U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN V. SHEPHERD, SR. and DEPARTMENT OF THE AIR FORCE, McCLELLAN AIR FORCE BASE, CA

Docket No. 01-1695; Submitted on the Record;
Issued July 2, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
DAVID S. GERSON

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 vocational rehabilitation efforts.

The Office accepted left carpal tunnel syndrome on February 23, 1993 and right carpal tunnel syndrome on September 13, 1993. By decision dated April 24, 1995, the Office issued a schedule award for a 10 percent impairment in each arm.[1] On March 25, 2000 appellant elected to have the Federal Employees' Compensation Act benefits, effective October 10, 1999. By letter dated April 4, 2000, the Office placed appellant on the automatic rolls for temporary total disability.

In an August 12, 1999 report, Dr. Peter W. Yip, an attending Board-certified internist, concluded that "Dr. Powers had restricted [appellant's] repetitive hand motions to an occasional basis for an indefinite period to time."

On April 5, 2000 the Office referred appellant for vocational rehabilitation.

In a letter dated April 26, 2000, appellant noted an appointment had been scheduled for May 2, 2000 and requested an extension of time as he believed that rehabilitation counselor would not have adequate time to prepare as it was less than the mandated 45-day period.

[1] This was assigned claim number 13-0998242. The Office also accepted a claim for binaural hearing loss and assigned it claim number 13-1081960. The Office accepted that appellant sustained bladder syndrome due to an injury on January 1, 1982 and was assigned claim number 13-914270. The Office terminated appellant's disability compensation by decision dated October 5, 1999, on the basis that he no longer suffered from bladder cancer. Appellant filed a reconsideration request, which was denied on March 20, 2000. He appealed the March 20, 2000 denying modification to the Board, which was docketed as 00-2056.

In a vocational rehabilitation progress report dated May 9, 2000, Thomas L. Sartoris, a vocational rehabilitation counselor, detailed his meeting with appellant on May 2, 2000. He noted that appellant indicated his willingness to cooperate.

In an August 17, 2000 report, Mr. Sartoris conducted a labor market survey and identified the position of a paralegal for appellant. He noted that there were sufficient job openings in the area and that it was estimated appellant's salary would begin with $10.00 to $11.00 an hour.

In a letter dated August 23, 2000, Mr. Sartoris noted that appellant refused to sign the recommended rehabilitation plan and award. Appellant indicated that he was still waiting for the Office's response to his request for software and a computer.

Mr. Sartoris, in an August 31, 2000 vocational rehabilitation progress report, again noted that appellant refused to sign the rehabilitation plan at an August 23, 2000 counseling session.

In a letter dated September 29, 2000, Mr. Sartoris noted that an appointment had been made for September 29, 2000, which appellant did not cancel or keep. He reminded appellant that his attendance was mandatory and rescheduled his appoint for October 4, 2000. Mr. Sartoris advised appellant that if he failed to keep his next appointment on October 4, 2000 that further action may be taken by the Office.

In response to Mr. Sartoris' letter, appellant, in an October 4, 2000 letter, noted that he was unavailable for appointments Wednesday through Friday and that he had been available Monday and Tuesday. He also stated that "until the Office corrects their errors on the medical conditions, medical information and medical restriction there is no reason for this appointment." Next, appellant stated that he would not sign any rehabilitation plan until the Office corrected its medical errors. Lastly, he noted: "Your Thursday afternoon telephone call demanding that I show up the next morning was disregarded and any future demand or attempts at intimidation will also be disregarded."

In an October 4, 2000 letter to the Office, appellant again indicated his unwillingness to sign any rehabilitation plans until the "correct medical conditions and correct medical restrictions" are done.

By letter dated October 5, 2000, the Office advised appellant of the consequences of his refusal to cooperate with vocational rehabilitation services. The Office directed appellant to contact both the Office and his vocational rehabilitation counselor within 30 days to make a good faith effort to participate in vocational rehabilitation. Appellant was given 30 days to comply with vocational rehabilitation or his compensation would be reduced pursuant to section 8113(b) and 20 C.F.R. § 10.519.

In a letter dated November 3, 2000, appellant stated he had complied with rehabilitation services until they required him to sign a rehabilitation plan that he believed was based upon incorrect medical evidence, which he had asked to be corrected.

In a January 18, 2001 letter, the Office detailed a conference discussion with appellant and a subsequent talk with Mr. Sartoris on January 18, 2001.

By letter dated January 24, 2001, Mr. Sartoris advised that appellant had not contacted him to restart his rehabilitation plan.

In a letter dated February 5, 2001, the Office informed appellant of the consequences of his failure to comply with rehabilitation services.

In a letter dated April 6, 2001, the Office informed appellant he had 15 days to cooperate with rehabilitation services or his compensation benefits would be reduced to zero.

Appellant, in a letter dated April 13, 2001, stated, "this letter was to serve as the contact requested in the Office's April 6, 2001 letter." He indicated that he had "no intention of contacting your consulting counselor, he made it quite clear that he was n[o]t to be bother[ed] with any of my problems, 'that it is between you and [the] Office -- do n[o]t waste my time or fax paper with it'." Appellant also submitted a signed Rehabilitation Plan and Award (Form OWCP-16c) and supporting documentation without the counselor's signature.

By decision dated April 26, 2001, the Office reduced appellant's wages to zero based upon his refusal to cooperate with vocational rehabilitation efforts.

The Board finds that the Office improperly reduced appellant's compensation benefits to zero for failing to cooperate in the vocational rehabilitation process.

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."[2]

Section 10.519 of Title 20 of the Code of Federal Regulations details the actions the Office will take when an employee without good cause fails or refuses to apply for, undergo, participate in, or continue to participate in a vocational rehabilitation effort when so directed. Section 10.519(a) provides in pertinent part:

> "Where a suitable job has been identified, [the Office] will reduce the employee's future monetary compensation based on the amount which would likely have been his or her wage-earning capacity had he or she undergone vocational rehabilitation. [The Office] will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with the [Office] nurse and the employer. The reduction will remain in

[2] 5 U.S.C. § 8113(b).

effect until such time as the employee acts in good faith to comply with the direction of [the Office]."[3]

Section 10.519(b) further provides that, if any 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 monetary compensation under the provisions of this paragraph shall continue until the employee in good faith complies with the direction of the Office.[4]

In this case, the Office reduced appellant's compensation to zero under section 10.519(b). This section of the regulations expressly makes this assumption applicable when the Office cannot determine what would probably have been his wage-earning capacity in the absence of the failure, requiring the Office to 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 record on appeal, however, shows that appellant participated in the early and necessary stages of the vocational rehabilitation effort. Appellant met with his rehabilitation counselor on May 2, 2000, participated in a vocational evaluation and cooperated with his counseling to the point that his rehabilitation counselor was able to integrate the psychological and functional capacities information and identify appropriate employment opportunities. In an August 17, 2000 report, the rehabilitation counselor identified the position of paralegal specialist, which was within appellant's physical limitations and aptitude and also available within his commuting area. Appellant refused to sign the rehabilitation plan at an August 23, 2000 counseling session and informed the rehabilitation counselor that he refused to sign any plan until the medical errors made by the Office had been corrected.

Therefore, the Office should have applied section 10.519(a) as the Office had sufficient information 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 participation in the vocational rehabilitation effort when so directed. The Board, therefore, finds that the Office has not met its burden of proof to justify reducing appellant's monetary compensation to zero.[5]

[3] 20 C.F.R. § 10.519(a).

[4] *Id.*

[5] *Compare Asline Johnson*, 41 ECAB 438 (1990).

The April 26, 2001 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
July 2, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member