U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CORLISIA L. SIMS and U.S. POSTAL SERVICE,
POST OFFICE, Atlanta, Ga.

Docket No. 97-842; Submitted on the Record;
Issued December 23, 1998

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation under 5 U.S.C. § 8113(b) to reflect her loss of wage-earning capacity had she continued to participate in vocational rehabilitation efforts.

This is appellant's second appeal before the Board. In the prior appeal, the Board found that appellant was totally disabled beginning August 27, 1992, due to a February 12, 1992 employment injury.[1] Appellant returned to work, but was reinjured on March 18, 1993 and again stopped work. The Office accepted her claim for cervical and right shoulder strain. On November 3, 1993 appellant was removed from employment with the employing establishment for cause. Her union grievance regarding her removal was denied on October 24, 1994.

On November 2, 1994 the Office referred appellant for vocational rehabilitation. On November 3, 1994 a rehabilitation specialist noted that appellant's work restrictions as of June 22, 1994 from Dr. Alan B. Lippitt, a Board-certified orthopedic surgeon, indicated that she was capable of engaging in full-time, light-duty work activity with lifting up to 30 pounds and with restrictions on reaching and lifting with the right upper extremity. On November 30, 1994 the rehabilitation specialist referred appellant to Gary Santavicca, Ph.D., to establish appropriate vocational goals. He confirmed the feasibility of appellant pursuing associate level training. The rehabilitation specialist noted that appellant expressed an interest in clerical occupations.

Appellant commenced taking courses at Atlanta Metropolitan College prior to the rehabilitation specialist beginning to work with her with the goal of obtaining an associate's degree in social work. Appellant's rehabilitation file was placed in "interrupted status" on March 17, 1995 due to her pregnancy. The recommendation was made to reopen appellant's case by April 30, 1995 and to proceed with training plans for the summer quarter that began

[1] Docket No. 94-565 (issued August 3, 1995). Docket No. 94-569 assigned to appellant was dismissed by order dated May 26, 1994.

June 21, 1995 at Atlanta Metropolitan College. On April 25, 1995 the rehabilitation counselor sent appellant an "Application for Readmissions" with instructions to complete and forward it to Atlanta Metropolitan College prior to May 24, 1995. The rehabilitation counselor noted that after discussion with the chairman of the department of social work, 15 hours was considered to be a full course load, and that appellant would take 3 courses per quarter of 5 hours each. An attachment listed the courses in the social work program. In a June 5, 1995 progress report, the rehabilitation counselor anticipated appellant would attend classes 5 days per week at 15 quarter hours in order to graduate in 5 quarters.

On June 22, 1995 appellant signed a training rehabilitation plan agreeing to participate in the program to obtain an associate degree in social work between June 1995 and August 1996, enrolling in 15 quarter hours per quarter and maintaining a minimum of a 2.0 grade point average (GPA) in each course. Appellant agreed that the only excused absences were ones related to personal illness or emergencies, and that excessive absences could be due cause for termination of the program. She agreed to utilize tutoring services when necessary and to keep the rehabilitation counselor informed of any problems arising that would interfere with her training program.

On June 16, 1995 the rehabilitation specialist confirmed that an associate's degree in social work would qualify appellant for a mental health assistant job and a caseworker job.

By letter dated July 17, 1995, the Office advised appellant that it had determined that the job duties as a mental health assistant were within her work limitations, and advised that she was expected to cooperate fully so that she might return to work in the specified job or one similar to it.

On August 10, 1995 three instructors at Atlanta Metropolitan College provided comments on appellant's classroom performance. Dr. Ezekiel Kennedy, an English instructor, indicated that appellant had a negative attitude towards him and the class, that she had excessive absences and tardiness, and that she missed several assignments. Mr. William Allen, a History instructor, noted that appellant had highly irregular class attendance, that she never participated in classroom discussions, that she always sat in the back of the classroom, that she did not pass the first examination, and that she withdrew failing from class on August 7, 1995. Ms. Gwendolyn Harris indicated that appellant had had five absences from an education class on personal development.

On August 11, 1995 the rehabilitation counselor noted appellant's obstruction on a rehabilitation action report, indicating that she did not appear at scheduled meetings and failed to carry out the rehabilitation plan. The counselor noted that appellant's instructors also appeared to question appellant's level of effort and motivation.

On August 18, 1995 appellant's equal employment opportunity complaint, alleging employing establishment discrimination against her based on her physical disability, neck and shoulder conditions, was denied. A human resources manager found that appellant was not denied work, that work within her medical restrictions was available, and that she was removed November 3, 1993 for being absent without leave, for refusing to follow instructions/insubordination, for refusing to work a limited-duty assignment within her medical

limitations, for submitting false information on a CA-8, for submitting false information on a CA-2, and for unacceptable conduct.

In an August 20, 1995 report, the rehabilitation counselor noted that appellant claimed that she was having difficulty finding the time to complete research and reading for her classes, that appellant only wanted to take two courses, and that she was slow in getting her maintenance forms signed by her instructors. The counselor noted that appellant canceled one scheduled appointment with the counselor and was absent from school because her baby sitter was ill. Appellant was counseled regarding excessive absences during the summer quarter. The rehabilitation counselor questioned appellant's motivation, noting she used her status as a single parent as her reason for classroom absences and for not having time to study.

On November 7, 1995 the rehabilitation counselor completed a rehabilitation action report finding appellant in obstruction as she continued to be late in returning maintenance forms, did not return telephone calls, and canceled a rehabilitation appointment on November 3, 1995. Appellant was absent from school on October 9, 23 and 25, 1995, and Ms. Johnson, appellant's social problems instructor, noted that appellant was marginally passing the course, her attendance had been a problem, and that appellant was not current on a paper that counted as one quarter of her grade.

In the fall quarter of 1995, appellant took three classes, passing two with "C" grades and one with a "D" grade. In the winter quarter of 1996, she took only two classes, withdrawing from one and passing the other with a "D" grade. The rehabilitation counselor completed a rehabilitation action report on January 25, 1996 noting obstruction, indicating that appellant only registered for two classes for the winter quarter. The counselor noted that appellant attended school only three days per week.

In the spring 1996 quarter, appellant took only one class which she passed with a "C" grade; her GPA at that time was 1.9. On March 28, 1996 the rehabilitation counselor found appellant missed 4 of 11 scheduled days of school in January and missed 2 of 12 days of scheduled classes in February. The counselor noted that appellant continued to be difficult to reach by telephone and had declined assistance in meeting with instructors to work out problems with courses or with registering for classes. On June 20, 1996 the rehabilitation counselor completed another report, noting that appellant was obstructing training and again took only one course. The counselor advised that appellant's file was currently in an interrupted status.

In a June 19, 1996 memorandum, the rehabilitation specialist advised of appellant's repeated failures to comply with the terms of her training program. The rehabilitation counselor provided numerous rehabilitation action reports advising of the difficulty with appellant's attendance, efforts and motivation. The rehabilitation counselor counseled appellant on her problems to no avail, as her school performance continued to be problematic, and she would not complete the training program in August as agreed. It was recommended that appellant's training program be discontinued.

By letter dated June 24, 1996, the Office notified appellant that it had been informed that she had refused to participate in the approved training program as recommended by the rehabilitation counselor. The Office explained the purpose of rehabilitation efforts, advised of

the provisions of 5 U.S.C. § 8113(b), and directed appellant to undergo the training program in social work as was approved. Appellant was given 30 days within which to comply with the instructions or have the rehabilitation effort terminated and her compensation reduced.

By report dated June 25, 1996, the rehabilitation counselor noted that appellant failed to return multiple telephone calls, advising that appellant had chosen not to communicate with her over the previous several weeks nor forward her grades. Appellant did not enroll in any courses for the summer 1996 quarter and her grade point average was 1.9.

A telephone conference was scheduled for July 10, 1996 with appellant, the claims examiner, the rehabilitation counselor, the rehabilitation specialist, and appellant was advised of the purpose of the call. A confirmatory letter was sent to appellant on June 24, 1996.

In a conference memorandum, it was noted that appellant called on June 26, 1996 and refused to have the telephone conference. Appellant claimed that there was nothing to resolve. The rehabilitation counselor and specialist explained that it was for appellant's own good, but noted that appellant stated that she would rather submit a written explanation as to why she was not cooperating.

By letter to the Office received on July 16, 1996, appellant denied that she had refused to participate in the training program, noted that she skipped the summer quarter of 1996 but planned to continue in the fall of 1996. She denied that she was going to school for a mental health assistant position, contending that the average person in the field of social work made about $15,500.00 per year and that she might change programs to medical assistant or technician. On September 27, 1996 the Office received another letter from appellant stating that she was no longer interested in a social work degree, that social work opportunities were diminishing, that she wanted information regarding various salaries, that 9 of 10 people in college changed their majors for various reasons, that the Office had failed to respond to her July 1996 letter and that she canceled the telephone conference call because she decided to have all questions and answers in writing. Appellant indicated that her main concern was to make sure she had a wide range of job opportunities and the ability to change fields when she saw fit. Appellant also claimed that the rehabilitation specialist was unprofessional on the telephone.

By letter dated September 20, 1996, the Office rehabilitation specialist advised appellant that she had not been in compliance with the terms of her vocational training program since June 1995. Under agreement, appellant was to maintain a full-time course load of 15 hours, maintain a passing grade of "C" in all classes, and only be absent due to personal illness or emergencies. The rehabilitation specialist noted that during the summer of 1995 appellant enrolled in 12 hours but withdrew from 5 hours, that during the fall of 1995 she failed the required physical fitness course by earning a "D" and ended the quarter with a 1.8 GPA, and that she failed in part due to poor attendance. The rehabilitation specialist noted that during the winter of 1996 she registered for only 10 hours but withdrew from 5 hours and failed the other 5 hours with a "D" grade. She noted that appellant failed to notify the rehabilitation counselor of her failing in a timely manner and failed to register for any courses at all for the 1996 summer session. When the rehabilitation counselor offered to get appellant enrolled in a remedial math course for the summer to prepare her for a required algebra course, she refused to participate. The rehabilitation specialist noted that the rehabilitation counselor reconfirmed the job availability for persons with an associate

degree in social work, with an entry level wage-earning capacity of $16,600.00, and noted that appellant's request to change programs to the field of medical assistant was not approved because she had not complied with the terms of her original training program. The rehabilitation specialist further noted that the medical technician program required 20 hours of mathematics, including algebra and geometry, and that appellant's evaluation by Dr. Santavicca indicated that she was functioning at the seventh grade level in math and was unable to work with percentages, decimal fractions or fractions with different denominators. The rehabilitation specialist noted that appellant had already failed remedial math on several occasions. She noted that appellant earned an unsatisfactory grade in developmental math at Atlanta Junior College in the fall of 1982 and earned an "F" in fundamental math for the spring of 1983. After attempting to repeat that course in the summer of 1984 she withdrew. The rehabilitation specialist reiterated that appellant was expected to enroll in 15 credit hours and that if she did not follow through with the terms of her vocational training agreement, her case would be closed and her compensation would be reduced as previously indicated.

In a rehabilitation action report dated October 3, 1996, the rehabilitation counselor found appellant in obstruction, indicating that she had not telephoned the counselor as requested to advise of classes being taken, that she had not returned telephone messages left on September 24 and 30, and October 1 and 2, 1996, that she was unavailable on September 30, 1996 when the counselor telephoned, and that the social service department had advised that appellant was only registered for one course. On October 7, 1996 the rehabilitation specialist noted that the action report from the rehabilitation counselor indicated that once again appellant had not complied with the terms of her vocational training agreement by not registering for school full time. She recommended that appellant's rehabilitation program be terminated and her compensation reduced for noncompliance with the terms of her vocational training agreement.

On October 28, 1996 the Office issued appellant a notice of proposed reduction of compensation based upon her ability to earn wages as a social work aide at the rate of $16,600.00 per year. The Office advised that section 8113(b) of the Federal Employees' Compensation Act provided that if an individual without good cause failed to undergo vocational rehabilitation when so directed, and if the Office finds that in the absence of such failure the individual's wage-earning capacity would have increased substantially, the Office may reduce compensation prospectively based upon what probably would have been the individual's wage-earning capacity had she not failed to undergo vocational rehabilitation. The Office found that appellant agreed to the vocational rehabilitation plan but then failed to comply with the requirements agreed upon. The Office found that appellant had been sent a due process letter for refusing to participate in the approved training program and in reply stated only that she had skipped the summer quarter and would enroll full time in the fall; however, no other reasons were given for class time missed. The Office noted that a labor market survey for Atlanta and surrounding areas confirmed the availability of social work aide positions on a full-time basis; a *Dictionary of Occupational Titles* description of the duties and physical requirements for a social service aide position was enclosed. It was noted to be a light-duty position.

In response appellant submitted a November 18, 1996 letter stating she disagreed with the proposed action. She maintained she had not refused to participate in vocational rehabilitation, that she was currently in school, that her absences were necessary, that she had

put forth her best effort, and that she did not have a wage-earning capacity of $16,600.00 per year. She enclosed a copy of her fall 1996 schedule showing enrollment in two courses, one of which she dropped.

On December 20, 1996 the Office finalized the proposed reduction of compensation finding that appellant's November 8, 1996 letter did not constitute "good cause" for her failure to continue her training program. The Office noted that appellant's attached schedule from the fall 1996 quarter demonstrated only that she had enrolled on two courses and had dropped one, math. It noted that this was not full-time enrollment and that she did not maintain a 2.0 GPA. The Office found that appellant failed to undergo vocational rehabilitation as directed and invoked 5 U.S.C. § 8113(b), finding that if appellant had undergone vocational rehabilitation, as agreed upon, as of August 1996 she would have had the wage-earning capacity of a social work aide. The Office applied the *Shadrick* formula to determined appellant's loss of wage-earning capacity, and reduced her compensation benefits accordingly.

The Board finds that the Office properly reduced appellant's compensation under 5 U.S.C. § 8113(b).

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 [her] wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary."

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."

A review of the record indicates that appellant was offered repeated opportunities to complete the agreed upon vocational rehabilitation plan. Her request for vocational rehabilitation to become a social work aide was approved in June 1995, and she agreed to take 15 class hours per quarter in order to complete an associate's degree in social work in 5 quarters, by August 1996. She further agreed to keep her counselor informed of her progress, to maintain a 2.0 GPA, to maintain consistent attendance, and to utilize tutoring services when necessary to meet her goals. Beginning with the first quarter, appellant was reported as having a negative

attitude towards her instructors and classroom participation, having excessive absences and tardiness, and missing numerous assignments. As she progressed with the plan, she failed to remain in regular communication with her rehabilitation counselors, or to notify them of her withdrawal from various courses. Appellant's instructors questioned her level of effort and motivation. After counseling, the rehabilitation counselor found appellant in obstruction for not appearing at scheduled meetings and for failing to carry out agreed upon actions. Appellant was found in continuing obstruction by not returning telephone calls and messages, for being late in returning maintenance forms, for canceling appointments, and for missing classes. Although appellant took three courses in the fall 1995 quarter, she did not maintain the required GPA. Thereafter she enrolled in only two winter quarter classes and dropped out of one, receiving a "D" in the other. When the rehabilitation counselor enlisted the help of the head of the department of social work, appellant did not follow through or contact her adviser. In the spring of 1996, appellant enrolled in only one class but missed multiple days of classes each month. The rehabilitation counselor found that appellant was difficult to contact and that she declined any assistance in meeting with her instructors. Thereafter, appellant failed to enroll at all in classes during the summer quarter 1996.

After being counseled on several occasions regarding her noncompliance with the vocational rehabilitation plan, appellant refused to participate in a telephone conference between the Office, her rehabilitation counselor and herself, to discuss problems that she was having. Appellant responded that she did not cooperate because she wished to change her field of study and she wanted the flexibility to optimize her range of job opportunities. This explanation is not fully responsive to the deficiencies noted in her cooperation with rehabilitation efforts or in her course work.

Appellant was provided another chance, but for the fall quarter of 1996 she enrolled in only two courses and then dropped a required course in math. It was noted by the rehabilitation specialist that appellant had also been offered enrollment in a remedial math course but that she refused to participate. Her request to change fields of study was appropriately denied because she had not demonstrated that she could successfully complete the math requirement of her academic program.

The rehabilitation counselor and rehabilitation specialist both noted that multiple counseling sessions were to no avail and that the feasibility of successful completion of her rehabilitation program was minimal. The recommendation was that, due to appellant's unwillingness to fully cooperate with school and Office personnel, her rehabilitation case be closed and her compensation be reduced under 5 U.S.C. § 8113(b).

Appellant contends that she did not obstruct or fail to participate in the vocational rehabilitation plan. Appellant submitted her fall 1996 class schedule showing that she was enrolled in school, had dropped one course, and remained in one course. The issue in this case is whether appellant has demonstrated "good cause" for failing to participate fully in the vocational rehabilitation training program.

The evidence of record from appellant's college instructors, her college transcripts, her rehabilitation counselor, and her rehabilitation specialist amply support that she was not cooperative, not responsive and not fully participatory with the goals of her vocational

rehabilitation training program. Appellant was enrolled in a college training program which would lead to an associate's degree in social work which would qualify her for a variety of positions including but not limited to that of social services aide, mental health assistant, and caseworker. She failed to cooperate with the rehabilitation counselor's instructions and requests, or to make a conscientious good faith effort in pursuit of her studies. Following counseling she failed to continue full participation in her vocational rehabilitation training program, and her training was appropriately terminated in December 1996. There is no evidence that appellant's failure to continue the training program was with "good cause."[2] Accordingly, the Board finds that the Office properly reduced appellant's compensation pursuant to 5 U.S.C. § 8113(b).

The decision of the Office of Workers' Compensation Programs dated December 20, 1996 is hereby affirmed.

Dated, Washington, D.C.
December 23, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[2] *See, e.g. Michael D. Snay*, 45 ECAB 403 (1994).