U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CECILE GREEN and DEPARTMENT OF HEALTH, EDUCATION & WELFARE, SOCIAL SECURITY ADMINISTRATION, Baltimore, Md.

Docket No. 96-2190; Submitted on the Record;
Issued February 1, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's monetary compensation by 100 percent on the grounds that she failed to cooperate with vocational rehabilitation efforts.

The Board has duly reviewed the case record and finds that the Office did not meet its burden of proof to reduce appellant's compensation benefits for refusal to cooperate with vocational rehabilitation.

On April 15, 1980 appellant, then a 32-year-old clerk filed a claim for traumatic injury alleging that on that day she injured her back while pulling open a file cabinet drawer. On August 4, 1980 the Office accepted appellant's claim for a lumbar strain and subsequently updated the acceptance to include a herniated disc at L4-5. Appellant lost time from work from April 16 through June 11, 1980 and from September 22 through 28, 1980. On January 5, 1981 appellant filed a claim for recurrence of disability, which was accepted by the Office. Appellant stopped work on January 27, 1981 and has not returned.

By letter dated August 18, 1995, the Office asked appellant to provide an update of her medical condition and furnished appellant with a Form OWCP-5c, a work capacity evaluation, to be completed by her attending physician. Appellant's physician, Dr. Robert F. Draper, competed the form on September 14, 1995 and indicated thereon that appellant could work four hours per day within certain restrictions. In December 1995, the Office initiated vocational rehabilitation efforts on the basis of Dr. Draper's report. By letter dated December 4, 1995, an Office vocational rehabilitation specialist notified appellant that the medical evidence of record indicated that vocational rehabilitation services might be of benefit to her and requested that appellant telephone him and provided his telephone number in the letter. By letter dated December 18, 1995, the rehabilitation specialist advised appellant that he had received no response from her and that the Office would assume that she was not interested in pursuing

vocational rehabilitation efforts, unless he was contacted within one week from the date appellant received the December 18, 1995 letter.[1]

By letter dated January 29, 1996, an Office supervisory claims examiner advised appellant that her benefits would be reduced by 100 percent, for failure to cooperate in vocational rehabilitation efforts, because she had not shown a good faith effort in responding to the requests of the vocational rehabilitation specialist.[2] Appellant was allotted 30 days from the date of the letter, to either make a good faith effort to participate in the vocational rehabilitation efforts or, if she believed she had good reason for not participating in the effort, to advise the Office of the reasons for her belief and to submit any evidence in support of her position.

In a decision dated March 7, 1996, the Office reduced appellant's compensation benefits by 100 percent, due to her failure to participate in vocational rehabilitation as evidenced by her failure to respond to any of the three Office letters. The Office noted that appellant's entitlement to further wage-loss compensation would be restored, upon participation in vocational rehabilitation, without compensation for the period during which time she had not cooperated. The Office found that, due to the lack of any vocational testing, it assumed that vocational rehabilitation efforts would have resulted in no loss of wage-earning capacity.

In a memorandum to the file dated March 11, 1996, an Office claims examiner noted that a response from appellant had been received by the Office on February 27, 1996, within 30 days of the Office's January 29, 1996 letter, but that this response had not been associated with the file until after the March 7, 1996 decision.[3] The claims examiner determined, however, that the reduction of appellant's compensation to zero was still appropriate, because appellant's letter did not provide any indication that she was willing to cooperate with the vocational rehabilitation efforts, nor did it provide any evidence that she could not return to some type of work.

On March 25, 1996 appellant's counsel requested reconsideration of the Office's March 7, 1997 decision. Counsel indicated that appellant had in fact responded to the Office's letters, as requested and noted that appellant had attempted to rehabilitate herself by going back to school. She further stated that appellant was scheduled to have additional back surgery and remained severely disabled and that she was in the process of obtaining medical documentation supporting this. Finally, she indicated that appellant would like to seek vocational rehabilitation or comply with any other requests by the Department of Labor.

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[1] By letter received by the Office on October 10, 1995, appellant notified the Office that she had moved and provided her new address. Both the December 4 and 18, 1995 letters from the rehabilitation specialist to appellant were sent to appellant's old address.

[2] This letter was sent to appellant's correct address.

[3] In her letter, appellant indicated that she was scheduled to have back surgery the following summer and stated, in pertinent part:

> "This letter is in reference to the letters I received about vocational rehabilitation. I know vocational rehabilitation is important, but why contact me after 16 years. I tried relentlessly to get vocational rehabilitation after I completed my back surgery but was turned down. Now at my age and still with a bad back pain, who will hire me? As far as rehabilitation goes, I have done that for myself. I went back to college … and received my associates degree in [C]omputer [P]rogramming. I tried to get a job but no one would hire me."

By letters dated April 29, 1996, the Office informed appellant and her counsel that it required written authorization of representation before it could further consider the request for reconsideration. In addition, the Office informed appellant that the medical evidence currently in the file indicated that she could work 4 hours per day and that if she now wanted to comply with rehabilitation efforts she needed to submit a written statement to that effect within 15 days, together with any additional medical evidence she would like the Office to consider.

On May 14, 1996 the Office received appellant's signed authorization of representation.

In a telephone call memorialized by the Office on May 23, 1996, counsel indicated that she was still attempting to obtain updated medical documentation from appellant's attending physician. By letter dated May 23, 1996, the Office informed counsel that it would issue a decision on appellant's request for reconsideration in three weeks and that she should submit any additional medical information by that time.

In a decision dated June 18, 1996, the Office found that the March 25, 1996 request for reconsideration was not sufficient to warrant review of the prior decision as appellant did not show that the Office erroneously interpreted a point of law, or advance a point of law or a fact not previously considered, or submit any relevant documentary or medical evidence not previously considered.

The Board finds that the Office did not meet its burden of proof to reduce appellant's compensation benefits.

Section 8113(b) of the Federal Employees' Compensation Act[4] provides as follows:

> "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."

Section 10.124(f) of Title 20 of the Code of Federal Regulations, 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 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

[4] 5 U.S.C. § 8113(b); *see also* 20 C.F.R. § 10.124(f).

> 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."[5] (Emphasis added.)

The Office may reduce compensation benefits for failure to cooperate with vocational rehabilitation by establishing that the employee, without good cause, failed or refused to undergo vocational rehabilitation as directed. Chapter 2.813.12 (a) of the Office's procedure manual, which pertains to the Office's obligation to evaluate any reasons advanced by a claimant for lack of cooperation in vocational rehabilitation efforts, notes that, given the variety of reasons and circumstances, which may be offered for inability to participate in vocational rehabilitation, it is impossible to establish a definitive list of acceptable and unacceptable reasons for lack of cooperation. The procedure manual does state that "In general, however, the claimant is expected to treat the vocational rehabilitation effort as seriously as employment and the reasons for lack of cooperation should be considered in this light…."[6] The procedure manual further states that a decision of the Office applying the sanctions under 5 U.S.C. § 8113(b) should address "[a]ny reasons advanced by the claimant for failure to cooperate," that therein "[e]ach reason should be evaluated according to the criteria discussed in paragraph 12a" and that the decision should contain "[t]he conclusion that the claimant's failure was without good cause."[7]

In the present case, in her letter received by the Office on February 27, 1995, in compliance with the Office's request that if she believed she had good reason for not participating in vocational rehabilitation efforts she so advise the Office within 30 days, appellant explained to the Office that she felt she had already vocationally rehabilitated herself, in that she had returned to college and achieved an associates degree in Computer Programming. She further stated that despite her degree, she was unable to get a job due to her back condition and indicated that she was scheduled to undergo additional surgery on her back. While the Office memorandum dated March 11, 1996, indicates that subsequent to the March 7, 1996 decision, the Office did review appellant's February 27, 1996 letter and determined that the reduction of appellant's compensation was still appropriate, the Office did not use the proper criteria in evaluating appellant's response. The Office's January 29, 1996 letter to appellant, advised her to either make a good faith effort to participate in vocational rehabilitation, or, if she believed she had good reason for not participating in the effort, to advise the Office of the

[5] 20 C.F.R. § 10.124(f).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.12a (December 1993).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.12b (December 1993).

reasons for her belief and to submit any evidence in support of her position. In reviewing appellant's February 27, 1996 letter, in which she explained why she believed she should not have to participate in vocational rehabilitation, the Office noted only that appellant had not provided any indication that she was willing to cooperate with vocational rehabilitation efforts and had not provided any evidence that she could not return to some type of work, but did not evaluate the reasons actually provided by appellant. In addition, the Board notes that the initial December 1995 letters to appellant, regarding vocational rehabilitation were sent to an incorrect address and the record contains no indication that appellant received these letters in a timely fashion. As the Office's January 29, 1996 letter, to which appellant did respond in a timely fashion, was the first letter sent to appellant's correct address, appellant's failure to respond to the December 1995 letters, or to participate in the early stages of vocational rehabilitation, cannot be equated with an unwillingness on the part of appellant to cooperate with the Office.

As appellant did comply with the Office's request that she provide reasons for not participating in vocational rehabilitation and as the Office did not evaluate these reasons or indicate in its decision that the reasons advanced by appellant were inadequate, the Office improperly reduced appellant's monetary compensation by 100 percent on the grounds that she failed to cooperate with vocational rehabilitation efforts.

The decisions of the Office of Workers' Compensation Programs dated June 18 and March 7, 1996 are reversed.

Dated, Washington, D.C.
February 1, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member