

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of KENNETH A. WATSON and DEPARTMENT OF THE ARMY,  
CORPS OF ENGINEERS, Walla Walla, WA

*Docket No. 98-763; Submitted on the Record;  
Issued December 17, 1999*

---

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant had a zero loss of wage-earning capacity due to a refusal to cooperate in preliminary vocational rehabilitation efforts; and (2) whether the Office abused its discretion by refusing to reopen appellant's claim for consideration of the merits.

The Board has duly reviewed the case on appeal and finds that the Office improperly determined that appellant had a zero loss of wage-earning capacity due to a refusal to cooperate in preliminary vocational rehabilitation efforts.

Appellant filed a claim on July 16, 1980 alleging that he developed an emotional condition. The Office accepted appellant's claim for major depression, panic disorder and multiple phobic phenomenon on September 17, 1986. The Office entered appellant on the periodic rolls on October 17, 1986. Appellant underwent rehabilitation counseling from April 5, 1990 through January 22, 1992. He began rehabilitation counseling on October 16, 1996. By letter dated January 24, 1997, the Office instructed appellant to cooperate with vocational rehabilitation and advised him of the penalty provision of its regulations. In a decision dated March 10, 1997, the Office reduced appellant's compensation benefits to zero finding that he failed to cooperate in vocational rehabilitation. Appellant requested reconsideration on July 9, 1997. By decision dated August 6, 1997, the Office declined to reopen appellant's claim for a review of the merits.

Section 8113(b) of the Federal Employees' Compensation Act provides:

“If an individual without good cause fails to apply for and undergo vocation 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.”<sup>1</sup>

Section 10.124(f) of the Office’s regulations provided that if a suitable position is not identified because of the failure or refusal to cooperate in the early but necessary stages of a vocational rehabilitation effort *i.e.*, interviews, testing, counseling, functional capacity evaluations or work evaluations, then 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 will reduce compensation 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.<sup>2</sup>

In the present case, appellant’s attending physician released him to participate in vocational rehabilitation on May 1, 1996. The Office rehabilitation specialist contacted appellant on May 9, 1996. Appellant’s rehabilitation counselor attempted to contact him beginning September 9, 1996. He was unable to reach appellant at the correct telephone number from November 12 through December 2, 1996. By letter dated January 14, 1997, the Office informed appellant of his obligation to participate in vocational rehabilitation efforts and of the penalty provision of the Office’s regulations.

On January 30, 1997 the rehabilitation specialist noted that appellant attended one appointment on December 6, 1996, responded to one telephone call on December 16, 1996 and did not appear for testing on December 20, 1996. Appellant underwent testing on January 21, 1997. In a report dated March 6, 1997, the rehabilitation specialist noted that appellant failed to attend a scheduled interview to arrange an on-the-job training program. As a result the prospective employer was unlikely to consider appellant for training.

The Office reduced appellant’s compensation to zero on the assumption, that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity. It is important to note, however, that this assumption does not apply in every instance involving a failure or refusal to continue participation in a vocational rehabilitation effort. The regulation expressly makes this assumption applicable to failure or refusal in “the early but necessary stages of a vocational rehabilitation effort,” involving such activities as interviews, testing, counseling, and work evaluations. In such a situation, “the Office cannot determine what would probably have been his wage-earning capacity in the absence of the failure” and so the Office may assume, 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.

The Board finds that the assumption relied upon by the Office to reduce appellant’s monetary compensation to zero does not apply in this case. The record on appeal shows that appellant participated in the early and necessary stages of the vocational rehabilitation effort.

---

<sup>1</sup> 5 U.S.C. § 8104.

<sup>2</sup> 20 C.F.R. § 10.124(f).

Appellant met with his rehabilitation counselor, underwent testing and cooperated with his counselor to the point that he was able to integrate the psychological and functional capacities information and identify an appropriate job training opportunity. As the evidence of record establishes that appellant cooperated with the early stages of vocational rehabilitation, the Office failed to meet its burden of proof to reduce appellant's compensation benefits to zero.<sup>3</sup>

The decision of the Office of Workers' Compensation Programs dated March 10, 1997 is reversed.

Dated, Washington, D.C.  
December 17, 1999

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

---

<sup>3</sup> Due to the disposition of this issue it is not necessary to consider whether the Office abused its discretion by refusing to reopen appellant's claim for consideration of the merits on August 6, 1997.