

**United States Department of Labor
Employees' Compensation Appeals Board**

D.H., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAIR
DEPOT, Jacksonville, FL, Employer**

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**Docket No. 06-213
Issued: January 31, 2007**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 7, 2005 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated August 10 and October 11, 2005 reducing his wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation based on his failure to continue to participate in a vocational rehabilitation program without good cause.

FACTUAL HISTORY

On May 29, 2003 appellant, then a 50-year-old pipe fitter, filed an occupational disease claim alleging that he developed pleural plaque asbestosis as a result of factors of his federal employment. On September 11, 2003 his claim was accepted by the Office for bilateral asbestosis. Appellant stopped work on September 30, 2003 and received appropriate compensation benefits.

On March 12, 2004 appellant was referred for vocational rehabilitation. The Office noted that he had a compensable pulmonary disability and that the employing establishment was unable to accommodate his restrictions. A rehabilitation counselor met with appellant on April 29, 2004 and reported that he had completed high school with no further formal education but with course work over a four-year span as an apprentice pipe fitter. Appellant began work as a pipe fitter apprentice at the Charleston Navy Yard in 1973 and worked up to the position of pipe fitter mechanic in 1976. In 1985, he became a submarine test director and subsequently worked from 1992 through August, 1995 as a design technician for systems on submarines. In 1995, he moved to the naval air station in Jacksonville and worked as a wastewater treatment plant operator.

Testing was conducted to determine appellant's ability to perform certain jobs. As a result of the testing and based upon his education, medical restrictions and a labor market survey, the vocational rehabilitation counselor identified two sedentary clerical positions that would accommodate appellant's physical limitations, as a receptionist or office clerk. The rehabilitation counselor conducted a labor market survey to determine that the positions were reasonably available within appellant's commuting area. Information was obtained from a local community college pertaining to certificate programs in office training. On August 11, 2004 the Office-approved training for one year to prepare appellant for employment in office management and software applications. It was noted that an active job search would commence at the end of the training program and that a wage-earning capacity determination would be made.

Appellant attended training until April 1, 2005. He subsequently advised the rehabilitation counselor that he had injured his back in a nonwork-related accident and was unable to attend classes. Appellant was requested to submit medical evidence pertaining to his inability to attend class. In a May 4, 2005 report, the rehabilitation counselor noted that he met with appellant at his home on May 2, 2005. Appellant was again advised to provide medical documentation regarding his inability to attend training classes as of April 1, 2005. He informed the counselor that his back injury made it impossible for him to attend training or to leave his home.

By letter dated May 6, 2005, the Office advised appellant that, if he failed to undergo the approved training program or show good cause for not undergoing the program within 30 days, action would be initiated to reduce his compensation to reflect his probable wage-earning capacity had he completed the training program.

Appellant submitted a copy of a June 2, 2005 magnetic resonance imaging (MRI) scan which listed a diagnosis of a left paracentral disc herniation at L5-S1 with stenosis of the left lateral recess. No other disc herniation was seen. On the report, appellant made a notation: "Will be having back surgery." A note from Stevens Family Practice dated June 7, 2005 bearing an illegible signature stated that he was unable to work or go to school until he was seen by a neurosurgeon.

On June 27, 2005 the Office proposed to reduce appellant's compensation, noting that he was not totally disabled and had the capacity to earn the wages of a receptionist or office clerk. The Office informed him that Dr. Stuart A. Millstone, a Board-certified internist, had advised

that appellant could work limited duty with restrictions as had his family physician in June 2004. Appellant had enrolled in a one-year certificate program but stopped attending courses after spring break in March 2005. He was advised to submit medical documentation of his inability to continue the training course work as of April 1, 2005. The Office advised that appellant's notation on the MRI scan and the June 7, 2005 note from the Stephen's Family Practice was insufficient to establish his total disability. The Office determined that the positions of receptionist and office clerk were medically and vocationally suitable for him and were reasonably available in his commuting area. The Office requested that appellant submit additional evidence or argument within 30 days if he disagreed with the proposed action.

In response, appellant submitted a July 1, 2005 letter expressing disagreement with the proposed reduction of compensation. He stated that he had undergone back surgery on June 21, 2005 and was unable to walk. Appellant stated that he had been unable to attend training classes due to back pain and depression over his mother's recent death. He submitted a June 16, 2005 note from Dr. Mark A. Spatola, a Board-certified neurological surgeon, stating: "[Appellant] here today for office visit. Surgery scheduled for June 21, 2005." In a July 8, 2005 letter to the rehabilitation counselor, appellant reiterated that he was unable to work following back surgery and requested additional time to "get well enough to get a job or go back to school." On July 24, 2005 he submitted a claim for compensation (CA-7) stating: "Was going back to school for rehab[ilitation]. My back went out on April 1, 2005 leaving school. Eventually I had to have back surgery...."

By decision dated August 10, 2005, the Office reduced appellant's compensation benefits effective August 7, 2005, finding that he was capable of performing the constructed positions of receptionist and office clerk. The Office determined that the medical evidence did not support that he was disabled from attending school or cooperating with his rehabilitation counselor from April 2 through June 2, 2005.

Appellant submitted an unsigned report from Dr. Spatola dictated on June 21, 2005 on appellant's admission to Orange Park Medical Center. The report noted a history that he "has had low back pain since April. Difficulty walking." An unsigned June 21, 2005 operative report reflected that Dr. Spatola performed an L5 hemilaminotomy and discectomy at L5-S1. An August 15, 2005 note signed by Dr. David C. Pearson, a plastic surgeon, indicated that appellant could not speak and that his vocal cords were paralyzed. In a note dated August 12, 2005, Dr. Spatola stated that appellant was to "continue to be out of work/school [until] September 16, 2005."

On August 15, 2005 appellant requested reconsideration. In an October 2, 2005 letter, he stated that he had been physically unable to attend training. Appellant noted: "I think classes at school resume again in January 2006. I would not have a problem attending school."

By decision dated October 11, 2005, the Office denied modification of its August 10, 2005 decision. It found that the medical evidence submitted was insufficient to support that appellant could not participate in training as of April 1, 2004 due to the accepted pulmonary condition.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.¹ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on a loss of wage-earning capacity.²

Section 8113(b) of the Federal Employees' Compensation Act provides:

“If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under 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

The Office's implementing federal regulations address failure to undergo vocational rehabilitation, stating in pertinent part:

“Under 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 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 [the Office].”⁴

¹ *James B. Christenson*, 47 ECAB 775, 778 (1996); *Patricia A. Keller*, 45 ECAB 278 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

² 20 C.F.R. §§ 10.402, 10.403 (2002). *See Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

³ 5 U.S.C. § 8113(b).

⁴ 20 C.F.R. § 10.519; *see Sam S. Wright*, 56 ECAB ____ Docket No. 04-1903 (issued February 18, 2005).

ANALYSIS

The Board finds that the Office properly reduced appellant's compensation based on his failure to continue participation in a rehabilitation training program without good cause. Appellant's claim was accepted for bilateral asbestosis. He stopped work and was placed on the periodic rolls. On March 12, 2004 appellant was referred for vocational rehabilitation. Based on his education and work experience, a rehabilitation plan was approved under which appellant enrolled in a certificate program at a local community college for one year to prepare for employment in the field of office management and software applications. He began his course studies in August 2004, taking nine hours and completing the fall term. On January 3, 2005 appellant enrolled in two courses for nine hours of study. He attended the training program until April 1, 2005, when he stopped attending class.⁵ By doing so, he failed to continue participating in the program authorized as part of his vocational rehabilitation efforts. As a result, the Office applied section 8113(b) to reduce his monetary compensation to reflect his probable wage-earning capacity in the absence of such failure.

When he stopped work on April 1, 2005, appellant did not promptly notify his rehabilitation counselor. The rehabilitation records note that the counselor did not learn that appellant had stopped the academic program until a conversation with appellant's wife on April 15, 2005. On several occasions the counselor requested that appellant submit medical evidence establishing that he could not attend class. The rehabilitation counselor met with appellant on May 2, 2005 and advised him again of the need to submit medical documentation that he was disabled for his course work as of April 1, 2005.

The medical evidence submitted by appellant does not address his disability commencing April 1, 2005. Appellant submitted a copy of a June 2, 2005 MRI scan of his lower back with a handwritten note that he would be having back surgery. However, this does not constitute probative medical evidence relevant to his capacity to continue in the rehabilitation program as of April 1, 2005. The June 7, 2005 note from Stevens Family Practice stated only that appellant was unable to work or go to school until he received treatment from a neurosurgeon. The note provided no discussion of his inability to attend classes at the community college on or after April 1, 2005. Appellant was advised by the Office that this medical evidence was insufficient to establish good cause for failing to continue in the rehabilitation training program and to submit additional medical reports.

Appellant responded on July 1, 2005 contending that he was unable to continue course work due to back pain and depression following his mother's death. He submitted a June 16, 2005 note from Dr. Spatola who indicated only that appellant was seen in an office visit that day and that surgery was scheduled for June 21, 2005. The report of Dr. Spatola did not provide any diagnosis of appellant's condition or address his inability to continue in the approved course work as of April 1, 2005. The Office properly reduced his monetary compensation under section 8113(b) on August 7, 2005. The Board finds that the medical evidence submitted does not establish that appellant was disabled from attending his course work commencing April 1

⁵ The rehabilitation counselor noted that appellant missed three days of school following his mother's death in February 2005. The Office subsequently approved tutoring and software recommended to assist him in his course work.

through June 2, 2005. Appellant contends that the reason he dropped out of the rehabilitation program was due to a back injury and anticipation of surgery. However, as of April 1, 2005 surgery had not yet been scheduled and the medical evidence submitted did not address any incapacity to continue in his studies due to his back condition. The Board finds that appellant has not provided medical evidence sufficient to establish that he stopped the approved academic program for good cause due to any necessity pertaining to treatment of his back. At the time of the Office's August 10, 2005 decision the evidence of record did not include adequate medical evidence to establish his disability commencing April 1, 2005.

Following the Office's decision, appellant submitted unsigned treatment records dated June 21, 2005 dictated upon his admission to a local hospital for surgery. However, it is well established that an unsigned medical report is not considered as probative medical evidence.⁶ These reports are not sufficient to establish good cause for appellant's failure to continue in the approved rehabilitation training courses as of April 1, 2005. The only record signed by Dr. Spatola, dated August 12, 2005, is a brief note stating that appellant was to be out of school until September 16, 2005. The Board finds that the medical evidence submitted by appellant is insufficient to establish good cause for his failure to continue participation in rehabilitation training commencing April 1, 2005.⁷ Based on the evidence of record, the Office properly reduced appellant's compensation based on its finding that he failed to show good cause for his failure to participate in the vocational rehabilitation program.⁸

CONCLUSION

The Board finds that the Office met its burden of proof to justify reduction of appellant's compensation to reflect his capacity to earn wages in the constructed positions of receptionist and/or office clerk had he completed the rehabilitation training program.

⁶ See *Merton J. Sills*, 39 ECAB 572, 575 (1988).

⁷ Appellant noted his willingness to resume course work in January 2006 in an October 2, 2005 letter to the Office.

⁸ Compare *Mary Ann J. Aanenson*, 53 ECAB 761 (2002) (the employee was found to have supported her failure to continue a directed vocational training program for good cause based on medical evidence from a treating physician); *Yusuf D. Amin*, 47 ECAB 804 (1996) (the employee provided medical evidence establishing his inability to participate in vocational rehabilitation and good cause for his failure to cooperate); *Demetrius Beverly*, 53 ECAB 305 (2002) (the employee's refusal to complete vocational training was without good cause); *Howard L. Miller*, Docket No. 04-2183, issued August 19, 2005 (the employee did not submit medical evidence to establish good cause for failing to continue in the academic program approved by vocational rehabilitation).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 11 and August 10, 2005 be affirmed.

Issued: January 31, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board