

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT JOHNSON and DEPARTMENT OF THE NAVY,  
PORTSMOUTH NAVAL SHIPYARD, Portsmouth, N.H.

*Docket No. 96-442; Submitted on the Record;  
Issued September 18, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect a zero percent loss of wage-earning capacity for refusal to cooperate with vocational rehabilitation efforts.

On May 24, 1986 appellant, then a 37-year-old plastic fabricator, fell while descending a set of stairs and sustained an injury to his left wrist. The Office accepted appellant's claim for chronic left wrist sprain and chronic de Quervain's tenosynovitis. Appellant was separated from the employing establishment on September 4, 1987 on the grounds that he was unable to perform the duties of his position because of his work restrictions. The Office began payment of temporary total disability effective the date of the termination of appellant's employment.

The Office referred appellant for vocational testing. In a March 8, 1988 report, Dr. Frank McAloon, a psychologist, diagnosed mixed specific developmental disorder and indicated that appellant was a complex man with a hands-on work history but with verbal-abstract preferences and strengths. He commented that in a college program appellant might need some support services, particularly if the math and reading aspects of the curriculum were heavy. He noted that, since appellant had been out of work, he had developed an avoidance style about returning to work. He suggested that appellant might need support as he reentered the work force or returned to school in the form of vocational counseling.

A vocational rehabilitation counselor indicated that appellant had not complied with a request to contact him. In a November 15, 1988 letter, the Office informed appellant of the need to undergo vocational rehabilitation. The Office warned appellant that, under Office regulations, his compensation could be reduced to zero percent loss of wage-earning capacity if he failed or refused to cooperate with the essential preparatory efforts of vocational rehabilitation.

In a February 16, 1989 note, a rehabilitation counselor indicated that he had met appellant who expressed a strong desire for school. He noted that he encouraged appellant to

meet with the state job service in the next week. In notes from April 1989, the rehabilitation counselor reported that appellant was applying to college for a program in which he could teach. In a June 21, 1989 letter, the assistant dean of admissions at the University of New Hampshire indicated that appellant's application for admission to the 1989 fall semester was withdrawn and he was advised to complete four to six courses through the university's division of continuing education with an average grade of B as a way to strengthen his overall academic credentials. She noted that appellant was enrolled in two courses for the fall semester and would be approved for a full-time special status for the spring semester if he achieved a B average in the courses. If he continued to maintain a B average he would be accepted to a baccalaureate program for the 1990 fall semester.

In his report for August 1989, the rehabilitation counselor indicated that he discussed with appellant the concept of working one day a week to help him test out his vocational goals in areas such as substitute teaching, teacher's aide or some aspect of counseling. He related that appellant resisted the idea on the grounds that he would be too busy with school and work would interfere with his education. He noted that appellant also expressed the fear that the Office would use part-time work as an excuse to make him work full time or reduce his compensation drastically. The rehabilitation counselor stated that he tried to reassure appellant that working part time would show his desire to become self-sufficient and provide evidence that he was suited for work in the field of education. He noted that appellant's claims examiner had explored the vocational rehabilitation issue and indicated that appellant could finish the program in three years with the Office continuing to pay compensation and the state paying the costs of vocational rehabilitation. The rehabilitation counselor reported that he subsequently got into a shouting match with appellant in discussing the idea in which appellant stated he would not work with the rehabilitation counselor any further and the counselor accused appellant of being uncooperative and indicated that working with appellant was unpleasant and unproductive. He noted that the Office claims examiner subsequently contacted him to inform him that it had been decided to discontinue the counselor's services and to let appellant continue working with the state employment service.

The Office referred appellant to Dr. Norman Berube for an examination and second opinion on his ability to work. In a November 2, 1989 report, Dr. Berube indicated that appellant had no limitation of dorsiflexion or volarflexion of the left wrist and normal radial deviation of the left wrist. He noted that ulnar deviation of the left wrist was also normal but appellant had pain in the extensor tendons of the thumb when forced ulnar deviation was attempted with the left wrist. He reported that appellant had a positive Finkelstein test in the left wrist because of de Quervain's stenosing tenosynovitis of the left wrist involving the long abductor and the short extensor of the left thumb. Dr. Berube related that appellant preferred not to have surgery because it might interfere with the vocational rehabilitation program he was taking. Dr. Berube stated that it was difficult to understand appellant as he wanted to work towards a degree and yet did not want to return to the work force. He commented that it was very possible that surgery would alleviate the symptoms in the left wrist and the question of returning to work would not be put on hold. He indicated that appellant could do some type of work more than he was currently doing as a college student. He concluded that it was hard to understand a person who could go on being a student without returning to any type of work because of a relatively minor injury incurred in a fall down a stairway.

In a January 19, 1990 letter, the associate dean of admissions informed appellant that his request to be a full-time undergraduate special student had been approved. The associate dean indicated that the permission to be a full-time special student was granted for one semester and did not constitute admission to a degree program at the university and did not guarantee appellant's entrance to all university courses. In a June 6, 1990 letter, the dean of admissions informed appellant that he had been admitted to the university.

The Office referred appellant to Dr. Michael Kalter for another examination. In a May 15, 1991 report, Dr. Kalter diagnosed chronic de Quervain's stenosing tenosynovitis of the left wrist. He noted that x-rays from March 1988 showed no obvious abnormalities or calcification of the radial aspect of the radius, distally. He recommended that appellant undergo a second cortisone injection or undergo surgery. He related that appellant clearly indicated that he did not want any further treatment because it might jeopardize his college funding. Dr. Kalter commented that appellant seemed able to control his symptoms with regard to activity modification. He indicated that any work restrictions would relate only to the use of the left hand and wrist with no repetitive forceful grasping or wrist extension activities. He commented that subsequent injection could be provided if appellant had an exacerbation but stated that a definitive cure would probably require surgery.

In a July 16, 1993 letter, the Office again referred appellant to a rehabilitation counselor. The Office noted to the counselor that appellant was working on a degree in psychology under a program paid for by the Veterans Administration. In an August 3, 1993 report, the rehabilitation counselor related that appellant was a client of the state's Department of Vocational Rehabilitation and was not receiving vocational rehabilitation benefits from the Veterans Administration. Appellant stated that he believed the Office had approved his rehabilitation program of a five-year program to obtain a Master's degree in education for a vocational goal of a teacher in secondary education. In an October 28, 1993 report, the counselor reported that out of three appointments to meet appellant, one was changed, appellant missed the second and wrote a note to indicate that he could not attend the third because of conflicts with his school schedule.

In a November 18, 1993 report, the rehabilitation counselor indicated that appellant lacked four to eight credits to complete his Bachelor's degree in psychology. He noted that appellant's subsequent plans included an effort to complete degree requirements for a Master's degree in education. The counselor noted that he tried to discuss other objectives with appellant such as including education courses into his current curriculum, particularly as he lacked the credits to graduate. He related that appellant responded that he would be attempting to enter graduate school and was expressing interest in becoming a counselor. Appellant indicated that he did not feel he would be able to become a teacher with a Bachelor's degree due to his age, lack of education and experience and would need a Master's degree to be employable and receive a higher pay. Appellant noted that he was under the impression that the Office had supported his vocational rehabilitation objective because there had been little interference with his progress toward the objective. The counselor stated that appellant was very concerned about the future of his compensation and questioned him on the status of his compensation if he did not continue with the planning process but proceeded with his established vocational rehabilitation plan with the state agency. The counselor was unable to answer appellant's question. He

reported that appellant seemed very determined to complete his plan and had indicated that meetings and discussions about his vocational objectives and what he perceived as interference caused him emotional stress and depression. He noted that appellant had become angry during the discussions. He stated that after attempting to explain the purpose of plan development and rationale for evaluating a vocational rehabilitation plan, appellant chose not to understand the purpose of the process and had his own agenda. He noted that appellant was angered and expressed feelings of depression toward the system and the fact that he perceived the counselor's intervention as interference. He concluded that the planning process would not be completed in a timely fashion. He indicated that appellant intended to obtain a Master's degree and commented that this may be a long process based on appellant's low grade point average, lack of credits to complete a degree and transportation difficulties. He recommended that the case be reassigned to another rehabilitation counselor.

Appellant was referred to a third rehabilitation counselor. In a January 14, 1994 report, the counselor noted that appellant was currently attending a bachelor of arts program in psychology and was 8 to 12 credits short of graduating from the program. The counselor reported that appellant's only income was his compensation benefits. He noted that appellant repeated his goal of entering a master's program in education and seeking employment as a teacher. Appellant felt he had been cooperative with rehabilitation efforts and felt tied to a rehabilitation plan made with the state's Department of Vocational Rehabilitation which he claimed was verbally approved by the Office. The counselor indicated that appellant had no evidence that the Office had approved his rehabilitation plan but believed that, given the lack of intervention by the Office, he had assumed that the education program was to the satisfaction of the Office. The counselor stated that appellant had not considered any vocational options which would fall within his current physical and vocational abilities. He indicated that he explained the vocational rehabilitation hierarchy to appellant but noted that appellant still maintained that he was in an approved rehabilitation program. The counselor informed appellant that if he maintained that position and failed to cooperate with rehabilitation activities, which were now geared towards alternative placement with a different employer in a job within his current physical and vocational abilities, he might jeopardize his compensation at the discretion of the Office. Appellant expressed a willingness to explore vocational alternatives. The counselor indicated that he prepared a specific vocational assignment for appellant to research several job areas such as secondary school teacher, retail salesperson, protective services, courier driver, general office clerk and counter clerk. He noted that an appointment was made to meet appellant on February 1, 1994. He concluded that, while appellant would cooperate with vocational exploration activities, his adamant desire to finish his college degree and continue his education might cause difficulties in developing goals and a specific vocational plan. He stated that he was unable to fully assess the chances of a successful rehabilitation until he and appellant approached development and signature of a rehabilitation program.

In a January 28, 1994 letter, appellant stated that his educational plans were formed in cooperation with the vocational rehabilitation process instituted by the Office. He reported that, prior to his referral to a new rehabilitation counselor in November 1993, he had complied with the vocational plan, submitting his grade and progress reports and financial reports and had indicated that he was still progressing under the plan despite the disadvantage of no fuel assistance for his car. He commented that in his meeting with the third rehabilitation counselor,

he was informed that the status of rehabilitation was to be disregarded. He noted that he was in the midst of a comprehensive language program and could not endure interference. He stated that plans were made to have no interference until after March 6, 1994. He stated that since that meeting he had received a passing grade and funding from the state for a second semester of the language program.

In a February 10, 1994 report, the rehabilitation counselor indicated that the February 1, 1994 meeting was postponed because appellant had the flu. The rescheduled meeting of February 11, 1994 was postponed because appellant was scheduled to be in class that day. The counselor indicated that the first postponement was understandable but the second postponement did not seem necessarily appropriate. In a March 7, 1994 note, the counselor indicated that, while appellant appeared for a February 21, 1994 meeting, he did not appear for a March 4, 1994 meeting.

In a March 8, 1994 letter, the Office informed appellant that the evidence of record showed he had failed to keep a scheduled appointment for vocational testing on February 11, 1994 and failed to keep an appointment for March 4, 1994. The Office therefore concluded that appellant had refused to participate in rehabilitation efforts. The Office warned appellant that his compensation could be reduced if he refused to cooperate with vocational rehabilitation efforts and if he did not cooperate in the early 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 would reduce his compensation, accordingly, to zero. The Office stated that the reduction would continue until appellant complied in good faith with the Office's directives concerning rehabilitation. The Office gave appellant 30 days to make a good faith effort to participate in vocational rehabilitation efforts to return him to gainful employment. The Office informed appellant that if he believed that he had good reason for not participating in this effort, he should so advise the Office within 30 days, giving his reasons and submitting evidence in support of his position. The Office stated that if appellant did not comply with these instructions, rehabilitation efforts would end and the Office would reduce his compensation.

In a March 10, 1994 report, the rehabilitation counselor indicated that he had met with appellant on February 11, 1994 at which time appellant indicated that he had not completed the vocational research assignment and reasserted that he was participating in a vocational rehabilitation plan approved by the Office. Appellant related that he had written to the Office and requested a response that his vocational rehabilitation plan had been approved by the Office or verifying that his course of activity was not approved by the Office. The counselor indicated that appellant had also requested his appeal rights concerning rehabilitation matters. He stated that since appellant had not completed his assignment, he was given one more opportunity to provide the requested information in a March 4, 1994 meeting. The counselor stated that appellant did not appear for the March 4, 1994 meeting. He noted that he had received a telephone call from appellant who stated that he had not received a response from the Office to his letter. The counselor warned appellant that his lack of attendance at meetings and noncompliance with the vocational research assignment would be interpreted as noncooperation. Appellant acknowledged the counselor's position but maintained that he was entitled to a response from the Office before continuing with rehabilitation activities. The counselor concluded that if appellant maintained his current desire to continue his education program, there

would be no chance for a successful rehabilitation in this case. He stated that if appellant agreed to participate further with the rehabilitation, the chances of a successful outcome could not be assessed until appellant's responses to additional rehabilitation tasks were monitored.

In an April 5, 1994 letter, appellant stated that his failure to keep the February 11 and March 4, 1994 meetings was not a refusal to participate in rehabilitation efforts. He indicated that on March 3, 1994 a major snowstorm struck where he lived. He stated that his driveway was over 150 feet long and he had been sealed in by snowplows. His landlord only plowed the driveway when the snow stopped. He indicated that, as he had no telephone at his home, he reached a pay telephone on the morning of March 3, 1994 and called the rehabilitation counselor's office to cancel the March 4, 1994 meeting. He related that he was told by the counselor's office that the counselor was snowbound. He canceled the meeting and indicated that he would call back to reschedule. He called the counselor's office twice on March 4, 1994. In the first call, he was informed that the counselor had gone to the scheduled March 4, 1994 meeting. He stated when he reached the counselor later that day, the counselor indicated that the Office had determined that appellant was in refusal and he did not care what the circumstances were for appellant's failure to make the meeting. Appellant stated that the February 11, 1994 meeting was not a scheduled meeting. He contended that the counselor had unilaterally picked February 11, 1994 as a date for a meeting and contended that the counselors depiction of the arrangement of the meeting was false, misleading and deleterious to his rights. He concluded that he found it unconscionable that in the last stages of a program set up and approved by the Office he was forced to endure the Office's interference. He submitted a copy of a September 5, 1989 letter from an Office claims examiner who suggested that appellant keep in contact with his veterans coordinator and have him send brief reports of appellant's progress once a semester during appellant's training. The claims examiner requested that appellant submit the progress report and his end of semester grade report to the Office rehabilitation specialist and another Office claims examiner.

In an April 22, 1994 letter to the rehabilitation counselor, appellant indicated that he had informed the Office that he had not refused to participate in rehabilitation efforts. He commented that he had not said he would refuse to participate in the future. He noted that the Office had not responded. He again pointed out that he was currently involved in a vocational rehabilitation program directed by the Office. He contended that the counselor had rescinded his promise not to interfere in this program. He complained that, as a result, an adverse action was brought in the February 11, 1994 meeting. He stated that the counselor's action was a breach of trust and was despicable, placing the relationship in a "strongly adverse mode." He suggested that if the counselor had any personal or professional integrity, he should resign from the case. Appellant stated that the Office had not addressed the issue of his ongoing vocational rehabilitation. He indicated that, by not answering his letters, the Office was disallowing his vocational rehabilitation program and denying his right to appeal. He stated that he was forced to eschew any threatening activities until the Office fully approached the issue.

In an April 28, 1994 note, the rehabilitation counselor indicated that appellant had not attended a scheduled April 26, 1994 meeting and, just prior to the meeting, had sent his April 22, 1994 letter.

In a May 13, 1994 decision, the Office suspended appellant's compensation, finding that his compensation for wage loss should be reduced to zero based on appellant's continued refusal to participate in the vocational rehabilitation efforts of the Office.

In a June 9, 1994 letter, appellant requested a hearing before an Office hearing representative. At the May 23, 1995 hearing, appellant testified that he was engaged in vocational rehabilitation and was in a shaky place within the program. He stated that he could not afford to be interrupted or engaged in another type of exercise. He related that the rehabilitation counselor stated that he would not bother appellant as far as his school times. Appellant indicated that the counselor then made appointments for times that appellant was going to be in class even though he knew the dates appellant was in class. Appellant stated that he had post-traumatic stress syndrome arising from his service in Vietnam which caused subsequent problems with his work record. He indicated that he cooperated with the counselor until he was placed in a position where he would not cooperate with the counselor any longer. He described the beginning of his vocational rehabilitation plan in 1989 after he was referred to the state program for vocational rehabilitation. He indicated that his progress to completion of the program had been slowed because he had a liver condition related to exposure to Agent Orange in Vietnam with associated high iron content in the tissues, cirrhosis and nonviral hepatitis. He commented that because of these conditions he was considered a restricted or disabled student. He also indicated that his vocational rehabilitation program was not fully funded by the state. He repeated his reasons for missing meetings with the counselor in February and March 1994. He stated that he cooperated with the counselor until the counselor warned him that once he missed a meeting for the second time, for any reason, he would be listed as uncooperative. He indicated that once the counselor started to interfere with his school work, he became uncooperative. He noted that he called the counselor on the last occasion to try to arrange an appointment but the counselor refused and instructed appellant to talk to the Office claims examiner in his case.

In an August 14, 1995 decision, the Office hearing representative found that the Office had properly suspended appellant's compensation because he had failed to participate in the early stages of vocational rehabilitation and had not complied in good faith with the direction of the Office. He therefore affirmed the Office's May 12, 1994 decision.

The Board finds that the Office improperly reduced appellant's compensation to zero percent loss of wage-earning capacity.

The Federal Employees' Compensation Act, in 5 U.S.C. § 8113(b) states:

"If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of this title, the [Office], 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 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]."

The regulation implementing this section of the Act, 20 C.F.R. § 10.124(f), restates section 8813(b) and then states:

“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 vocational 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 a 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 provisions of this paragraph shall continue until the employee in good faith complies with the direction of the Office.”

In the case of *Asline Johnson*,<sup>1</sup> the Board upheld the provisions of 20 C.F.R. § 10.124(f) as an appropriate implementation of section 8113(b). The Office, however, has the burden of showing that it invoked these provisions properly and appropriately.<sup>2</sup>

In this case, the Office reduced appellant’s compensation on the grounds that he had missed meetings with the rehabilitation counselor and therefore had not participated in good faith with the preliminary stages of vocational rehabilitation for the period of February through April 1994. However, the Office had investigated the issue of vocational rehabilitation with appellant in 1989. At that time, the Office referred appellant to the state program of vocational rehabilitation. While the Office did not approve any vocational rehabilitation program for appellant, the state agency prepared a vocational rehabilitation program for appellant in which he enrolled in a program to earn a college degree in teaching. The Office made no findings at that time on whether it found the state vocational rehabilitation plan to be appropriate or suitable for appellant. Appellant cooperated at that time in the preliminary stages in developing a vocational rehabilitation plan with the state along with referrals by the Office to physicians to examine his physical and psychological abilities to work. The Office did not take any action at that time on appellant’s vocational rehabilitation plan, based on the reports of these physicians.

The Office’s actions in 1994 to review appellant’s vocational rehabilitation occurred over four years after it had referred appellant to the state agency for vocational rehabilitation. Appellant had gone through the preliminary stages of vocational rehabilitation and had begun a vocational rehabilitation program. Appellant initially cooperated with the Office’s vocational rehabilitation efforts in 1994 and gave appropriate explanations for his failure to meet the rehabilitation counselor on two occasions, causing the rescheduling of these meetings. The only evidence of appellant’s failure to cooperate was his failure to appear at the scheduled April 26, 1994 meeting without giving any reason for his failure to appear. However, by this time, appellant was well beyond the preliminary stages of preparing for vocational rehabilitation as

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<sup>1</sup> 41 ECAB 438 (1990).

<sup>2</sup> *Michael L. Bowden*, 41 ECAB 672 (1990).



stipulated in section 10.124(f) of the regulations. Section 10.124(f) allows the Office to assume that vocational rehabilitation would have allowed appellant to return to work without any disability and thereby to reduce appellant's compensation to zero for failure to comply with the initial stages of vocational rehabilitation planning. However, appellant had complied with the preliminary stages of vocational rehabilitation preparation in 1989 and had commenced on a vocational rehabilitation program, even though the Office had not explicitly approved the program. After four years in the program, appellant again initially cooperated with the Office's vocational rehabilitation planning efforts. Therefore, appellant's vocational rehabilitation had gone beyond the preliminary stages. The assumptions permitted by section 10.124(f) does not apply in this circumstance where appellant has been engaged in a vocational rehabilitation program for over four years. The Office had sufficient information to determine under section 8113(b) of the Act what would have probably been appellant's wage-earning capacity if he failed to cooperate with vocational rehabilitation efforts in 1994 when so directed.<sup>3</sup> As the assumption found in section 10.124(f) of the federal regulations does not apply to the circumstances of this case and as the Office failed to determine under section 8113(b) of the Act what would probably have been appellant's wage-earning capacity in the absence of his failure to continue to participate in the Office's vocational rehabilitation efforts, the Board finds that the Office has not met its burden of proof to justify reducing appellant's monetary compensation to zero.

The decision of the Office of Workers' Compensation Programs, dated August 14, 1995, is hereby reversed.

Dated, Washington, D.C.  
September 18, 1998

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>3</sup> *Tony R. Scott*, 46 ECAB 772 (1995).