U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LILLIAN L. KERLEY and DEPARTMENT OF THE ARMY, ANNISTON ARMY DEPOT, Anniston, Ala.

Docket No. 96-1020; Submitted on the Record;
Issued August 13, 1998

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's monetary compensation to zero for failure to cooperate with vocational rehabilitation.

On February 23, 1987 appellant, then a 37-year-old electronics worker, injured her back in the performance of duty. The Office accepted her claim for low back strain and a herniated nucleus pulposus. The Office paid appellant compensation for temporary total disability and placed her on the periodic compensation rolls.

The Office referred appellant for vocational rehabilitation in October 1989. Appellant returned to work in October 1990 but stopped working in April 1991 on the recommendation of her physician. The Office returned appellant to the periodic rolls.

On January 31, 1994 appellant underwent a functional capacities evaluation on the referral of her attending physician. The occupational therapist who evaluated appellant completed a work restriction evaluation (OWCP-5) and found that appellant could work for eight hours per day in accordance with his listed limitations. He stated in his report that appellant could perform sedentary work.

In an office visit note dated April 21, 1994, Dr. Dewey H. Jones, III, a Board-certified orthopedic surgeon and appellant's attending physician, opined that appellant could perform "any kind of light sitting down work."

On November 3, 1994 the Office initiated vocational rehabilitation at appellant's request.

In a report dated January 11, 1995, a rehabilitation counselor related that she had spoken with appellant, who believed that she could receive rehabilitative training without returning to work. The rehabilitation counselor opined that appellant's motivation was "questionable at best."

In a report dated March 12, 1995, the rehabilitation counselor related that she telephoned appellant at which time appellant indicated that she could not work due to back pain. The rehabilitation counselor referred appellant to Mr. Donald Parsons for a vocational evaluation.

In a vocational assessment report dated March 14, 1995, Mr. Parsons related that he had previously evaluated appellant on May 14, 1990. He performed additional testing on appellant and noted that she was cooperative during the process but "has also taken the position that she is medically and physically unable to report to any job on a daily and consistent basis." He included a list of jobs which would be suitable for appellant based on her previous work history, education and physical limitations.

In a report dated May 31, 1995, the rehabilitation counselor related that she had met with appellant at her home on April 12, 1995 and discussed the results of her vocational testing and her desire to perform in a professional environment rather than returning to secretarial work. The rehabilitation counselor noted that appellant stated that she had associate degrees in mental health counseling and teacher education. The rehabilitation counselor recommended a plan of placement with a new employer and stated:

> "[Appellant] does not appear motivated to pursue [p]lacement/[n]ew employer but she has been released to return to sedentary work and is qualified for such employment based on her reports of work history and educational background. Due to her performance on vocational testing, a four year degree is not recommended, particularly in light of her inability to produce certificates and transcripts for training programs.
>
> "Probability of success is poor due to [appellant's] lack of motivation and narrow view of job possibilities. Nevertheless, she possesses skills and could obtain employment with those skills without further training."

In a treatment note dated August 14, 1995, Dr. Jones noted appellant's complaints of back, hip and leg pain and stated that she could work within the recommended limitations as long as the work was "light or sedentary."

Appellant's rehabilitation counselor reported that on May 30 and June 13, 1995 she sent appellant letters requesting her signature on the rehabilitation plan and award but had received no response. She further noted that she had the signed return receipt indicating delivery of the certified letter of June 13, 1995. The rehabilitation counselor recommended that the case be placed in interrupted status pending the receipt of the signed rehabilitation plan and award.

By letter dated June 26, 1995, the Office advised appellant of the provisions of 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.124(f) regarding failure or refusal to participate in vocational rehabilitation. The Office advised appellant that she had 30 days to provide her reasons for noncompliance together with any evidence supporting her position, and that, if she did not comply with the terms of the letter, the rehabilitation effort would be terminated and action taken to reduce her compensation under the described provisions.

The rehabilitation counselor performed a labor market survey based on appellant's functional capacities assessment and the psychological report and found that the positions of secretary and human service work as identified in the Department of Labor's *Dictionary of Occupational Titles* were available in sufficient numbers in appellant's geographical area.

In a rehabilitation status report dated August 25, 1995, the Office rehabilitation specialist noted that appellant did not cooperate with placement efforts but that rehabilitation "was able to do vocational testing and establish two jobs which [appellant] is able to do both physically and vocationally, and which are found in her commuting area in sufficient numbers so as to make them reasonably available."

By decision dated November 7, 1995, the Office reduced appellant's monetary compensation to zero effective November 12, 1995 on the grounds that she failed to cooperate with vocational rehabilitation.

The Board finds that the Office improperly reduced appellant's monetary compensation to zero for failure to cooperate with vocational rehabilitation.

Section 8113(b) of the Federal Employees' Compension 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."[1]

Section 10.134(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 a failure or refusal."

Section 10.124(f) further provides that if any employee without good cause refuses to apply for, undergo, participate in, or continue participation in the early but necessary stages of a vocational rehabilitation effort (interviews, testing, counseling, and work evaluations), the Office cannot determine what would have been the employee's wage-earning capacity had there been

[1] 5 U.S.C. § 8113(b).

no failure or refusal. It will be assumed, therefore, 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, and the Office will reduce the employee's monetary compensation accordingly. Any reduction in the employee's monetary compensation under the provisions of this paragraph shall continue until the employee in good faith complies with the direction of the Office.

The Office reduced appellant's compensation to zero on the assumption, noted in section 10.124(f) of the implementing regulations, that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity. It is important to note, however, that this assumption does not apply in every instance involving a failure or refusal to continue participation in a vocational rehabilitation effort. The regulation expressly makes this assumption applicable to failure or refusal in "the early but necessary stages of a vocational rehabilitation effort," involving such activities as interviews, testing, counseling, and work evaluations. In such a situation, "the Office cannot determine what would probably have been his wage-earning capacity in the absence of the failure," and so the Office may assume, 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.

Although the record supports that appellant without good cause failed or refused to continue participation in a vocational rehabilitation effort when so directed,[2] and that in the absence of this failure her wage-earning capacity would probably have substantially increased, the Board finds that the assumption relied upon by the Office to reduce appellant's monetary compensation to zero does not apply in this case. The record on appeal shows that appellant participated in the early and necessary stages of the vocational rehabilitation effort. Appellant met with her rehabilitation counselor, participated in a vocational evaluation and cooperated with her counseling to the point that her rehabilitation counselor was able to integrate the psychological and functional capacities information and identify appropriate employment opportunities. The rehabilitation counselor identified positions available within appellant's physical limitations and aptitude which were also available within her commuting area.

It is apparent, therefore, that this is not a case in which the employee refused to continue participation in the early but necessary stages of a vocational rehabilitation effort such that the Office could not determine what would have been the employee's wage-earning capacity had there been no failure or refusal. The Board finds that the Office had sufficient information to determine under section 8113(b) of the Act "what would probably have been [appellant's] wage-earning capacity" in the absence of her failure to continue participation in the vocational

[2] The rehabilitation counselor developed a job/training and placement plan and requested that appellant sign the plan indicating that she agreed to participate in training and job seeking. Appellant, however, refused to sign the job plan and agreement. Appellant further did not respond to the Office's instruction to either cooperate or provide reasons for her refusal. Subsequent to the Office's reduction of her compensation to zero, appellant submitted additional evidence. The Board cannot consider this evidence, however, as the Board's review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

rehabilitation effort when so directed. The Board therefore finds that the Office has not met its burden of proof to justify reducing appellant's monetary compensation to zero.[3]

The decision of the Office of Workers' Compensation Programs dated November 7, 1995 is hereby reversed.

Dated, Washington, D.C.
August 13, 1998

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[3] *Compare Asline Johnson*, 41 ECAB 438 (1990).