

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PATRICIA PHILLIPS and DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION, Vandalia, OH

*Docket No. 99-2302; Submitted on the Record;  
Issued October 27, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's monetary compensation for disability to zero for the period November 19 through December 1, 1997 for failure to cooperate in preliminary vocational rehabilitation efforts.

On December 4, 1995 appellant, then a 45-year-old air traffic controller, filed a traumatic injury claim for a left knee and ankle injury sustained on November 21, 1995 when she slipped on ice in the parking lot at work. The Office accepted that this injury resulted in aggravation of reflex sympathetic dystrophy (RSD) and a torn left medial meniscus. Appellant stopped work on November 22, 1995 and received appropriate compensation for lost wages. The Office subsequently placed appellant on the periodic rolls and began payment of compensation for temporary total disability.

The Office referred appellant to a private rehabilitation counselor based on the finding by Dr. Malcolm Meyn, a Board-certified orthopedic surgeon, in a June 3, 1997 report, that appellant could return to gainful employment with restrictions. In an August 20, 1997 letter, to the Office, the rehabilitation counselor stated that all efforts to schedule an initial appointment with appellant had failed. She indicated that voice mail messages had been left on appellant's answering machine and with her son requesting that appellant schedule an appointment and that two letters were mailed, one of which was certified, requesting that an appointment be scheduled with no response. By letter dated August 26, 1997, the Office instructed appellant to cooperate with vocational rehabilitation and advised her of the penalty provision of its regulations. The Office allotted her 30 days to make a good faith effort to participate in vocational rehabilitation, provide good reason for not participating, or submit evidence that vocational rehabilitation would not reduce her loss of wage-earning capacity to zero.

Appellant subsequently met with the rehabilitation counselor on September 5, 1997. She also scheduled vocational testing for September 26, 1997, however, cancelled due to a migraine headache. Appellant attended a vocational testing appointment on October 23, 1997, however,

she left early after having only completed half of the testing. Appellant was scheduled for a follow-up appointment on October 30, 1997, however, she cancelled due to illness.

By decision dated November 19, 1997, the Office reduced appellant's compensation for disability to zero effective November 19, 1997 on the basis that she failed to fully cooperate in the early stages of the rehabilitation process.<sup>1</sup>

Appellant disagreed with the November 19, 1997 decision and requested an oral hearing. On reconsideration, appellant submitted a narrative statement explaining why she had missed scheduled appointments and failed to complete vocational testing on October 23, 1997. Appellant stated that she did not receive telephone calls and letters mailed regarding vocational rehabilitation because she had been on vacation. She stated that when she attempted to retrieve the certified letter, it had already been returned. Regarding vocational testing on October 23, 1997, appellant stated that she was unable to finish because she was in a great deal of pain due to her clothing. She stated that the appointment was rescheduled for October 30, 1997 but that she later cancelled due to a migraine headache. Appellant noted that her reflex sympathetic disorder caused migraine headaches with photophobia, nausea, and vomiting and that she did not believe that she could drive or complete two additional hours of testing in her condition. Appellant indicated that she later attempted to reschedule the cancelled appointment but was told that someone would call her to reschedule. Appellant stated that she rescheduled the appointment for December 2, 1997 and completed testing.

Following the hearing held on February 23, 1999, an Office hearing representative affirmed the prior Office decision in a decision dated April 30, 1999.

The Board finds that the Office properly reduced appellant's monetary compensation for disability to zero for the period November 19 through December 1, 1997 for failure to cooperate in preliminary vocational rehabilitation efforts.

Section 8113(b) of the Federal Employees' Compensation Act<sup>2</sup> states:

“If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of this title, the [Office], 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 have been her wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary.”

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<sup>1</sup> The Board notes that appellant's compensation was subsequently restored retroactive to December 2, 1997, the date that she appeared for a testing session and resumed cooperation in rehabilitation efforts. The period of suspension, therefore, was determined from November 19 through December 1, 1997.

<sup>2</sup> 5 U.S.C. § 8113(b).

The Office regulation implementing this section of the Act, 20 C.F.R. § 10.519, restates section 8113(b) and then states:

“Under 5 U.S.C. § 8104(a), [the Office] may direct a permanently disabled employee to undergo vocational rehabilitation. To ensure that vocational rehabilitation services are available to all who might be entitled to benefit from them, an injured employee who has a loss of wage-earning capacity shall be presumed to be ‘permanently disabled,’ for purposes of this section only, unless and until the employee proves that the disability is not permanent. If 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, [the Office] will act as follows:

“(a) 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 effect until such time as the employee acts in good faith to comply with the direction of [the Office.]

“(b) Where a suitable job has not been identified, because the failure or refusal occurred in the early but necessary stages of a vocational rehabilitation effort (that is, meetings with [the Office] nurse, interviews, testing, counseling, functional capacity evaluations and work evaluations), [the Office] cannot determine what would have been the employee’s wage-earning capacity.

“(c) Under the circumstance identified in paragraph (b) of this section, in the absence of evidence to the contrary, [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 [the Office] will reduce the employee’s monetary compensation accordingly (that is, 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].”

The evidence in this case shows that appellant, without good cause, failed to participate in the preliminary vocational rehabilitation meetings and complete testing such that she failed to participate in the “early but necessary stages of a vocational rehabilitation effort.”<sup>3</sup> The Office properly referred appellant to a rehabilitation counselor based on the finding by Dr. Meyn, a Board-certified orthopedic surgeon, that appellant could return to gainful employment with restrictions. The rehabilitation counselor attempted to contact appellant through regular and certified mail and subsequently left several voicemail messages on her telephone and with her son regarding vocational rehabilitation and received no response. The Office informed appellant

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<sup>3</sup> See 20 C.F.R. § 10.519(b).

by letter dated August 26, 1997 of the consequences of not participating in the early stages of vocational rehabilitation and as a result she scheduled a meeting with the rehabilitation counselor on September 5, 1997. Appellant later attended vocational testing on October 23, 1997, however, she left the appointment early and did not complete the testing. Appellant rescheduled an appointment with her counselor for October 30, 1997, however, she later cancelled due to illness.

Appellant did not show good cause for her repeated failure to keep appointments and complete vocational testing from November 19 through December 1, 1997. Appellant only stated that she was unable to attend scheduled appointments due to “migraine headaches” or “illness” and that she was in a great deal of pain such that she was unable to complete vocational testing on October 23, 1997. The medical evidence of record has established that appellant can return to gainful employment and appellant has not submitted any evidence to the contrary or established that she was unable to participate in vocational rehabilitation. Therefore, the Office properly found that appellant failed to participate, without good reason, in the vocational rehabilitation effort, such that 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 applied.

The decision of the Office of Workers’ Compensation Programs dated April 30, 1999 is hereby affirmed.

Dated, Washington, DC  
October 27, 2000

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

Valerie D. Evans-Harrell  
Alternate Member