participate in the Job Club as of January 7, 1993.

In a letter dated December 30, 1991, Dr. Frank Hatchett, Jr., appellant's treating Board-certified orthopedic surgeon, opined that appellant "should be retrained" to perform "other type of work."

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[1] Appellant previously filed an appeal with the Board regarding the Office's denial of payment for orthopedic shoes, which the Board affirmed on August 26, 1994 in Docket No. 93-1353.

In letters dated February 10 and March 6, 1992, Dr. Hatchett opined that appellant would be a good candidate for rehabilitation and should be retrained to do some type of useful work.

By letter dated May 9, 1992, appellant stated:

> "I am, however, disappointed in that the TVA representative for the rehabilitation program nor your office contacted me on this pass (sic) Thursday as discussed and eagerly expected. I also disagree with the two (2) year rehabilitation plan with a private industry. This program as dialogued has no permanent stability."

Appellant then stated any position should be "[a] permanent position with TVA or another appropriate [f]ederal [a]gency that will provide reinstatement of full benefits and seniority status should be mandated."

In a note dated June 26, 1992, a vocational consultant noted that appellant attended a vocational assessment and testing.

In a report dated February 18, 1993, the rehabilitation specialist summarized his contacts with appellant and potential employers. The rehabilitation specialist noted that he attempted to call appellant on January 13, 1993 to invite him to join the Job Club without success. On January 25, 1993 the rehabilitation specialist tried three times to contact appellant and left a message with his son on the third try. The rehabilitation specialist noted that he wrote appellant a letter on February 17, 1992 directing appellant to meet with him.

In a report dated March 18, 1993, the rehabilitation specialist noted that appellant did not show up for his scheduled 10:30 a.m. appointment on February 22, 1993. The rehabilitation specialist noted that he tried to contact appellant by telephone, but was unsuccessful. The rehabilitation specialist noted that he attempted to contact appellant by telephone and later stopped by his residence on February 22, 1993 when appellant did not show up for his scheduled meeting. On February 26, 1993 the rehabilitation specialist noted that he sent appellant a second letter requesting a meeting on March 4, 1993 "to discuss vocational rehabilitation services and his compliance." The rehabilitation specialist telephoned appellant on March 1 and 2, 1993. In a note of the March 2, 1993 telephone conversation, the rehabilitation specialist noted that appellant "states he is not going to commit to anything else as far as rehabilitation until his lawyer approves it." The rehabilitation specialist noted that he waited for appellant for approximately one hour and fifteen minutes on March 4, 1993 for a scheduled meeting at which appellant did not show up. On March 10, 1993 the rehabilitation specialist called and left a message for appellant to return his call.

By letter dated March 25, 1993, the Office advised appellant that the rehabilitation specialist had informed the Office that he had failed to cooperate with the rehabilitation effort on his behalf and had not responded to various letters written by the rehabilitation specialist. Appellant was advised that, if he failed or refused to participate in vocational rehabilitation without good cause, his compensation benefits would be reduced.

In a letter dated June 25, 1993, the rehabilitation specialist noted that appellant had not responded to the Office's March 25, 1993 letter, that the file would be closed and rehabilitation services discontinued due to appellant's noncooperation.

By letter dated June 14, 1995, an Office claims examiner advised appellant that his benefits would be reduced by 100 percent, for failure to cooperate in rehabilitation efforts, because he had not shown a good faith effort in responding to the requests of the vocational rehabilitation specialist. Appellant was allotted 30 days from the date of the letter to provide any reason for his failure to respond to the vocational rehabilitation specialist, and to provide any supporting evidence which would show that vocational rehabilitation efforts would not have resulted in the same earning capacity as he experienced in his federal employment. The Office also advised appellant that he needed to submit current medical evidence documenting any treatments received as the record contains no medical evidence subsequent to May 1993 when the case was sent to the Employees' Compensation Appeals Board.

In a letter dated June 22, 1995, appellant responded to the Office's June 14, 1995 letter. Appellant stated that he last spoke with the rehabilitation specialist on April 28, 1993 and that a job club was never mentioned. Appellant also stated that he attended vocational training and never left the program. Appellant also asserted that he had received medical treatment which should be in the record. Appellant stated that he did reply to all communications even those sent to a different address.

By letter decision dated October 10, 1995, the Office reduced appellant's compensation benefits by 100 percent due to his failure to participate in vocational rehabilitation as evidenced by a lack of response to the previous Office letters. The Office noted that his entitlement to further wage-loss compensation would be restored, upon participation in vocational rehabilitation, without compensation for the period during which time he had not cooperated. The Office found that due to lack of any vocational rehabilitation efforts would have resulted in no loss of wage-earning capacity.

The Board finds that the Office properly reduced appellant's monetary compensation by 100 percent on the grounds that he failed to cooperate with vocational rehabilitation efforts without good cause.

Section 8113(b) of the Federal Employees' Compensation Act[2] provides as follows:

> "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."

[2] 5 U.S.C. § 8113(b); *see also* 20 C.F.R. § 10.124(f).

Section 10.124(f) of Title 20 of the Code of Federal Regulations, the implementing regulation of 5 U.S.C. § 8113(b), further provides as follows:

> "Pursuant to 5 U.S.C. § 8104(a), the Office may direct a permanently disabled employee to undergo vocational rehabilitation. If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue participation in a vocational rehabilitation effort when so directed, the Office will, in accordance with 5 U.S.C. § 8113(b), reduce prospectively the employee's monetary compensation based on what would have been the employee's wage-earning capacity had there not been such failure or refusal. If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue participation in the early but necessary stages of a vocation rehabilitation effort (*i.e.*, interviews, testing, counseling and work evaluations) the Office cannot determine what would have been the employee's wage-earning capacity had there not been such failure or refusal. *It will be assumed, therefore, 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 and the Office will reduce the employee's monetary compensation accordingly.* Any reduction in the employee's monetary compensation under the provision of this paragraph shall continue until the employee in good faith complies with the direction of the Office."[3] (Emphasis added.)

Rehabilitation reports beginning June 26, 1992 indicated that appellant cooperated, initially, with vocational rehabilitation efforts by undergoing vocational testing. The reports beginning February 18, 1993 indicate that appellant was unwilling to look for work outside of the employing establishment or federal government. However, as noted in the February 18 and March 18, 1993 reports, the rehabilitation specialist stated that he tried to contact appellant on various occasions, that he tried to enlist appellant in a job club and set up a meeting on February 22, 1993 at which appellant did not appear. The rehabilitation specialist subsequently tried to contact appellant at home and stopped by his residence. Appellant also did not appear at a meeting scheduled for March 4, 1993. The rehabilitation specialist, in a letter dated June 25, 1993, recommended that appellant's case be closed due to his unwillingness to go forward with rehabilitation services.

In letters dated March 25, 1993 and June 14, 1995, the Office advised appellant that his refusal, without good cause, to take steps to fulfill the purposes of vocational rehabilitation. The Office further advised appellant that he had 30 days to participate in the rehabilitation effort, provide reasons for and evidence supporting his noncompliance, or to submit evidence showing that vocational rehabilitation would not have resulted in a return to work without a loss of wage-earning capacity. The Office requested appellant to submit current medical evidence as the record contained no medical evidence subsequent to May 1993. In his June 22, 1995 letter, appellant stated that he had never left the rehabilitation program and that his medical treatment should be in the record. Appellant contends that he responded to all correspondence, even that sent to an incorrect address.

[3] 20 C.F.R. § 10.124(f).

The Board finds that the evidence does not support appellant's contention that he responded to all the Office correspondence subsequent to his vocational testing in July 1992. The record does not contain any telephone memorandum to demonstrate that his rehabilitation specialist or the Office received any telephone calls in response to the rehabilitation specialist's calls nor does it contain any letters in response to the letters from the Office and rehabilitation specialist except for the June 25, 1995 letter.

Accordingly, as the record is void of any evidence indicating that vocational rehabilitation would not have resulted in appellant's return to work at a wage equal to or higher than he was earning at the time of his work injury, the Office properly applied the provisions of 5 U.S.C. § 8813(b) in finding that appellant had no loss of wage-earning capacity and in reducing his monetary capacity accordingly.[4]

The decision of the Office of Workers' Compensation Programs dated October 11, 1995 is hereby affirmed.

Dated, Washington, D.C.
October 1, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[4] *See Asline Johnson*, 41 ECAB 438 (1990).