

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOEY P. JACK and DEPARTMENT OF LABOR,
San Marcos, Tex.

*Docket No. 96-478; Submitted on the Record;
Issued February 4, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits for refusal to participate in vocational rehabilitation.

The Board finds that the Office properly reduced appellant's monetary compensation to zero on the basis that his failure to undergo the essential preparatory efforts of vocational testing did not permit the Office to determine what would have been his wage-earning capacity had he undergone vocational rehabilitation as directed by the Office.

Section 8113(b) of the Federal Employees' Compensation 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/her wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Secretary.”¹

Section 10.124(f) of Title 20 of the Code of Federal Regulations,² the implementing regulation of 5 U.S.C. § 8113(b), further provides as follows:

“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

¹ 5 U.S.C. § 8113(b).

² 20 C.F.R. § 10.124(f).

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 have been the employee's wage-earning capacity had there not been such failure or refusal. If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue participation in the early but necessary stages of a vocation rehabilitation effort (*i.e.*, interviews, testing, counseling and work evaluations) the Office cannot determine what would have been the employee's wage-earning capacity had there not been such 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 provision of this paragraph shall continue until the employee in good faith complies with the direction of the Office."

In the present case, the Office has accepted that appellant sustained a skull fracture on September 7, 1993 while participating in a Job Corps program. Appellant was referred for vocational rehabilitation on April 17, 1995. On May 23, 1995 appellant underwent a comprehensive vocational evaluation and vocational interest inventory, administered by John Grimes, Ph.D., a certified rehabilitation counselor. In a report dated June 30, 1995, the rehabilitation counselor stated that appellant continued in the rehabilitation planning stage. The rehabilitation counselor further indicated that it was necessary to obtain information regarding appellant's preinjury level of functioning as well as an additional neuropsychological assessment to specifically delineate appellant's long term functioning, as a viable rehabilitation plan could not be established without such information. The rehabilitation counselor indicated that Dr. John Bolter, a Board-certified psychiatrist, had been contacted and a neuropsychological evaluation was arranged for July 21, 1995. Appellant did not attend the evaluation on July 21, 1995. The Office advised appellant by letter dated August 18, 1995 that as he had missed the appointment scheduled for July 21, 1995 and had not attempted to cancel or reschedule the appointment, the appointment had been rescheduled for him with Dr. Bolter for August 30, 1995. Appellant was advised that pursuant to Section 8113(b) of the Act a claimant must undergo vocational rehabilitation when directed by the Office and if claimant failed to do so, without good cause, claimant's compensation may be reduced based on what claimant would probably have earned had he undergone vocational rehabilitation. By letter dated September 22, 1995, Dr. Bolter advised the vocational rehabilitation counselor that appellant had not cooperated with the neuropsychological consultation. Dr. Bolter advised that appellant failed to show for the initial July 21, 1995 consultation. Appellant was rescheduled for a six-hour evaluation on August 30, 1995 to accommodate his request for limited travel, however, appellant arrived for the August 30, 1995 appointment 2 and ½ hours late, stayed for approximately 45 minutes before insisting that he had to leave. Dr. Bolter stated that he asked appellant to return to the clinic on September 22, 1995 for 4 to 5 hours of testing, again appellant failed to show for that scheduled appointment. Dr. Bolter advised that he could not afford to continue to schedule appointments for appellant, which interfered with his clinic's schedule. By decision dated October 17, 1995, the Office found that appellant had failed to cooperate in the vocational rehabilitation process.

Appellant was advised that his continued failure to undergo the essential preparatory effort of vocational testing did not permit the Office to determine what would have been his wage-earning capacity had he in fact undergone the testing and rehabilitation effort.

The Board has previously held that pursuant to section 8113(b) of the Act, an employee's failure to willingly cooperate with a vocational rehabilitation process could be the basis for termination of a rehabilitation program and reduction of compensation for failure to participate in the rehabilitation process.³ The record established that following appellant's initial vocational evaluation, the vocational rehabilitation counselor concluded that he could not develop a rehabilitation plan for appellant without a neuropsychological evaluation. Appellant refused to submit to the neuropsychological evaluation. Appellant was properly advised by the Office on August 18, 1995 that his failure to cooperate with vocational rehabilitation could result in the reduction of his compensation. Appellant continued to fail to cooperate with the testing rescheduled for August 30, 1995 and did not submit to testing scheduled for September 22, 1995. The evidence of record amply establishes that appellant did not cooperate with the early and necessary stages of the rehabilitation effort such that the Office could not determine what would have been his wage-earning capacity. There is no evidence that appellant's failure to continue with vocational rehabilitation was with "good cause." The Office therefore properly assumed that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity and reduced appellant's monetary compensation accordingly.

The decision of the Office of Workers' Compensation Programs dated October 17, 1995 is hereby affirmed.

Dated, Washington, D.C.
February 4, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

³ *Michael D. Snay*, 45 ECAB 403 (1994).