

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EMMA J. ALLEN and DEPARTMENT OF DEFENSE,
DEFENSE LOGISTICS AGENCY, Memphis, Tenn.

*Docket No. 97-1534; Submitted on the Record;
Issued June 10, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs (OWCP) abused its discretion in reducing appellant's compensation under 5 U.S.C. § 8113(b) because she failed to cooperate with rehabilitation efforts; and (2) whether the Office abused its discretion in denying appellant's request for a hearing.

The facts in this case, indicate that, on June 30, 1992, the Office accepted that appellant, then a 44-year-old supply technician, sustained employment-related bilateral carpal tunnel syndrome and trigger thumb syndrome with right shoulder tendinitis which required rotator cuff decompression. Appellant had stopped work on August 8, 1992 and received appropriate compensation. By decision dated March 7, 1995, the Office terminated appellant's compensation on the grounds that she refused an offer of suitable work. She then filed for Office of Personnel Management (OPM) benefits and requested a hearing. By decision dated October 19, 1995, an Office hearing representative reversed the March 7, 1995 decision on the grounds that, the position offered appellant was temporary, the position description had not been reviewed by her physician and it did not provide pay rate information.

Following further development by the Office, on November 20, 1995 appellant was referred for vocational rehabilitation. A file memorandum dated January 5, 1996, indicated that she had not decided between OWCP and OPM retirement benefits, and a memorandum dated February 7, 1996, noted that appellant's delay in electing benefits was preventing vocational rehabilitation and recommended that this be viewed as an obstruction. On March 5, 1996 she was granted a schedule award for a two percent permanent impairment of the left thumb and a one percent permanent impairment of the right thumb, for a total of 2.25 weeks, to run from March 3 to 18, 1996. An election form signed by appellant on March 7, 1996 indicated that she elected OWCP benefits. Her compensation was reinstated effective March 31, 1996 and vocational rehabilitation was reactivated. By letter dated May 23, 1996, the assigned vocational rehabilitation case manager informed the Office that, after repeated attempts to contact appellant by telephone to schedule an initial interview, appellant telephoned that day and informed the

case manager that she had undergone further surgery in April 1996 and had no improvement in her symptoms. She related to the counselor that she had not elected OWCP benefits and refused to schedule an initial meeting, stating that she was unable to perform virtually any physical activity although she stated she had been out working in her yard.

In a June 12, 1996 letter, the Office advised appellant that, pursuant to section 8113(b) of the Federal Employees' Compensation Act,¹ her compensation would be reduced to zero based on her failure to participate in vocational rehabilitation. The Office noted that the medical evidence of record indicated that she was able to perform some work and directed her to make a good faith effort to participate in vocational rehabilitation. The Office informed appellant that it was assumed that vocational rehabilitation would have resulted in a return to work with no loss of wage-earning capacity and, accordingly, compensation would be reduced to zero. She was given 30 days in which to respond. By letter dated June 28, 1996, appellant requested an extension to respond, stating that she had been ill.

A file memorandum dated July 25, 1996, indicated that appellant was still refusing to cooperate with vocational rehabilitation and, by decision dated that day, the Office reduced her compensation to zero because she had not cooperated with vocational rehabilitation efforts. The Office informed appellant that the reduction to zero would continue until she, in good faith, complied with the Office's directions concerning rehabilitation efforts. By letter dated August 29, 1996, appellant requested reconsideration, stating that she did not refuse to participate in vocational rehabilitation. In an October 10, 1996 letter, she explained that when initially contacted by the vocational rehabilitation counselor, she had not elected OWCP benefits, that she had not been informed that she was eligible to participate in vocational rehabilitation and questioned whether her 1996 surgery would prevent her participation.² She indicated that the rehabilitation counselor did not answer her questions. By decision dated November 19, 1996, the Office denied appellant's request on the grounds that she neither raised substantive legal questions nor included new and relevant evidence.

On January 29, 1997 appellant requested a hearing in regard to the March 5, 1996 schedule award. By decision dated March 12, 1997, an Office hearing representative denied appellant's request on the grounds that it was not timely filed. The instant appeal follows.

Initially, the Board finds that the Office properly reduced appellant's compensation to zero for her refusal to cooperate in vocational rehabilitation efforts.

Section 8113(b) of the Act states:

“If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of this title, the [Office], 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

¹ 5 U.S.C. § 8113(b).

² The record indicates that on August 19, 1993 arthroscopy of the right shoulder was performed with debridement of a partial rotator cuff tear.

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 [Office].”³

The regulation implementing this section of the Act, 20 C.F.R. § 10.124(f), restates section 8113 (b) and then states:

“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 vocational 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 a 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.”⁴

The Board has upheld the provisions of 20 C.F.R. § 10.124(f) as an appropriate implementation of section 8113(b) of the Act.⁵ The Office, however, has the burden of showing that it invoked these provisions properly and appropriately.⁶

In the instant case, appellant was referred to a rehabilitation counselor in November 1995 in an effort to find employment for her. The relevant medical evidence includes an Office form report dated January 10, 1995, in which her treating Board-certified orthopedic surgeon, Dr. William R. Fly, indicated that appellant had reached maximum medical improvement and could return to light duty with restrictions to her physical activity. In an April 11, 1996 office note, Dr. Fly noted that appellant was having shoulder pain and on April 23, 1996 screw removal was performed under local anesthesia. Dr. John W. Neblett, a Board-certified orthopedic surgeon, provided an April 23, 1996 report, in which he noted appellant’s complaints regarding her hands and recommended further testing. A May 9, 1996 electromyographic study of both upper extremities was within normal limits. Nerve conduction velocities showed definite slowing in the right median sensory distal latency. Left sensory latency was within normal limits. The impression was evidence of carpal tunnel syndrome on the right and probable early carpal tunnel syndrome on the left.⁷ In a May 9, 1996 treatment note, Dr. Fly advised that

³ 5 U.S.C. § 8113(b).

⁴ 20 C.F.R. § 10.124(f).

⁵ *Asline Johnson*, 41 ECAB 438 (1990).

⁶ *See Michael L. Bowden*, 41 ECAB 672 (1990).

⁷ Appellant had previously undergone right carpal tunnel release on August 7, 1992 and left carpal tunnel release on March 8, 1993.

appellant's shoulder "look[ed] good." In a May 21, 1996 summary report, he advised that appellant's prior restrictions were unchanged.

A review of the record indicates that appellant was provided with opportunities to commence vocational rehabilitation, refused to participate and was subsequently advised by the Office that her compensation would be reduced if she did not participate in good faith. There is no evidence that her failure to exercise a reasonable standard of cooperation was based on good cause. The Board thus concludes that the Office properly determined that appellant refused to cooperate in the early and necessary stages of vocational rehabilitation.⁸

The Board further finds that the Office properly determined that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity. The regulations previously cited provided that it will be 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. While appellant submitted medical evidence in which Dr. Fly advised that her physical activities were restricted, she did not submit probative, rationalized medical evidence that explained why with vocational rehabilitation she could not return to some work activities in which she would have the same wage-earning capacity that she had at the time of her employment injury.⁹

The Board further finds that the Office did not abuse its discretion in denying appellant's request for a hearing as untimely.

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.¹⁰ In the present case, appellant's request for a hearing on January 29, 1997 was made more than 30 days after the date of issuance of the Office's prior decision dated March 5, 1996. Hence, the Office was correct in stating in its March 12, 1997 decision, that appellant was not entitled to a hearing as a matter of right because her request was not made within 30 days of the Office's March 5, 1996 decision. While the Office also has the discretionary power to grant a hearing request when a claimant is not entitled to a hearing as a matter of right, the Office, in its March 12, 1997 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue in question could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.¹¹ In the present case, the evidence of record

⁸ See *Linda M. McCormick*, 44 ECAB 958 (1993).

⁹ *Id.*

¹⁰ *Henry Moreno*, 39 ECAB 475, 482 (1988).

¹¹ See *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

The decisions of the Office of Workers' Compensation Programs dated March 12, 1997 and November 29 and July 25, 1996 are hereby affirmed.

Dated, Washington, D.C.
June 10, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member