

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA A. McKINNEY and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Norcross, GA

*Docket No. 99-2320; Submitted on the Record;
Issued December 12, 2000*

DECISION and ORDER

Before MICHAEL E. GROOM, A. PETER KANJORSKI,
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 she refused to cooperate with vocational rehabilitation efforts.

On December 8, 1987 appellant, then a 39-year-old data transcriber/clerk, sustained a cervical strain in the performance of duty. Effective May 8, 1988 she was placed on the periodic compensation rolls to receive compensation benefits for temporary total disability.

On May 20, 1998 Georgiana Farmer, an Office rehabilitation specialist, referred appellant to a rehabilitation counselor for development of a vocational rehabilitation program. The Office advised appellant that cooperation and participation in vocational rehabilitation was compulsory under the Federal Employees' Compensation Act.

By letter dated June 3, 1998, Roger K. McNeeley, a rehabilitation counselor, advised appellant that he had attempted to telephone her to arrange an initial rehabilitation interview but apparently her telephone number had been changed. He requested that appellant call him to advise whether she would be able to meet with him on June 12, 1998 at his home-based office.

In a letter dated June 9, 1998, appellant advised Ms. Farmer that she did not wish to meet with Mr. McNeeley in his home office as she was not comfortable meeting with a stranger, particularly a man, in such a setting. She stated that she would attend a meeting in an office that was not in someone's home.

By letter dated June 29, 1998, Mr. McNeeley advised the Office that appellant had not responded to his June 3, 1998 letter. He related that he found a telephone number with appellant's address in the telephone directory and twice left messages for appellant but had not received a response.

By letter dated July 3, 1998, Mr. McNeeley asked appellant to telephone him to schedule a date, time and location for an initial rehabilitation interview.

By letter dated July 29, 1998, Ms. Farmer advised appellant that Mr. McNeeley would be willing to meet with appellant at a public place near her home, if that was her preference and also noted that most rehabilitation counselors were self-employed and consequently had home-based offices. She suggested that appellant contact Mr. McNeeley to arrange a meeting so that the vocational rehabilitation process could go forward. Ms. Farmer also asked appellant to provide a telephone number where she could be reached. She advised that if appellant failed to cooperate in the rehabilitation efforts the Office would be notified and her compensation could be suspended.

By letter dated August 3, 1998, appellant stated that she did not want to discuss her medical situation in a public place where others might overhear. She related that she was assaulted and beaten in 1997 by two men she did not know and feared being alone with men who were strangers. Appellant requested that she be allowed to meet with a rehabilitation counselor in an office setting that was not located in a residence. She provided copies of documents regarding the attacks in 1995 and 1997.

By letter dated October 22, 1998, James Bridges, a supervisory claims examiner, related that he had been advised by Ms. Farmer that appellant had not been cooperative in participating in rehabilitation efforts. He advised appellant that her refusal without good cause to participate in vocational rehabilitation could be construed as a refusal to undergo rehabilitation and her compensation could be reduced to zero until she complied in good faith with the Office's directions concerning rehabilitation. Appellant was advised to contact the Office and the rehabilitation specialist within 30 days to make a good faith effort to participate in rehabilitation efforts.

In a letter dated October 26, 1998, appellant advised Mr. Bridges that she would not meet with a rehabilitation counselor in her home or the counselor's home and did not wish to meet in a public setting such as a restaurant while discussing her medical and physical concerns. She stated that she did not want to meet with strange men in a private setting because she had been attacked in 1997 and in 1995 was chased in traffic by a strange man with a gun. Appellant stated that she would be willing to meet with a rehabilitation counselor in an office setting such as the office of her attorney but not in her home or the counselor's home.

In a status report dated March 29, 1999, Ms. Farmer related that Mr. McNeeley had not been able to move forward in the rehabilitation process because appellant did not wish to meet with him in her home, his home or a public place and that she had requested a meeting in an office setting.

In a report dated April 11, 1999, Mr. McNeeley advised the Office that he had mailed a letter to appellant by certified mail and regular mail on March 31, 1999 because she had blocked his telephone number and asked her to contact him by April 5, 1999 but he had not received a response. He related that during the 11 months since appellant's case had been referred to him, she had not returned his telephone messages or replied to his letters.

In a memorandum dated April 12, 1999, Ms. Farmer noted that appellant had telephoned her and left a message. She returned appellant's call but received only her voice mail and left a message advising appellant that no further attempts would be made to contact her and, if she was interested in participating in rehabilitation efforts, she should contact Ms. Farmer or Mr. McNeeley.

In a status report dated April 12, 1999, Ms. Farmer related that Mr. McNeeley had made numerous attempts to obtain appellant's participation in the rehabilitation process during the past year but appellant had not been cooperative. She stated that every reasonable effort had been made to obtain appellant's cooperation without success.

By decision dated April 13, 1999, the Office reduced appellant's compensation to zero, effective April 25, 1999, on the grounds that she failed to participate in vocational rehabilitation efforts. The Office related that appellant had advised that she was unable to meet with her assigned rehabilitation counselor in his home or her home due to the emotional trauma of two previous incidents when she was assaulted by men and that she did not wish to meet in a public place because she did not want strangers to overhear a discussion about her medical condition. The Office indicated that appellant's reasons for failing to participate in rehabilitation efforts were insufficient to constitute good cause because: (1) she had not submitted medical evidence establishing that she was unable to meet with the counselor due to a nonwork-related emotional condition; (2) her rejection of a public meeting place was not well founded as there were public places where appellant's discussion with a counselor would not be overheard such as separate "study rooms" in libraries; and (3) although appellant had requested that a meeting be held in an office setting, she had not attempted to arrange such a meeting and even blocked Mr. McNeeley's telephone number so that he could not call her. The Office indicated that for these reasons appellant did not provide good cause for her failure to participate in rehabilitation efforts.

By letter dated April 28, 1999, appellant requested reconsideration and stated that she never refused to meet with a vocational counselor, only that she wanted to meet in an office setting. She stated that she did not want to meet in a library study room where people were expected to be quiet. Appellant suggested meeting in her attorney's office.

In a report dated May 17, 1999, received by the Office on May 20, 1999, Dr. Walter Shehee, a psychiatrist, related that appellant had experienced many traumas to her emotional equilibrium. He related appellant's fear that meeting with Mr. McNeeley in his home would "send her over the edge." Dr. Shehee related appellant's belief that if she could meet with Mr. McNeeley in a professional setting it would be less stressful for her.

By letter dated May 18, 1999, appellant advised that she did not want to meet with a rehabilitation counselor in a home office, restaurant or library.

By decision dated May 21, 1999, the Office denied modification of its April 13, 1999 decision.

The Board finds that the Office properly reduced appellant's compensation benefits to zero effective April 25, 1999 on the grounds that she refused to cooperate with vocational rehabilitation efforts without good cause.

The Federal Employees' Compensation Act¹ 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 probably would 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

The Office's implementing regulations provide 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.*, meeting with nurse, 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.³

The Office properly reduced appellant's compensation effective April 25, 1999 on the grounds that she failed, without good cause, to participate in her vocational rehabilitation efforts. For almost one year Ms. Farmer, the Office rehabilitation specialist and Mr. McNeeley, the rehabilitation counselor, attempted to have appellant meet with Mr. McNeeley, but appellant would not respond to Mr. McNeeley's telephone calls or letters and only insisted that the meeting be held in an office setting. She suggested a meeting in her attorney's office but did not attempt to arrange such a meeting. The Office advised appellant by letter dated October 22, 1998 that she had failed to participate in meeting with her assigned rehabilitation counselor as directed by the Office, that she had 30 days to contact the Office to make a good faith effort to cooperate in rehabilitation efforts or provide good cause for not doing so, and that her compensation would be reduced to zero if she did not comply within 30 days with the instructions contained in the letter. Appellant contacted the Office but failed to provide good cause for failing to cooperate with rehabilitation efforts.

The record shows that by letter dated October 26, 1998 appellant advised the Office that she would not meet with Mr. McNeeley in her home or the counselor's home and did not wish to meet in a public setting such as a restaurant while discussing her medical and physical concerns. She related that she did not want to meet with a strange man in a private setting because she had

¹ 5 U.S.C. §§ 8101-8193.

² 5 U.S.C. § 8113(b).

³ 20 C.F.R. § 10.519(b) and (c) (1999).

been attacked by two strange men in 1997 and, in 1995, she was chased in traffic by a strange man with a gun. Appellant stated that she would be willing to meet with a rehabilitation counselor in an office setting such as the office of her attorney but not in her home or the counselor's home. In *Gregory Apicos*⁴ the claimant did not attend a scheduled appointment with his assigned rehabilitation counselor. He subsequently advised the Office that he would be willing to meet at his home but the rehabilitation counselor indicated she would not attend and the counselor did not offer alternative arrangements. The Board held in that case that the Office had improperly reduced the claimant's compensation because a single missed appointment without further effort by the Office to reschedule was not sufficient grounds to warrant the penalty provided for in section 10.519(b) and (c). In contrast, in this case, the Office rehabilitation specialist and the assigned rehabilitation counselor made numerous attempts to obtain appellant's cooperation in rehabilitation efforts; specifically, to have an initial meeting with Mr. McNeeley to begin developing a rehabilitation plan. The record indicates that for almost one year appellant failed to return telephone calls and respond to letters from Mr. McNeeley and even blocked his telephone number and did not attempt to arrange a meeting at a location acceptable to her. The report of the psychiatrist does not establish good cause for appellant's failure to cooperate with rehabilitation efforts because Dr. Shehee merely related appellant's concern about meeting in a private home. As noted above, the Office did not require appellant to meet with Mr. McNeeley at his home.

Appellant's failure, without good cause, to participate in rehabilitation efforts by meeting with her assigned rehabilitation counselor constitutes a failure to participate in the "early but necessary stages of a vocational rehabilitation effort." Office regulations provide that, in such a case, it cannot be determined what would have been the employee's wage-earning capacity had there been no failure to participate and it is assumed, 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.⁵ Appellant did not submit sufficient evidence to refute such assumption, and the Office had a proper basis to reduce appellant's disability to zero effective April 25, 1999.

⁴ 51 ECAB ____ (Docket No. 97-2729, issued January 14, 2000).

⁵ 20 C.F.R. § 519(b) and (c) (1999).

The decisions of the Office of Workers' Compensation Programs dated May 21 and April 13, 1999 are affirmed.

Dated, Washington, DC
December 12, 2000

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

Valerie D. Evans-Harrell
Alternate Member