United States Department of Labor
Employees' Compensation Appeals Board

S.E., Appellant	)	
and	)	**Docket No. 09-677**
	)	**Issued: December 2, 2009**
DEPARTMENT OF VETERANS AFFAIRS, EDWARD HINES, JR., VETERANS MEDICAL CENTER, Hines, IL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 9, 2009 appellant filed a timely appeal from the July 8, 2008 merit decision of the Office of Workers' Compensation Programs reducing her compensation and a December 9, 2008 nonmerit decision denying her request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether the Office properly reduced appellant's compensation under 5 U.S.C. § 8113(b) to reflect her loss of wage-earning capacity had she continued to participate in vocational rehabilitation efforts; and (2) whether the Office properly denied her request for a hearing.

FACTUAL HISTORY

On September 29, 1993 appellant, then a 36-year-old housekeeping aid, injured her right hand while taking the trash bag out of a 30-gallon can. She stopped work on

September 30, 1993. The Office accepted the claim for radial-ulnar dislocation of the right arm, tenosynovitis of the right hand and wrist, internal derangement and triangular fibrocartilage tear and commenced payment of temporary total disability compensation. Appellant underwent an authorized arthroscopic surgery of the wrist on March 21, 1994 and eventually returned to full-duty employment. On June 4, 2002 the Office accepted her claim of recurrence of total disability beginning April 22, 2002. Appellant eventually returned to work as a surgical technician. She last worked on December 16, 2005, when the employing establishment terminated her because she was not medically capable of performing her duties. The Office placed appellant on its periodic compensation rolls.

On June 26, 2006 appellant underwent a functional capacity evaluation. The July 21, 2006 functional capacity evaluation report indicated that she was capable of working light level physical demand requirements as defined by the Department of Labor's *Dictionary of Occupational Titles* with restrictions on lifting, carrying, bilateral and unilateral pushing/pulling and writing to limit stress placed on her right wrist. On July 24, 2006 appellant's treating physician, Dr. Paul T. Prinz, a Board-certified orthopedic surgeon specializing in hand surgery, agreed with physical restrictions recommended in the functional capacity evaluation and advised that the restrictions were permanent.

On August 21, 2006 the Office referred appellant for vocational rehabilitation services to assist in her return to work. It advised her that she was required to cooperate with rehabilitation activities or her compensation could be terminated or reduced. On February 2, 2007 the vocational rehabilitation counselor provided appellant a rehabilitation placement plan in which the position of pharmacy technician assistant, DOT No. 074-382.010, was identified as one of the job goals.[1] Appellant and the rehabilitation counselor signed the plan. The rehabilitation counselor indicated that the employing establishment would not hire appellant. On April 9, 2007 he advised the Office that appellant had failed to submit the required job search logs. The rehabilitation counselor noted that appellant had had an extended virus but, since her recovery, had halted job search activity. On April 12, 2007 he informed the Office that appellant unequivocally stated that she would not consider, pursue, search or accept any work that was not with the United States Government. In light of this, the rehabilitation counselor recommended service closure. In an April 25, 2007 report, he again recommended service closure and noted that appellant had no interest in working outside the Federal Government.

By letter to appellant dated April 26, 2007, the Office noted that appellant had discontinued good faith participation in an Office-approved job placement program. Appellant was accorded 30 days from the date of the letter to either resume a good faith effort in the placement program or show good cause for discontinuing the placement effort. She was advised that, if she did not take any action within 30 days from the date of the letter, the Office would reduce her compensation to reflect her wage-earning capacity in a job which her rehabilitation counselor had found to be within her restrictions and abilities. It noted that the medical and factual evidence of record reflected that appellant was able to perform the duties of a surgical instrument central supply and pharmacy technician assistant. Appellant did not respond.

[1] The plan also identified the position of surgical instrument central supply as a goal.

On May 23, 2007 vocational rehabilitation services were closed due to appellant's failure to cooperate or provide any employer contacts. The closing report indicated that services were closed as appellant remained noncompliant and continued to express no interest in employment outside the United States Government. The rehabilitation counselor also indicated that, in any event, he would no longer provide services as his company was terminating its business relationship with the Office.

On November 16, 2007 the Office noted that the previous rehabilitation counselor did not complete a labor market survey for the targeted positions in the rehabilitation plan and that a new counselor would complete the survey. In a December 15, 2007 report, the vocational rehabilitation counselor conducted a labor market study for the identified position of pharmacy technician. The *Dictionary of Occupational Titles* (DOT) describes the position of pharmacy technician, number 074-382.010, as: performs any combination of following duties to assist pharmacist (medical serv.) 074.161-010 in hospital pharmacy or retail establishment: mixes pharmaceutical preparations, fills bottles with prescribed tablets and capsules, and types labels for bottles; assists pharmacist (medical serv.) to prepare and dispense medication; receives and stores incoming supplies; counts stock and enters data in computer to maintain inventory records; processes records of medication and equipment dispensed to hospital patient, computes charges, and enters data in computer; prepares intravenous (IV) packs, using sterile technique, under supervision of hospital pharmacist; and cleans equipment and sterilizes glassware according to prescribed methods. The *Dictionary of Occupational Titles* describes the physical requirements as light work exerting up to 20 pounds of force occasionally and/or up to 10 pounds of force frequently, and a negligible amount of force constantly. The vocational rehabilitation counselor found the position available in sufficient numbers within a 50-mile driving radius from appellant's home. The rehabilitation counselor further noted that Walgreens and CVS pharmacies have paid on-the-job training with assistance towards certification. Licensure involves a background check and a fee of $25.00 to $40.00. Annual salary wages were provided from various sources. In a January 24, 2007 report, the vocational rehabilitation counselor advised the position of pharmacy technician assistant was medically and vocationally suitable for appellant. On February 15, 2008 the rehabilitation counselor noted that, following completion of the labor market survey, the file was being closed at the request of the Office. The rehabilitation counselor provided an April 7, 2008, updated job classification sheet, Form CA-66, noting the job requirements for a pharmacy technician, indicating that the job remained available in appellant's commuting area and noting the average wages for the position.

In a May 16, 2008 letter, the Office proposed to reduce appellant's compensation for wage loss due to her failure to continue participation in the reemployment efforts in the vocational rehabilitation program. It noted that the medical and factual evidence established that appellant was no longer totally disabled and that she had the capacity to earn wages as a pharmacy technician, DOT No. 074-382.010 at the rate of $511.54 per week. It attached the Form CA-816 showing the gross amount of weekly compensation based upon her wage-earning capacity in the identified position. Appellant was afforded 30 days from the date of the letter to submit additional evidence or argument regarding her capacity to earn wages in the position described.

In a May 23, 2008 letter, appellant disagreed with the May 16, 2008 proposed action. She contended that she continued to be totally disabled and that the pharmacy technician position

was not vocationally suitable. Appellant further stated that she did cooperate with the vocational rehabilitation program. She indicated that when she was told about the pharmacy technician position her research at Wal-Mart, CVS Drugs, Walgreens and hospitals indicated that she had to complete a pharmacy technician program and pass the state certification test.

Medical reports from Dr. Prinz indicated that appellant received injections into her right wrist and elbow on February 14, 2008 for recurrent lateral epicondylitis and right-sided recurrent ulnar-sided wrist pain. Copies of the February 14, 2008, July 30, 2007 x-ray reports of appellant's right wrist and elbow were also provided.

By decision dated July 8, 2008, the Office reduced appellant's compensation under 5 U.S.C. § 8113(b) and 5 U.S.C. § 8104 effective July 8, 2008 to reflect her loss of wage-earning capacity had she continued to participate in vocational rehabilitation efforts. It determined that appellant had failed, without good cause, to undergo vocational rehabilitation as directed. With respect to her wage-earning capacity, the Office further found that, if appellant had participated in good faith in vocational rehabilitation, she would have been able to perform the position of pharmacy technician. It reduced appellant's compensation based on what her wage-earning capacity would have been had she cooperated with vocational rehabilitation efforts. Based upon the residuals of her injury and considering all significant preexisting impairments and pertinent nonmedical factors, the Office found that, if appellant had participated in good faith in vocational rehabilitation, she would been able to perform the position of pharmacy technician.[2]

On August 7, 2008 and postmarked August 30, 2008, appellant requested an oral hearing, in the form of a telephonic hearing, before the Office's Branch of Hearings and Review. Additional reports from Dr. Prinz were received.

By decision dated December 9, 2008, the Office denied appellant's oral hearing request finding that it was not filed within 30 days. It exercised its discretion and determined that her case could be equally well addressed by requesting reconsideration and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.[3] Section 8113(b) of the Federal Employees' Compensation Act provides that, if an individual, without good cause, fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of the Act, the Office, 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

[2] The Office used the *Shadrick* formula (derived from *Albert Shadrick*, 5 ECAB 376 (1953)) to calculate appellant's wage-earning capacity. This calculation included a figure for the amount appellant would have earned as a pharmacy technician.

[3] *Betty F. Wade*, 37 ECAB 556, 565 (1986).

or her wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Office.[4]

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. [It] 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 effect until such time as the employee acts in good faith to comply with the direction of [the Office]."[5]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained radial-ulnar dislocation of the right arm, tenosynovitis of the right hand and wrist, and internal derangement and triangular fibrocartilage tear as a result of her September 30, 1993 employment injury. On July 24, 2006 Dr. Prinz, appellant's attending hand surgeon, confirmed that the physical restrictions recommended in the June 26, 2006 functional capacity evaluation were appropriate and permanent.

Appellant began participating in a vocational rehabilitation plan but the Board finds that appellant later refused to participate in the plan. The Office initiated vocational rehabilitation efforts on August 21, 2006 and advised appellant that she was required to cooperate with rehabilitation activities or her compensation could be terminated or reduced. On February 2, 2007 appellant and the rehabilitation counselor agreed to pursue a rehabilitation plan in which appellant's employment as a pharmacy technician was a goal. Records from the vocational rehabilitation counselor reflect that in April 2007 appellant failed to engage in, consider, search or accept any employment that was not with the Federal Government. A warning letter was sent to appellant on April 26, 2007 advising her of the penalties involved in not cooperating with the rehabilitation counselor. The letter also provided appellant an opportunity to cooperate. Appellant however did not respond to the letter. While appellant may have preferred to be reemployed by the Federal Government, the main purpose of a rehabilitation program is to assist returning appellant to gainful employment consistent with her skills and abilities in either the public or private sector. The Office subsequently had a rehabilitation counselor prepare a labor market survey which confirmed the availability and wage rate of a pharmacy technician. Following this, the Office on May 16, 2008 proposed to reduce her compensation due to her failure to participate in vocational rehabilitation.

[4] 5 U.S.C. § 8113(b).

[5] 20 C.F.R. § 10.519(a).

The Board finds that appellant did not show good cause for failure to participate in her vocational rehabilitation plan. The medical evidence indicates that Dr. Prinz agreed with the restrictions recommended in the June 26, 2006 functional capacity evaluation. Although appellant underwent subsequent treatment for her right wrist and elbow, Dr. Prinz did not provide an opinion indicating any change in appellant's work restrictions or that appellant was unable to participate in vocational rehabilitation. There is no other evidence that appellant's failure to fully participate in the rehabilitation program was based on good cause.[6] While appellant contended that Wal-Mart, CVS Drugs, Walgreens and various hospitals required training and passing of the state examination for the position, the vocational rehabilitation counselor had indicated in the December 15, 2007 labor market study that Walgreens and CVS pharmacies have paid, on-the-job training with assistance towards certification. Her reservations about the pharmacy technician position were not otherwise supported by any probative evidence. Thus, appellant's contentions are not valid.

The Office properly found that the reduction of appellant's compensation should be based on the determination that she probably would have been able to earn wages as a pharmacy technician if she had not failed to participate in her vocational rehabilitation program.[7] For these reasons, it properly reduced appellant's compensation under 5 U.S.C. § 8113(b) to reflect her loss of wage-earning capacity had she continued to participate in vocational rehabilitation efforts.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that a claimant not satisfied with a decision of the Office is entitled to a hearing before an Office hearing representative when the request is made within 30 days after issuance of the Office's decision.[8] Under the implementing regulations, a claimant who has received a final adverse decision by the Office is entitled to a hearing by writing to the address specified in the decision within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.[9] If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.[10]

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. The Office's procedures, which require the

[6] *See Michael D. Snay*, 45 ECAB 403, 410-12 (1994).

[7] The rehabilitation specialist found that the position of pharmacy technician was reasonably available in appellant's commuting area with weekly pay of $511.54. The Office properly applied the Shadrick formula to calculate appellant's compensation based on the new wage-earning capacity determination.

[8] 5 U.S.C. § 8124(b)(1).

[9] 20 C.F.R. § 10.616(a); 5 U.S.C. § 8124(b)(1).

[10] *Teresa Valle*, 57 ECAB 542 (2006); 20 C.F.R. § 10.616(b).

Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of Board precedent.[11]

ANALYSIS -- ISSUE 2

The Office reduced appellant's compensation on July 8, 2008. Appellant's request for an oral hearing, in the form of a telephonic hearing, was postmarked August 30, 2008. Because the hearing request was made more than 30 days after the July 8, 2008 decision, the Board finds that the Office properly denied her request for a hearing as untimely filed. Appellant is not entitled to a hearing as a matter of right. The Board has held that section 8124(b)(1) is unequivocal in setting forth the time limitation in requests for a hearing.[12]

The Office exercised its discretionary authority under section 8124 in considering whether to grant a hearing. It found that appellant's request could be equally well addressed through a request for reconsideration under section 8128 and the submission of new evidence. The Board has held that it is an appropriate exercise of discretion for the Office to apprise appellant of the right to further proceedings under the reconsideration provisions of section 8128.[13] The Board finds that the Office properly exercised its discretion in denying appellant's request for an oral hearing as untimely.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation under 5 U.S.C. § 8113(b) to reflect her loss of wage-earning capacity had she continued to participate in vocational rehabilitation efforts. The Board further finds that the Office properly denied appellant's request for a hearing.

[11] *D.E.*, 59 ECAB ___ (Docket No. 07-2334, issued April 11, 2008).

[12] *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

[13] *See André Thyratron*, 54 ECAB 257 (2002).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated December 9 and July 8, 2008 are affirmed.

Issued: December 2, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board