U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEONARD I. HARRELL and DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE LIBERTY ISLAND, New York, N.Y.

Docket No. 97-1789; Submitted on the Record;
Issued April 1, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to zero effective February 2, 1997 due to his failure, without good cause, to participate in vocational rehabilitation; (2) whether the Office abused its discretion in denying appellant's request for a hearing.

On January 1, 1992 appellant, then a 34-year-old laborer, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on December 23, 1991 he tore a muscle in his left shoulder and dislocated his shoulder blade when he was lifting a boat rudder from the ground to a truck. The Office accepted the claim for a dislocation of the left shoulder and authorized surgery to repair appellant's left shoulder Appellant's employment was terminated by the employing establishment effective January 12, 1992 due to lack of funds. The Office placed appellant on the periodic rolls for temporary total disability effective May 22, 1992.

Appellant was referred to vocational rehabilitation services on May 23, 1993 and assigned to Ellen Goren as his rehabilitation counselor. By letters dated August 20 and September 3, 1993, Ms. Goren advised appellant that she had tried unsuccessfully to contact him over the past several weeks and that there was no answer or answering machine. In a status report dated October 7, 1993, the rehabilitation specialist noted that appellant was not cooperating with his vocational rehabilitation counselor.

In an October 7, 1993 letter, the Office advised appellant that the evidence showed that he failed to participate, without good cause, in his vocational rehabilitation and that the Federal Employees' Compensation Act provided that the Office would assume, in the absence of contrary evidence, that such participation would have resulted in a return to work with no loss of wage-earning capacity. The Office informed appellant that he had 30 days to contact the Office in order to make a good faith effort to participate in the early stages of vocational rehabilitation, to provide a good faith reason for his failure to participate in these early stages or provide

evidence showing that vocational rehabilitation would not result in a return to work with no loss of wage-earning capacity. The Office further advised that his compensation would be reduced to zero if he did not comply within 30 days with the instructions contained in the letter.

In a status report dated December 30, 1993, the rehabilitation specialist noted that the rehabilitation counselor had been developing a plan for appellant when the counselor had been advised on December 10, 1993 that appellant had been incarcerated. The rehabilitation specialist closed the rehabilitation file as appellant was in prison.

On October 5, 1995 following appellant's release to probation the Office again referred appellant for vocational rehabilitation and assigned him Morie Belgorod, as his rehabilitation counselor.

In his vocational rehabilitation report dated November 15, 1995, Mr. Belgorod indicated that he had left two messages for appellant on October 9, October 10 and October 11, 1995. Mr. Belgorod talked to appellant on October 12, 1995 to discuss his rehabilitation and called him again on October 16, 1995 to confirm a meeting at noon on October 16, 1995. Appellant did not appear for the meeting on October 16, 1995. Mr. Belgorod scheduled a second meeting on October 23, 1995 at which time he and appellant discussed appellant's status. Appellant was scheduled for psychological and vocational testing on December 15, 1995.

By letter dated May 13, 1996, Mr. Belgorod stated that he had tried to contact appellant numerous times and that appellant had not responded to the messages left. Mr. Belgorod also reminded appellant that he had not rescheduled an appointment to complete his psychological testing and that he had not received the requested information from his probation officer.

In a work restriction evaluation (Form OWCP-5) dated June 10, 1996, Dr. Sylvester Lango, appellant's treating physician, indicated that appellant could work 8 hours per day with a lifting restriction of 10 to 20 pounds.

By vocational rehabilitation report dated June 7, 1996, Mr. Belgorod noted that appellant had not submitted the information requested, had not rescheduled an appointment to complete his vocational testing and had not responded to his telephone calls. He recommended that the vocational services be terminated due to appellant's lack of cooperation.

In a November 5, 1996 letter, the Office advised appellant that the evidence showed that he failed to participate, without good cause, in his vocational rehabilitation and that the Act provided that the Office would assume, in the absence of contrary evidence, that such participation would have resulted in a return to work with no loss of wage-earning capacity. The Office informed appellant that he had 30 days to contact the Office in order to make a good faith effort to participate in the early stages of vocational rehabilitation, to provide a good faith reason for his failure to participate in these early stages or provide evidence showing that vocational rehabilitation would not result in a return to work with no loss of wage-earning capacity. The Office further advised that his compensation would be reduced to zero if he did not comply within 30 days with the instructions contained in the letter.

In a report of a telephone call in November 1996, appellant told the Office that he had been cooperating and that he had not heard from Mr. Belgorod in months. Appellant denied that Mr. Belgorod tried to contact him in April and May 1996. The Office advised appellant to put this in writing.

By memorandum dated November 14, 1996, the Office instructed Mr. Belgorod to contact appellant and attempt to provide vocational services. If appellant again failed to comply, Mr. Belgorod was to notify the Office.

By letter dated December 4, 1996, appellant stated that he was willing to cooperate with Mr. Belgorod and that it was untrue that he was not cooperating with rehabilitation services.

In a rehabilitation action report (Form OWCP-44) dated December 26, 1996, Mr. Belgorod indicated that he had unsuccessfully attempted to contact appellant by telephone and via a certified letter dated December 16, 1996.

In a memorandum to the claims examiner dated December 30, 1996, the rehabilitation specialist indicated that sanctions seemed indicated as appellant was failing to comply with his rehabilitation counselor.

By decision dated January 8, 1997, the Office reduced appellant's compensation to zero effective February 2, 1997 on the grounds that he failed, without good cause, to participate in the early stages of vocational rehabilitation.

By record of telephone conversation dated January 21, 1997, the Office advised appellant that he must demonstrate his participation in vocational rehabilitation and that his stating that he will or has cooperated is not sufficient.

By record of telephone conversation dated January 23, 1997, appellant informed the Office that he had contacted the rehabilitation counselor who agreed to reestablish vocational services. Appellant stated that he had never received Mr. Belgorod's letter and the Office advised him that the letter was assumed delivered as it had not been returned.

By letter dated March 5, 1997 and postmarked March 11, 1997, appellant requested an oral hearing before an Office hearing representative.

In a decision dated April 10, 1997, the Office's Branch of Hearings and Review denied appellant's request for a hearing as untimely, as it was not made within 30 days of the Office's January 8, 1997 decision.

The Board finds that the Office did not abuse its discretion in reducing appellant's compensation to zero effective February 2, 1997 due to his failure, without good cause, to participate in vocational rehabilitation.

Section 8113(b) of the Act provides:

> "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."[1]

Section 10.124(f) of the Office's regulations further provide:

> "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 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 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 compensation under the provisions of this paragraph shall continue until the employee in good faith complies with the direction of the Office."[2]

In the present case, the Office initiated rehabilitation efforts in May 1993 and again in October 1995 and obtained medical documentation from Dr. Lango indicating appellant could perform eight hours of work per day with restrictions. By letters dated May 13 and June 7, 1996, the Office vocation rehabilitation specialist indicated that he had tried to contact appellant numerous times, left messages, indicated that appellant had failed to contact to complete his psychological testing, failed to submit information from his probation officer and had not responded to telephone calls. Appellant contended that he did not refuse to participate in vocational rehabilitation efforts since he did not receive the May 13, 1996 letter and that the vocational rehabilitation specialist had not contacted him in months. In a Form OWCP-44, the rehabilitation specialist indicated again that he had unsuccessfully tried to contact appellant by telephone and had sent him a certified letter dated December 16, 1996.

[1] 5 U.S.C. § 8113(b).

[2] 20 C.F.R. § 10.124(f).

The Board finds that the evidence does not support appellant's allegations that the rehabilitation specialist had not contacted him in months. The rehabilitation specialist noted that he had tried to contact appellant at various times. Neither does the record demonstrate a lack of receipt of the prior May 13, 1996 letter. Under the "mailbox rule," it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.[3] A copy of the May 13, 1996 letter shows appellant's correct address. Accordingly, the Office did not abuse its discretion in finding that appellant's failure to respond to the letter and telephone calls from the vocational rehabilitation specialist, and the notice of the proposed reduction in compensation benefits, constituted refusal to participate in the vocational rehabilitation efforts

The Board notes that the evidence shows that appellant failed, without good cause, to participate in preliminary vocational rehabilitation meetings and testing such that he failed to participate in the "early but necessary stages of a vocational rehabilitation effort."[4] The Office referred appellant to a vocational rehabilitation counselor to begin rehabilitation services. The evidence of record shows that appellant did not keep appointments with his rehabilitation counselor, that he failed to keep and reschedule appointments to complete his psychological and vocational testing and failed to respond to telephone calls or letters from his rehabilitation counselor. Appellant claimed that he did not receive a May 13, 1996 letter from Mr. Belgorod but the record reveals that the letter was properly addressed to him and duly mailed and appellant has not submitted evidence to rebut the presumption that he received the letter. In a letter dated November 5, 1996, the Office advised appellant of the consequences in not participating in the early stages of vocational rehabilitation. In a telephone call in November 1996, appellant denied that he had not cooperated and that Mr. Belgorod had not contacted him in months. The Office advised appellant to put this in writing, which appellant did not do.

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.[5] Appellant did not submit evidence to refute such an assumption and the Office in its January 8, 1997 decision, had a proper basis to reduce his disability compensation to zero effective February 2, 1997.

The Board further finds that the Office did not abuse its discretion in denying appellant's hearing request.

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[3] *Clara T. Norga*, 46 ECAB (1995); *Newton D. Lashmett*, 45 ECAB (1993); *Larry D. Hill*, 42 ECAB 596 (1991); *Michele R. Littlejohn*, 42 ECAB 463 (1991); *Feorge F. Gidicisin*, 36 ECAB 175 (1984).

[4] *See* 20 C.F.R. § 10.124(f).

[5] *See* Federal (FECA) Procedures Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Service*, Chapter 2.813.11(a) (November 1996).

Section 8124(b) of the Act provides claimants under the Act a right to a hearing if they request a hearing within 30 days of an Office decision.[6] In its April 10, 1997 decision, the Office denied appellant's request for a hearing because it was untimely, stating that he was not, as a matter of right, entitled to a hearing since his request, dated March 5, 1997 and postmarked March 11, 1997, had not been made within 30 days of its January 8, 1997 decision. The Office noted that the matter had been considered in relation to the issue involved and indicated that appellant's request was denied on the basis that the issue could be addressed through a reconsideration application.

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[7] In the present case, appellant's request for a hearing dated March 5, 1997 and postmarked March 11, 1997 was more than 30 days after the date of issuance of the Office's prior decision dated January 8, 1997. Hence, the Office was correct in stating in its April 10, 1997 decision that appellant was not entitled to a hearing as a matter of right because his hearing request was not made within 30 days of the Office's January 8, 1997 decision. While the Office also has the discretionary power to grant a hearing request when a claimant is not entitled to a hearing as a matter of right, the Office properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[8] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

[6] 5 U.S.C. § 8124(b).

[7] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[8] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

The decisions of the Office of Workers' Compensation Programs dated April 10 and January 8, 1997 are hereby affirmed.

Dated, Washington, D.C.
April 1, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member