U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PATRICIA N. PRICE and DEPARTMENT OF THE AIR FORCE, ANDREWS AIR FORCE BASE, MD

*Docket No. 99-1330; Submitted on the Record;*
*Issued November 9, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation by 100 percent effective January 31, 1999.

On April 19, 1996 appellant, then a 36-year-old lead program assistant at the Andrew Air Force Base Child Development Center, filed a notice of traumatic injury and claim, alleging that she pulled her back while diapering one child and trying to avoid stepping on another child on April 11, 1996. Appellant stopped work April 17, 1996. On May 17, 1996 the Office accepted appellant's claim for lumbar strain. Appellant sustained an injury to her right foot on April 26, 1996 which she alleged was caused by her back giving out. In October 1996 Susan R. Joyce, a registered nurse (RN), was assigned to work with appellant as part of the nurse intervention program in an attempt to return appellant to work.[1] In December 3, 1996 Susan Logsden, the RN intervention coordinator, notified the Office that Ms. Joyce was able to conduct an initial interview with appellant, however, appellant did not return any subsequent phone calls. As Ms. Joyce was unable to establish client contact, the case was referred for field nurse intervention. The case was assigned to Janice Johnson, RN, who attempted to facilitate appellant's return to work through June 10, 1997 when the case was closed by the Office. On August 13, 1998 the Office referred appellant for vocational rehabilitation. In a rehabilitation action report dated October 7, 1997, rehabilitation counselor Fortuna Scheige, advised the rehabilitation specialist, David Gerdts, that appellant was not cooperating with the vocational rehabilitation process. Ms. Scheige reported that appellant refused to meet with her, claimed she had not received written notification of a scheduled meeting and indicated that she had not been released for work by Dr. Mills, a Board-certified orthopedic surgeon.[2] On October 15, 1998 the

[1] A review of the record indicates that appellant was referred to Dr. J. Michael Joly, a Board-certified orthopedic surgeon, by Dr. William B. Sheer, a family practitioner and her treating physician. Dr. Joly indicated that appellant could return to work on May 20, 1996.

[2] Appellant contended on appeal that Dr. Mills was her attending physician. However, a review of the record reveals that appellant sought treatment by Dr. Mills after she was displeased with Dr. Joly. Dr. Sheer referred

Office was advised by Mr. Gerdts that appellant refused to participate in the vocational rehabilitation program.

By letter dated October 21, 1998, appellant was advised that the Office was aware that she had refused to participate in the vocational rehabilitation program and that pursuant to 8113(b) of the Federal Employees' Compensation Act the following guideline applied:

> "If an individual without good cause fails or refuses to apply for and undergo vocational rehabilitation when so directed, and the O[ffice] finds that in the absence of the failure the individual's wage-earning capacity would probably have substantially increased, the O[ffice] may reduce prospectively the compensation…."[3]

Appellant was notified that pursuant to 20 C.F.R. § 10.124(f) of the federal regulations, "Unless the claimant provides evidence to the contrary, the Office will assume that vocational rehabilitation would have resulted in a return to work with no loss of wage-earning capacity and compensation will be reduced accordingly -- that is to zero." Appellant was instructed to fully participate in the rehabilitation process or have her compensation reduced in accordance with section 8113(b) of the Act and section 10.124(f) of the federal regulations. Appellant did not respond to the Office, the rehabilitation specialist or the rehabilitation counselor.

By decision dated January 29, 1999, the Office found that appellant's compensation should be reduced to zero effective January 31, 1999 under section 8113(b) of the Act for the reason that appellant refused to participate in rehabilitation efforts that would have resulted in a return to work with no loss of wage-earning capacity.

The Board finds that the Office properly reduced appellant's monetary compensation by 100 percent on the basis that the evidence of record indicated that she would have sustained no loss of wage-earning capacity if she had undergone vocational rehabilitation as directed by the Office.

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."

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appellant to a Board-certified orthopedist in Waldorf, Maryland, but appellant elected to seek treatment from Dr. Mills instead. The Office has not approved Dr. Mills as appellant's treating physician.

[3] 5 U.S.C. § 8113(b); *see also* 20 C.F.R. § 10.124(f).

Section 10.124(f) of the federal regulations, the implementing regulations of section 8113(b) of the Act, 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 wage-earning capacity had there not been such failure or refusal. If an employee without good cause fails 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 the Office will reduce the employee's monetary compensation accordingly.* Any reduction in the employee's monetary compensation provided under the provision of the paragraph shall continue until the employee in good faith complies with the direction of the Office." (Emphasis in the original.)

Pursuant to the foregoing regulatory provision, the Office properly reduced appellant's monetary compensation by 100 percent.[4]

In the present case, the Office initiated vocational rehabilitation in August 1998, however, appellant did not acquiesce to any rehabilitation efforts, including the initial interview. Appellant advised Ms. Scheige that she had not been released for work by Dr. Mills. After being advised of the sanction for noncompliance with the vocational rehabilitation process, appellant did not respond or contact either the Office or the rehabilitation service to advise them of an intent to participate fully.

As provided by the Federal Procedure Manual, when appellant impeded the early stages of the rehabilitation process, in this case by refusal to meet with the rehabilitation counselor or return her calls, she was advised that her monetary compensation would be decreased to zero should the impediments continue.[5] As appellant did not respond to the Office's October 21, 1998 letter, she did not provide any basis for her refusal to participate in the rehabilitation process prior to the Office's reduction of her monetary compensation by 100 percent.

The Board also 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

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[4] *Linda M. McCormick*, 44 ECAB 958 (1993); *Asline Johnson*, 41 ECAB 438 (1990); *see also Michael L. Bowden*, 41 ECAB 672 (1990).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2-813.11(a) (November 1996).

capacity. The regulations previously cited provide that it will be assumed in the absence of evidence to the contrary that the vocational rehabilitation would have resulted in a return to work with no loss of wage-earning capacity. Appellant has not submitted any medical or other evidence which explains why, with vocational rehabilitation, she could not return to some work activities. The Board therefore finds that there is no evidence that vocational rehabilitation would not have resulted in a return to work with no loss of wage-earning capacity.

The decision of the Office of Workers' Compensation Programs dated January 29, 1999 is hereby affirmed.

Dated, Washington, D.C.
November 9, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member