U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHERRY L. CRAFT and DEPARTMENT OF AGRICULTURE, Goleta, Calif.

Docket No. 97-1387; Submitted on the Record;
Issued February 24, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

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.

The Office accepted appellant's claim for a disc herniation at L1-2, thoracic, cervical and lumbar sprains, a discectomy and fusion. Appellant began receiving compensation benefits. In another claim, No. 12-958351, appellant sustained a knee injury, and the Office accepted appellant's claim for a left patella subluxation with subsequent surgery for which appellant received a schedule award for a 16 percent impairment to her left knee. Based on the April 22, 1996 opinion of Dr. Robert G. Klein, a Board-certified internist, that appellant could work with restrictions, the Office referred appellant to a rehabilitation counselor on May 9, 1996. The rehabilitation counselor, Edward L. Bennett, had difficulty scheduling an appointment with appellant because she stated that she was unable to drive because of her back but on September 4, 1996, after intervention from the claims examiner, they met for an initial evaluation. In a report dated September 6, 1996, Mr. Bennett stated that appellant did not say hello at the initial evaluation, and on two other occasions, did not say hello and when asked why, said it was due to back pain. Mr. Bennett stated that appellant refused to fill out an initial evaluation form claiming that she could not sit to complete the form and when she took it home, she returned it incomplete. Further, he stated that appellant would not sign an information release form.

By letter dated August 6, 1996, the Office informed appellant that it had been advised that appellant had refused to participate in Mr. Bennett's rehabilitation efforts, that appellant had not come in on six dates in July stating she could not drive 15 miles to the office but then routinely drove to her physician's office, which was at least the same distance from her home as the rehabilitation counselor's office. The Office gave appellant 30 days to submit a letter indicating that she would cooperate in the rehabilitation effort.

On October 21, 1996 appellant met with the rehabilitation counselor but did not want to participate in the vocational testing due to pain and left for Calaveras County involving two or three hours of driving. Mr. Bennett stated that appellant drove from Lompoc to Santa Barbara on that date, a one-hour drive, and the prior day, drove from Copperopolis to Lompoc. On October 28, 1996 Mr. Bennett noted that appellant had temporarily relocated to Copperopolis which is approximately 45 miles east of Stockton thereby creating a problem in providing adequate counseling. She did not sign the release form for release of her college transcripts. Appellant intended to move to San Luis Obispo in December 1996.

By decision dated November 5, 1996, the Office reduced appellant's monetary compensation to zero for her failure to cooperate and participate in vocational rehabilitation.

The Board finds that the Office properly reduced appellant's monetary compensation to zero for her failure to cooperate and participate in vocational rehabilitation.

Section 8113(b) of the Federal Employees' Compensation Act[1] provides as follows:

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

[1] 5 U.S.C. §§ 8101-8193.

> 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."[2]

A review of the record indicates that appellant was provided several vocational rehabilitation opportunities including testing and meeting with the rehabilitation counselor. Appellant refused to cooperate with the rehabilitation counselor by failing to sign the release form for her college transcript, failing to complete the evaluation questionnaire, refusing to perform vocational testing and effectively removing herself geographically from receiving vocational assistance. Appellant claimed that she was unable to complete the questionnaire or perform the testing due to back pain but that was negated by evidence she was able to drive significant distances. The Office provided appellant with the opportunity to submit a letter indicating that she would cooperate but appellant did not did so. The evidence therefore establishes that appellant without good cause failed or refused to undergo, participate in and continue to participate in the early but necessary stages of a vocational rehabilitation effort. The Office was unable to determine what appellant's wage-earning capacity would have been had there not been such failure or refusal and properly assumed, 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. Accordingly, the Office properly reduced appellant's monetary compensation to zero.

The decision of the Office of Workers' Compensation Programs dated November 5, 1996 is hereby affirmed.

Dated, Washington, D.C.
February 24, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[2] 20 C.F.R. § 10.124(b).