

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of MARY HENSON and DEPARTMENT OF THE ARMY,  
WALTER REED ARMY MEDICAL CENTER, Washington, D.C.

*Docket No. 97-53; Submitted on the Record;  
Issued May 25, 1999*

---

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to zero for failing to cooperate with vocational rehabilitation; and (2) whether appellant was with fault in the creation of an overpayment of \$4,879.86 from May 24, 1992 through December 9, 1995, thereby precluding recovery.

Appellant, a custodial worker, sustained an injury while in the performance of duty on August 29, 1990 when she was hit in the back by a closing door. The Office accepted her claim for the conditions of back contusion and herniated disc at the L4-5 level. Appellant received compensation for temporary total disability on the periodic rolls.

In a decision dated December 8, 1995, the Office reduced appellant's compensation to zero for failure to cooperate with a rehabilitation program. In a decision dated February 23, 1996, the Office found that appellant was with fault in the creation of an overpayment of \$4,879.86 from May 24, 1992 through December 9, 1995 because she had no qualified dependents but accepted payments at the augmented rate, payments that she knew or should have been expected to know were incorrect.

The Board finds that the Office properly reduced appellant's compensation to zero.

Section 8104 of the Federal Employees' Compensation Act provides that the Office may direct a permanently disabled employee whose disability is compensable under the Act to undergo vocational rehabilitation.<sup>1</sup> 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

---

<sup>1</sup> 5 U.S.C. § 8104.

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.”<sup>2</sup>

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 a 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 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 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 that 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.”<sup>3</sup>

A review of the record reveals that the Office referred appellant to a vocational rehabilitation specialist on April 5, 1995. The specialist reported that he had conducted an initial interview with appellant, who was interested in returning to work and was willing to cooperate with vocation rehabilitation. Because the record contained a current release to return to limited-duty, primarily sedentary work, the specialist determined that appellant could be considered a candidate for vocational rehabilitation. The specialist referred appellant to a rehabilitation counselor.

On June 26, 1995, however, the rehabilitation counselor reported that she had been unable to hold an initial interview with appellant despite numerous attempts. Appellant missed meetings scheduled for May 17 and 24, 1995. On May 31, 1995 appellant called to advise that she had been in an automobile accident on May 27, 1995 but agreed to meet at her home on June 13, 1995. When the rehabilitation counselor arrived at appellant’s home on that date, appellant’s daughter advised that her mother was in pain and was sleeping and that she would

---

<sup>2</sup> *Id.* at § 8113(b).

<sup>3</sup> 20 C.F.R. § 10.124(f).

not wake her mother up. The following day, a meeting was scheduled for June 21, 1995 at the library. Appellant did not appear. Her sister explained to the rehabilitation counselor that a doctor's appointment had taken longer than expected and that appellant would not be home for at least two hours. Arrangements were made for appellant's sister to drive appellant to the rehabilitation counselor's office on June 26, 1995. On that date, appellant explained that she was unable to keep the appointment because her knee was causing her too much pain. A meeting was scheduled for July 6, 1995, but appellant failed to appear.

On September 7, 1995 the Office advised appellant of the importance of vocational rehabilitation and of the consequences of failing to undergo vocational rehabilitation as directed. The Office requested that appellant contact the Office within 30 days to make a good faith effort to participate in vocational rehabilitation and to provide any reasons and evidence she might have for not participating as directed.

When appellant did not respond, the Office issued its December 8, 1995 decision, reducing appellant's monetary compensation to zero.

Appellant missed appointments on May 17 and 24 and July 6, 1995 with no reason or justification appearing in the record. In light of the numerous attempts made by the rehabilitation counselor, the extent to which she endeavored over a period of seven weeks to schedule times and places that were convenient for appellant and in light of appellant's failure to respond to the Office's request for a good faith effort to cooperate, the Board finds that the evidence fails to show good cause for appellant's continuing failure to undergo or participate in the early but necessary stages of vocational rehabilitation. As the medical evidence released appellant to limited-duty, primarily sedentary work, and as the employing establishment reported that appellant could easily be accommodated, the Board finds that the Office acted properly in reducing appellant's monetary compensation to zero pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.124(f).

The Board also finds that appellant was with fault in the creation of an overpayment of \$4,879.86 from May 24, 1992 through December 9, 1995.

An overpayment of \$4,879.86 occurred in the present case, when appellant received augmented compensation for one or more dependents after her daughter, who was born on May 24, 1974 no longer qualified as a dependent. On a Form CA-1032 signed and dated February 1, 1992, appellant listed as dependents her daughter and one minor grandchild. The form explained whom appellant could claim as a dependent, such as an unmarried child under 18 years of age, including an adopted child or stepchild, who was living with appellant. On a Form CA-1032 signed and dated March 13, 1992, appellant listed as dependents her daughter together with two minor grandchildren. On a Form CA-1032 signed and dated February 22, 1993, appellant listed as a dependent one minor grandchild.

On May 3, 1993 the Office requested additional information concerning appellant's daughter and her qualifications as a dependent. The Office advised appellant that if her daughter was no longer a full-time student, had completed 4 years of education beyond high school, had married, had reached the age of 23 or had died, she was to notify the Office immediately and return any uncashed compensation checks. The Office also advised appellant that her daughter

was not considered an eligible dependent unless she was enrolled in school full time beyond high school and that her grandchildren were not considered dependents unless she had legal custody of them. The Office requested that appellant provide any original legal document showing that she had been granted custody of the children in question.

On a Form CA-1032 signed and dated February 6, 1995, appellant listed as a dependent one minor grandchild. She indicated that she would like to claim compensation on account of dependents as she was the guardian and had custody.

The Office issued a preliminary determination of fault in the matter of the overpayment on January 11, 1996. When appellant did not respond, the Office finalized its determination in a decision dated February 23, 1996.

Section 8129 of the Act provides that the Office may not adjust later compensation or recover an overpayment unless an “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.”<sup>4</sup> Thus, before the Office may recover an overpayment of compensation, it must determine whether the individual is with fault.

Section 10.320 of the implementing federal regulations provides the following:

“In determining whether an individual is with fault, the Office will consider all pertinent circumstances including age, intelligence, education, and physical and mental condition. An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to furnish information which the individual knew or should have known to be material; or
- (3) With respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.”<sup>5</sup>

The record in this case, establishes that the Office well advised appellant as to whom she could and could not claim as a dependent. This is evident not only from the various Forms CA-1032 appellant completed but also from the May 3, 1993 request for additional information, wherein the Office made clear that appellant was to return any uncashed compensation checks if she had no eligible dependents. This evidence supports the Office’s finding that appellant was with fault in the matter of the overpayment that arose because she accepted payments that she

---

<sup>4</sup> 5 U.S.C. § 8129(b).

<sup>5</sup> 20 C.F.R. § 10.320(b).

knew or should have been expected to know were incorrect. Section 8129 of the Act, therefore, does not preclude recovery by the Office.<sup>6</sup>

The February 23, 1996 and December 8, 1995 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.  
May 25, 1999

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member

---

<sup>6</sup> The Board's jurisdiction to review the collection of an overpayment is limited to cases of adjustment, wherein the Office decreases later payments to which the individual is entitled; *see* 5 U.S.C. § 8129; *Levon H. Knight*, 40 ECAB 658 (1989). Because collection of the overpayment in this case cannot be made by adjusting later payments (the Office reduced appellant's compensation to zero for failure to cooperate with vocational rehabilitation) but must be recovered by other means, the Board lacks jurisdiction to review the Office's recovery.