

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROXIE L. HILL and DEPARTMENT OF COMMERCE,
BUREAU OF THE CENSUS, Dickinson, TX

*Docket No. 98-215; Submitted on the Record;
Issued August 16, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's monetary compensation to zero for failure to cooperate with vocational rehabilitation.

On July 2, 1996 appellant, a 51-year-old field representative, injured her right knee in the performance of duty. The Office accepted that appellant sustained a right knee strain and internal derangement of the right knee, and authorized a right knee arthroscopy and open lateral release. The Office placed appellant on the periodic rolls effective October 13, 1996.

In a work restriction evaluation (OWCP-5) dated April 28, 1997, Dr. Steven Dickhaut, a Board-certified orthopedic surgeon and appellant's attending physician, found that appellant could return to light-duty work for four to six hours per day beginning May 1, 1998. He listed limitations on lifting of up to 10 pounds, bending and twisting 2 hours per day, standing and walking 1 hour per day and sitting and lifting 4 to 6 hours per day. Dr. Dickhaut further indicated that appellant could not drive over 20 to 30 minutes per day.

In a memorandum of conference dated June 18, 1997, the Office noted that appellant should be referred for vocational rehabilitation and that the employing establishment had no positions available within her work restrictions.

By letter dated June 23, 1997, the Office referred appellant to a rehabilitation counselor "for development of a vocational rehabilitation program."

By letter dated July 10, 1997, appellant elected retirement benefits effective June 21, 1997, from the Office of Personnel Management in lieu of benefits under the Federal Employees' Compensation Act.

In a report dated July 12, 1997, the rehabilitation counselor described his meeting with appellant at appellant's home on July 2, 1997. The rehabilitation counselor stated that appellant informed him of her retirement on medical disability effective June 1997.

By letter dated July 15, 1997, the Office advised appellant of the provisions of 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.124(f) regarding failure or refusal to participate in vocational rehabilitation. The Office advised appellant that she had 30 days to provide her reasons for noncompliance together with any evidence supporting her position and that, if she did not comply with the terms of the letter, the rehabilitation effort would be terminated and action taken to reduce her compensation under the described provisions. The Office further notified appellant that electing retirement benefits did not constitute a suitable reason for refusing vocational rehabilitation.

Appellant did not respond to the Office's July 15, 1997 letter.

By decision dated August 15, 1997, the Office reduced appellant's monetary compensation to zero effective July 20, 1997 on the grounds that she failed to cooperate with vocational rehabilitation.

The Board finds that the Office properly reduced appellant's monetary compensation to zero for failure to cooperate with vocational rehabilitation.

Section 8113(b) of the Act 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.”¹

Section 10.134(f) of title 20 of the Code of Federal Regulations, the implementing regulations of 5 U.S.C. § 8113(b), further provides in pertinent part:

“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 probably have been the employee's wage-earning capacity had there not been such a failure or refusal.”

Section 10.124(f) further provides that if any employee without good cause refuses to apply for, undergo, participate in, or continue participation in the early but necessary stages of a vocational rehabilitation effort (interviews, testing, counseling and work evaluations), the Office cannot determine what would have been the employee's wage-earning capacity had there been

¹ 5 U.S.C. § 8113(b).

no 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.

The Board notes that the evidence shows that appellant failed, without good cause, to participate in the preliminary vocational rehabilitation meetings and testing such that she failed to participate in the "early but necessary stages of a vocational rehabilitation effort."² The Office properly referred appellant to a rehabilitation counselor based on the finding by Dr. Dickhaut, her attending physician, that she could perform part-time limited-duty employment. Appellant met with her rehabilitation counselor on July 2, 1997 at which time she informed him that she had retired. The Office informed appellant by letter dated July 15, 1997, of the consequences of not participating in the early stages of vocational rehabilitation and further informed her that retiring did not justify a failure to cooperate.³ Appellant did not respond to this letter within the time allotted. Therefore, the Office properly found that appellant failed to participate, without good reason, in the vocational rehabilitation effort, such that 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.124(f) applied.

The Board further finds that the Office properly determined that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity. The regulations previously cited provide that it will be assumed in the absence of evidence to the contrary that the vocational rehabilitation would have resulted in a return to work with no loss of wage-earning capacity. Appellant has not submitted probative, rationalized medical evidence explaining why she could not, with vocational rehabilitation, resume some work activities.⁴ The Board, therefore, finds that there is no evidence that vocational rehabilitation would not have resulted in a return to work with no loss of wage-earning capacity.⁵

The decision of the Office of Workers' Compensation Programs dated August 15, 1997 is hereby affirmed.

Dated, Washington, D.C.
August 16, 1999

² See 20 C.F.R. § 10.124(f).

³ Office procedures provide as follows: "*If the claimant elects OPM benefits in lieu of cooperating with rehabilitation efforts, the CE [claim's examiner], RS [rehabilitation specialist] and RC [rehabilitation counselor] should not delay or discourage this choice. If the claimant elects benefits from OPM in lieu of complying with the Office's instructions, the final decision reducing compensation to zero must still be issued.*" (Emphasis in original.) Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11(a)(5) (December 1993).

⁴ *Linda M. McCormick*, 44 ECAB 958 (1993).

⁵ On August 20, 1997 appellant filed a claim for a schedule award. Appellant's claim for a schedule award has not yet been adjudicated by the Office and thus the issue is not before the Board.

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member