U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of HORDON H. EVONO and DEPARTMENT OF JUSTICE,
U.S. MARSHALS SERVICE, McLean, Va.

*Docket No. 97-503; Submitted on the Record;*
*Issued May 5, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's monetary compensation under 5 U.S.C. § 8113(b) to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation; (2) whether appellant has established that he is entitled to a higher pay rate for compensation purposes.

On January 17, 1984 appellant, then a 40-year-old deputy marshal, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he first realized on October 27, 1984 that his hearing loss was due to his employment.[1] At the time of injury, appellant was at a GS-9, step 8 level. Appellant retired from the employing establishment on March 30, 1984. On November 14, 1986 appellant elected to be paid under the Federal Employees' Compensation Act. The Office accepted appellant's claim for binaural hearing loss on March 25, 1987 and placed appellant on the periodic rolls for temporary disability.[2]

On June 13, 1987 the Office contacted appellant regarding vocational rehabilitation. Appellant was also advised that other vocational rehabilitation services may be commenced as the employing establishment might not be able to accommodate him.

In a status report dated December 27, 1988, a rehabilitation specialist noted that appellant preferred to be reemployed with the employing establishment despite being informed that there are no positions available. Appellant was advised as to the consequences for failure to cooperate with vocational rehabilitation.

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[1] Appellant indicated on the form that he had originally filed his claim on November 21, 1983.

[2] On July 10, 1985 appellant was issued a schedule award for a 19 percent permanent loss of binaural hearing loss.

Appellant was referred again for vocational rehabilitation services on February 17, 1994.

In letters dated March 18 and April 5, 1994, appellant indicated that he desired to continue his employment in the federal government with no time loss due to his accepted employment injury.

By letter dated April 20, 1994, the Office advised appellant that compensation would be reduced if appellant failed to comply with vocational rehabilitation services.

By letter dated June 8, 1994, appellant stated that the nonfederal employment was not suitable and requested that his current rate of compensation be adjusted due to the upgrade in the position he had held. Appellant also requested a hearing.

In a job placement plan dated June 6, 1994, the rehabilitation specialist found three positions to be suitable employment for appellant in the private sector. The positions identified were that of a private investigator, security consultant -- loss control officer and desk officer/dispatcher.

In a rehabilitation action report dated June 10, 1994, the rehabilitation specialist indicated that appellant refused to sign the placement plan.

In a status report dated July 12, 1994, the rehabilitation specialist noted that further vocational rehabilitation services were not possible as appellant had refused to cooperate with placement in the private sector.

By letter dated July 13, 1994, the Office advised appellant that his compensation would be reduced based upon what he would have earned had he not refused vocational rehabilitation. The Office advised appellant that he had 30 days in which to cooperate with vocational rehabilitation or establish a good cause for failing to cooperate.

By letter dated August 4, 1994, appellant contended that he had informed the Office that he was not willing to waive his rights under the Federal Employees' Compensation Act and that private sector employment was not suitable employment.

In a memorandum to file dated August 15, 1994, the rehabilitation specialist noted that appellant called to say he would cooperate with rehabilitation services.

On September 9, 1994 the Office adjusted appellant's compensation based upon his ability to perform the position of private investigator.

By decision dated September 8, 1994, the Office found that appellant had failed to cooperate with vocational rehabilitation. The Office noted that the rehabilitation specialist had found that appellant could have obtained employment as a private investigator had he cooperated with vocational rehabilitation.

By letter dated September 14, 1994, appellant requested an oral hearing regarding the reduction in his compensation. A hearing was held on April 13, 1995 at which appellant testified and submitted evidence.

By letter dated May 11, 1995, appellant submitted a May 9, 1995 decision by the Merit Systems Protection Board (MSPB) which found that appellant was not entitled to restoration as a partially recovered employee for the period March 31, 1984 to September 9, 1994. The MSPB found that appellant was partially recovered based upon the Office's finding that appellant was no longer totally disabled effective September 9, 1994 and ordered the agency to place appellant in a criminal investigator position at the GS-11 grade retroactive to September 9, 1994.

In a decision dated August 8, 1995, the hearing representative affirmed the Office's September 8, 1994 decision which reduced appellant's compensation for failure to comply with vocational rehabilitation services. The hearing representative also denied appellant's request to have his monetary compensation recalculated since his position as a United States Deputy Marshall had been upgraded from a GS-9 to either GS-11 or GS-12. The hearing representative noted that there was no evidence establishing that the upgrade in the position occurred while appellant performed the duties of a United States Deputy Marshall.

By letter dated August 14, 1995, appellant requested reconsideration of the September 8, 1994 and August 8, 1995 decisions. Appellant argued that vocation rehabilitation services should have been directed towards reemployment with the Department of Justice or other federal agencys and not the private sector. Appellant also argued that he was entitled to compensation at the GS-11 pay rate.

By decision dated November 30, 1995, the Office denied appellant's request for modification of its decision dated November 8, 1994. The Office found that appellant failed to submit any evidence which supported that he did not obstruct or refuse to comply with the vocational rehabilitation efforts of the Office. The Office also found that appellant was not entitled to a higher compensation pay rate due to the upgrade in his former position of United States Deputy Marshall.

The Board finds that the Office properly reduced appellant's monetary compensation under 5 U.S.C. § 8113(b) to reflect wage-earning capacity had he continued to participate in 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."[3]

[3] 5 U.S.C. § 8113(b).

Section 10.124(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 failure or refusal."

Appellant attended the early stages of vocational rehabilitation by meeting with his rehabilitation counselor and participating in an extensive vocational evaluation. The rehabilitation counselor identified positions available within appellant's physical limitations and aptitude which were also available within his commuting area. The rehabilitation counselor developed a job/training and placement plan and requested that appellant sign the plan indicating that he agreed to participate in training and job seeking. Appellant, however, refused to sign the job plan and agreement. Appellant later told the rehabilitation counselor he would cooperate, but again refused to consider private sector employment.

The question presented, therefore, is whether appellant has established "good cause" for failing to continue participation in vocational rehabilitation efforts. Appellant generally stated that he would not consider any positions outside the federal government as employment in the private sector would adversely affect him. This does not constitute good cause. The Office, therefore, properly reduced appellant's compensation in accordance with section 8113(b) as appellant's wage-earning capacity would have increased if he had participated in vocational rehabilitation and as he did not provide good cause for failing to cooperate with rehabilitation efforts.[4]

Next, the Board finds that appellant has not established that he is entitled to a higher pay rate for compensation purposes.

In all situations under the Act, compensation is to be based on the pay rate as determined under section 8101(4) which defines "monthly pay" as:

> "The monthly pay at the time of injury or the monthly pay at the time disability begins, ... which ever is greater."

On appeal appellant argues that he is entitled to have his compensation pay determined at the upgrade pay rate of his position. In this case, appellant retired from the employing establishment and his position of United States Deputy Marshall on March 30, 1984. The record supports that appellant's position of United States Deputy Marshall was upgraded to either a GS-11 or GS-12 in October 1984. The record contains no evidence to support that the upgrade in the position of United States Deputy Marshall was applied retroactively. As set forth

[4] *Hattie Drummond*, 39 ECAB 904 (1988).

in the regulations, the compensation pay is determined at the time of injury or at the time disability begins. The upgrade in appellant's position occurred subsequent to appellant leaving the employing establishment. Therefore, the record supports that the Office properly determined appellant's pay rate as of the date of his injury.

The decision of the Office of Workers' Compensation Programs dated November 30, 1995 is hereby affirmed.[5]

Dated, Washington, D.C.
May 5, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[5] On appeal, appellant contends that his due process rights were violated by the Board's acceptance of the Director's late response. The Director had filed motions to request an extension of time to file a response brief on January 21, 1997 and the Board granted an extension until March 21, 1997. On March 20, 1997 the Director requested another extension which the Board granted the Director an extension until May 22, 1997. On May 11, 1997 the Director requested a third extension of time to file by July 14, 1997 which the Board granted. Appellant filed a motion to deny the Director further time extension response dated July 8, 1997. The Director filed a response brief on July 25, 1997, which was past the requested extension of time date of July 14, 1997. Contrary to appellant's contention, the Board has the discretion to grant extensions of time pursuant to section 501.4(b).