U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOELOUIS N. RAMIEREZ and DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Alameda, CA

Docket No. 98-916; Submitted on the Record;
Issued November 29, 1999

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in reducing appellant's compensation.

On April 1, 1993 appellant, then a 37-year-old aircraft painter, filed a claim for a traumatic injury on March 25, 1993 to his lower back.[1] The Office accepted appellant's claim for low back strain and a disc protrusion at L4-5. Appellant returned to work with restrictions until the employing establishment notified the Office on July 27, 1994 that it did not have positions suitable for appellant. The Office placed appellant on the periodic rolls effective February 5, 1995.

On December 15, 1994 the Office referred appellant for vocational rehabilitation.

In a work restriction evaluation (OWCP-5) dated December 15, 1994, Dr. Norman L. Cheung, a Board-certified orthopedic surgeon and appellant's attending physician, found that appellant could work for eight hours per day with listed restrictions.

The rehabilitation counselor performed vocational testing on appellant in February 1995 and developed a rehabilitation plan, signed on May 25, 1995 by appellant, which identified as suitable for the positions of computer typesetter/keyliner, varitype operator and photocomposition keyboard operator after suitable training. In vocational rehabilitation reports from February through April 1995, the rehabilitation counselor noted as problems appellant's poor participation, frequently missed appointments and habitual lateness as problem areas.

[1] Appellant sustained a prior traumatic injury to his back on October 18, 1990 which the Office accepted for lumbosacral sprain. Appellant returned to limited-duty employment following his injury on November 26, 1990 and to his regular employment on December 12, 1990.

The Office authorized appellant to attend preliminary computer training from July 5 to December 31, 1995. The rehabilitation counselor continued to note appellant's problem with attendance.

On August 31, 1995 the rehabilitation counselor noted that appellant had completed basic computer training. The Office authorized further training at the Computer Arts Institute (CAI) from June 5 to December 5, 1996.

In a rehabilitation report dated March 31, 1996, the rehabilitation counselor noted appellant's "erratic participation" and questioned his ability to successfully complete the program at the CAI.

In a report dated May 31, 1996, an Office rehabilitation specialist noted that appellant had "completed the prevocational part of the plan" and was "approved for commencing training as [a] computer typesetter-keyliner" from June 5 to December 5, 1996.

In a student evaluation dated June 28, 1996, CAI rated appellant's performance in the programs and attendance as poor.

In a report dated August 20, 1996, Dr. Cheung noted that appellant's condition was stable and that he should continue with his vocational rehabilitation.

By letter dated October 4, 1996, the Office informed appellant that if he refused to participate with rehabilitative efforts his compensation would be reduced in accordance with 5 U.S.C. § 8113(b).

On October 18, 1996 the Office assigned appellant a new rehabilitation counselor.

In a report dated November 25, 1996, the rehabilitation counselor stated:

> "Although the school informs me that [appellant] has been attending as required, recently, it appears to be 'too little, too late.' [Appellant] has not, as yet, made any substantial progress towards putting together his final portfolio. The school does not feel that [appellant] is at employable skill levels at this time. This, despite [appellant's] being involved in training at two separate facilities, since August 1995."

The Office authorized an extension of training at the CAI from January 2 to April 2, 1997.

The rehabilitation counselor submitted a labor market survey dated January 1997 which identified the position of computer typesetter/keyliner as within appellant's physical restrictions and available in sufficient numbers within his commuting area. The rehabilitation counselor stated that the school indicated that appellant "would have been employable if he had fully participated in the program."

In a letter dated March 13, 1997, the Director of the CAI stated, "Because the different software is integrated into a final portfolio project, we base completion and certification upon

completion of that project. [Appellant] has not supplied that project so his grading status is incomplete." The Director of the CAI further indicated that appellant could not obtain a position without a completed portfolio and that "[t]he impact of [his] poor attendance cannot be overstated…. I feel that [appellant] is not employable and that the responsibility lies squarely upon his shoulders."

In a report dated April 17, 1997, the rehabilitation counselor recommended case closure and noted that appellant could not be employed as he had not produced a portfolio and had problems with motivation.

By letter dated September 12, 1997, the Office notified appellant that it proposed to reduce his compensation based on his capacity to earn wages as a computer typesetter/keyliner. The Office discussed appellant's failure to cooperate. The Office provided appellant 30 days within which to "submit additional evidence or argument relevant to your capacity to earn wages in the position described."

By decision dated October 14, 1997, the Office reduced appellant's compensation based on his capacity to earn wages as a computer typesetter/keyliner.

The Board finds that the Office improperly determined that the position of computer typesetter/keyliner represented appellant's wage-earning capacity effective October 12, 1997.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.[2] Under section 8115(a) of the Federal Employees' Compensation Act,[3] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[4]

After the Office makes a medical determination of partial disability and of special work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment services or other applicable services. Finally, application of

[2] *David W. Green*, 43 ECAB 883 (1992); *Harold S. McGough*, 36 ECAB 332 (1984).

[3] 5 U.S.C. §§ 8101-8193.

[4] *Samuel J. Chavez*, 44 ECAB 431 (1993).

the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[5]

The Office properly based its finding that appellant had the physical capacity to perform the position of computer typesetter/keyliner on the findings of Dr. Cheung, who found that appellant could work for eight hours per day with listed limitations. However, the Office failed to discuss the effect of appellant's failure to successfully complete vocational rehabilitation training upon his wage-earning capacity. As discussed above, appellant's qualification for a position should be taken into consideration when making a wage-earning capacity determination. The rehabilitation counselor indicated that appellant did not successfully complete the training necessary to obtain employment as a computer typesetter/keyliner. It appears that the Office considered appellant's failure to attend class and lack of motivation as a basis for its reduction in compensation. However, reduction of compensation due to failure to participate in vocational rehabilitation under section 8113(b) of the Act,[6] is a separate issue from a loss of wage-earning capacity determination under section 8115 of the Act.[7] Appellant's degree of cooperation with vocational rehabilitation efforts is not relevant in computing loss of wage-earning capacity under section 8115 of the Act, which requires both a medical finding that appellant has the ability to perform a particular position and a determination that appellant has the vocational training to perform the position.

Further, the reduction of compensation was also improper under section 8113(b) of the Act.

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 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."

When an appellant fails to proceed with an approved training program, the Office must direct appellant to comply with the program and explain that if appellant fails to comply the Office will apply the provisions of section 8113(b) and reduce his monetary compensation.[8] In the instant case, the Office noted that it provided appellant with a warning letter in 1995 advising him of the provision of section 8113(b). However, subsequent to the 1995 warning letter

[5] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[6] 5 U.S.C. § 8113(b).

[7] *See David W. Green*, 43 ECAB 883 (1992).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813(11) (December 1993).

appellant continued with his vocational rehabilitation training program and the Office took no further action toward reducing his compensation. As the Office did not follow its procedures to notify appellant of the penalty for failing to cooperate with vocational rehabilitation and provide him 30 days within which to comply or provide a written explanation of his failure to cooperate, the Office did not properly reduce appellant's compensation under section 8113(b).[9]

For the foregoing reasons, the Office has failed to meet its burden of proof in reducing appellant's monetary compensation.

The decision of the Office of Workers' Compensation Programs dated October 14, 1997 is hereby reversed.

Dated, Washington, D.C.
November 29, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[9] *Id.*