

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of MICHAEL KEARINS and U.S. POSTAL SERVICE,
POST OFFICE, Richardson, TX

*Docket No. 99-725; Submitted on the Record;
Issued December 20, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits to zero on the grounds that he refused to cooperate with early vocational rehabilitation efforts.

The Board has duly reviewed the case on appeal and finds that the Office properly reduced appellant's compensation benefits to zero on the grounds that he refused to cooperate with early vocational rehabilitation efforts.

Appellant, a letter carrier, filed a traumatic injury claim alleging that on August 8, 1995 his leg gave way and he fell injuring his right arm and shoulder. On February 8, 1996 the Office accepted his claim for sprain right elbow, sprain right shoulder, right shoulder arthroscopy on April 12, 1996 and right tennis elbow release on June 26, 1996. On December 18, 1996 the Office referred appellant for vocational rehabilitation. By decision dated June 24, 1997, the Office reduced his compensation benefits to zero for refusing to cooperate with the initial stage of vocational rehabilitation. Appellant requested an oral hearing on July 7, 1997. By decision dated November 23, 1998, the hearing representative affirmed the Office's June 24, 1997 decision.¹

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

¹ Appellant submitted additional new evidence before the Board. As the Office did not review this evidence in reaching a final decision, the Board may not consider it for the first time on appeal. 20 C.F.R. § 501.2(c).

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

Section 10.124(f) of the Office’s regulations provides that, if an employee without good cause fails to cooperate in the early but necessary stages of a vocational rehabilitation effort *i.e.*, interviews, testing, counseling and 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.³

Appellant began rehabilitative services on December 18, 1996. His initial vocational rehabilitation counselor, Patricia Harris, noted that, at the initial meeting, appellant suggested that he attend work hardening near his home at associated occupational rehabilitation. Appellant attended the functional capacity evaluation, but did not complete the assessment due to pain.

In a report dated January 24, 1997, an associated occupational rehabilitation exercise physiologist indicated that appellant participated in a “work[-]hardening entrance evaluation.” The report indicated that musculoskeletal screen was not tested. The counselor indicated that appellant could return to work in a light level job with minimal restrictions after a six-week period of work hardening. Appellant’s attending physician, Dr. Douglas R. Turgeon, a Board-certified orthopedic surgeon, stated on February 6, 1997 that appellant had reached maximum medical improvement, that he discharged appellant from his practice and that he was unable to provide a final disability or impairment rating or determination of functions capacity due to appellant’s inability to complete the programs.

In a letter dated February 16, 1997, appellant contended that Ms. Harris interfered with his doctor/patient relationship. Appellant addressed a second letter dated February 16, 1997 to Ms. Harris and instructed her to stay out of his life. The Office responded and informed appellant that he was required to fully participate in vocational rehabilitation and informed him of the penalty provision of the Act, section 8113(b).⁴ In her February 24, 1997 report, Ms. Harris noted that appellant did not complete the functional capacity examination and that the exercise physiologist at associated occupational rehabilitation was unable to complete his report without further musculoskeletal testing. She withdrew her services in response to the February 16, 1997 letters.

In a letter dated February 26, 1997, the Office again informed appellant of the penalties for noncooperation and allowed appellant 30 days to cooperate with vocational rehabilitation efforts. Appellant responded on March 20, 1997 and stated that he was worried about further

² 5 U.S.C. § 8104.

³ 20 C.F.R. § 10.124(f).

⁴ 5 U.S.C. §§ 8101-8193, 8113(b).

injury due to the testing for work hardening. He also stated that he did not have a treating physician.

The Office referred appellant to a second rehabilitation counselor, Carol A. Clapp, on February 25, 1997. In her initial report dated April 24, 1997, Ms. Clapp noted that appellant agreed to contact her with his selection of an attending physician as well as the date and time of the appointment.

Dr. Jeffrey T. Hamm, a Board-certified orthopedic surgeon, examined appellant on April 28, 1997 and noted his history of injury. Dr. Hamm stated that he was not a neck specialist and recommended that appellant seek treatment from another physician for this condition and that he continue treatment with his attending physician for his shoulder and elbow.

In a note dated May 17, 1997, Ms. Clapp stated that appellant did not notify her of the date and time of the appointment with Dr. Hamm. She stated that she received a call from the office of Dr. Abbass Sekhvat, a Board-certified orthopedic surgeon, informing her that appellant had an appointment scheduled for May 21, 1997.

On May 21, 1997 the rehabilitation specialist noted that appellant was not cooperating with the rehabilitation counselor, that he was rude to her at the physician's office and that he ordered her to get out and stated that she lied to him.

By letter dated May 27, 1997, the Office stated that Ms. Clapp reported that appellant was loud and rude to her on May 21, 1997 in Dr. Sekhvat's waiting room and that appellant ordered Ms. Clapp from the office. Ms. Clapp stated that appellant accused her of lying to him. The Office informed appellant of his duty to cooperate and requested his version of the events of May 21, 1997.

In a report dated June 10, 1997, Ms. Clapp stated on May 16, 1997 that appellant had not informed her of his appointment with Dr. Hamm. Ms. Clapp stated on May 21, 1997 she traveled to Dr. Sekhvat's office, and introduced herself at the reception desk. She stated, "[Appellant] related that I was not his case manager and ordered me to 'get out' of the doctor's office. He stated that I had lied about Dr. Hamm's appointment and he had called himself and left a message about the appointment." Ms. Clapp left the office to avoid a scene. She requested to withdraw from further service to appellant.

Appellant responded on June 23, 1997 contending that Ms. Clapp made the appointment with Dr. Hamm's office and that she failed to appear. He stated that Ms. Clapp forgot the appointment with Dr. Hamm and blamed him for her mistake. Appellant stated that he fully cooperated with Ms. Clapp alleging that she called him a liar.

Following the Office's June 24, 1997 decision reducing his compensation benefits to zero for the failure to cooperate with vocational rehabilitation efforts, appellant submitted additional evidence and requested an oral hearing. Appellant submitted a statement dated June 27, 1997 from Debbie Rourk, Dr. Sekhvat's office manager. Ms. Rourk stated that Ms. Clapp did know of the date and time of appellant's appointment with Dr. Sekhvat. She stated that Ms. Clapp did appear for the appointment, but left before appellant saw Dr. Sekhvat. Ms. Rourk stated that

there was no loud confrontation, no raised voices, shouting or any type of conflict of which she was aware.

By letter dated June 27, 1997, appellant responded to the Office's request for compliance by stating that he requested authorization for treatment with Dr. Sekhavat, and that he would provide the Office with the time and date of the appointment as soon as the Office granted authorization. He further requested to attend a functional capacity evaluation at Texas Pain Medicine Clinic and stated that he required authorization to attend. Appellant asserted that he was always in compliance with the rehabilitation program.⁵

Appellant submitted a witness statement that Ms. Clapp spoke with appellant's wife and then left the office on May 21, 1997. The witness stated that there were no confrontations or disturbances. He stated that he did not have a loud and threatening altercation with Ms. Clapp, that he was not rude and that he did not order her to get out. He stated that Ms. Clapp spoke to his wife for about 10 seconds and then left. Mrs. Kearins stated that she informed Ms. Clapp that she was filing a complaint against her for the failure to appear at the appointment with Dr. Hamm and for attributing the blame to appellant. She stated that her assertion was made in a quiet whisper and that Ms. Clapp left without a word.

At the oral hearing, appellant stated that he contacted Dr. Hamm's office and provided the personnel with Ms. Clapp's telephone number. He stated that Ms. Clapp was aware that the appointment was with Dr. Hamm based on her initial report. Ms. Kearins testified that she informed Ms. Clapp that she planned to file a complaint regarding the missed appointment with Dr. Hamm and that Ms. Clapp turned and left. Appellant asserted that he only waved to Ms. Clapp without verbal comment.

The Board finds that appellant has failed to cooperate with the early and necessary stages of the vocational rehabilitation process. The evidence indicates that appellant did not complete the function capacity evaluation at associated occupational specialist prior to beginning a work hardening. This is specifically noted in the report from associated occupational specialist. Furthermore, appellant asserted that Ms. Harris interfered with his doctor-patient relationship and lied to him. He initially asserted that Ms. Clapp scheduled the appointment with Dr. Hamm for him and that she lied regarding the scheduling when she forgot the appointment. Appellant later backed away from this statement, noting that Ms. Clapp was aware that he planned to see Dr. Hamm, not necessarily that she was aware of the date and time of the appointment. Appellant has accused both of his rehabilitation counselors of lying to him and has been so unpleasant in his interactions that both counselors requested to be removed from his case. The Board finds that appellant has engaged in an adversarial relationship with his rehabilitation counselors and failed to complete the functional capacity evaluation. His actions demonstrate a failure to cooperate with the early and necessary stage of the vocational rehabilitation process and the Office properly reduced his compensation to zero based on these failures to cooperate.

⁵ The Board notes that the decision of record, the November 23, 1998 decision of the Branch of Hearings and Review, does not address when nor whether appellant's failure to cooperate with vocational rehabilitation efforts ceased. As the Office has not issued a final decision on this issue prior to appellant's appeal to the Board on January 26, 1999, the Board will not consider this issue on appeal. 20 C.F.R. § 501.2(c).

The November 23, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 20, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member