U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CONRAD HIGHTOWER and DEPARTMENT OF THE ARMY, RED RIVER ARMY DEPOT, Texarkana, TX

Docket No. 98-1655; Submitted on the Record;
Issued August 3, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation for failure to cooperate with rehabilitation efforts.

This case has previously been before the Board on two occasions. In the first decision, the Board affirmed the Office's loss of wage-earning capacity determination for the period December 16, 1979 through March 9, 1980.[1] In the second decision, the Board dismissed appellant's appeal because the case was in an interlocutory posture regarding an April 23, 1986 hearing representative's decision which found that the Office properly terminated benefits, but remanded the case for further development.[2] The facts and circumstances of the case as set out in the Board's prior decisions are incorporated herein by reference.

In a February 26, 1996 report, Dr. Wilson[3] opined that appellant was capable of performing a sedentary light-duty job that "would allow him to change positions intermittently standing and sitting" for four hours per day.

In a work capacity evaluation form dated May 25, 1996, Dr. Wilson indicated that appellant could work four hours per day with restrictions of no lifting more than 10 pounds, 12 times per hour and limitations on kneeling, standing, bending, twisting, reaching and lifting.

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[1] 32 ECAB 1738 (1981).

[2] Docket No. 86-1919 (issued November 21, 1986). Pursuant to the hearing representative's instructions, the Office referred appellant to Dr. Richard V. Wilson, a Board-certified orthopedic surgeon, by letter dated February 4, 1987 for a second opinion as to whether appellant was totally disabled. Based upon Dr. Wilson's February 24, 1987 report, the Office placed appellant on the periodic rolls for temporary total disability.

[3] As noted in footnote 2, *supra*, Dr. Wilson initially was a second opinion physician. Appellant currently sees Dr. Wilson on a yearly basis to comply with the Office's requirement for a yearly physical.

On December 13, 1996 the Office rehabilitation specialist, Ms. Laura Miller, referred appellant for vocational rehabilitation following Dr. Wilson's May 25, 1996 work capacity evaluation. The rehabilitation counselor, Mr. Terry Carlton, recommended vocational testing and enrollment appellant in an Adult Education Class/GED Training. On March 18, 1997 appellant indicated to the rehabilitation counselor that he was not going to enroll in the adult education class as he felt he was unemployable with his disability.

In a summary of contacts for the period July 2 through 25, 1997, the rehabilitation counselor noted that appellant refused to enroll in a computer literacy program as directed by the rehabilitation specialist. The rehabilitation counselor stated that he had contacted the Office rehabilitation specialist to report appellant's refusal to cooperate in his rehabilitation program and that he indicated that he was not going to complete the last three weeks of his keyboarding class.

In a letter dated July 29, 1997, the Office directed appellant to undergo the training specified by the Office and advised him of the penalty provisions of 5 U.S.C. § 8113(b) for failure to comply with vocational rehabilitation services. The Office advised appellant that the purpose of the training program was to provide him with the knowledge and skills required for placement as a telephone solicitor. Lastly, the Office informed appellant that if he did not comply within 30 days of the date of the letter that action would be taken to reduce his compensation to reflect his probable wage-earning capacity had he complied with his vocational rehabilitation program.

In a letter dated August 12, 1997, appellant stated that he would not comply with the rehabilitation program because of his age, hearing problems, difficulty getting out of bed some days and perceived lack of employability. Appellant also stated that the Office was wasting its time and that he believed the "rehab program is a joke."

In an August 23, 1997 vocational rehabilitation report, the rehabilitation counselor noted that appellant refused to cooperate with the rehabilitation program and that Dr. Wilson indicated appellant could work intermittently for four hours per day. The rehabilitation counselor closed the case due to appellant's refusal to cooperate.

On September 11, 1997 the Office rehabilitation specialist noted that the case had been closed due to appellant's refusal to cooperate in vocational training.

On September 25, 1997 the Office reduced appellant's compensation for four hours per day effective October 12, 1997 based upon his refusal to comply with vocational rehabilitation. The Office noted that the medical evidence of record indicated that he was able to work four hours per day.

In a letter dated October 12, 1997, appellant requested a review of the written record. Appellant also alleged that he was in the early stages of Alzheimer's disease based upon his memory loss and the heredity nature of the disease since his mother had Alzheimer's disease. Appellant attached a physician's report dated March 8, 1993 which diagnosed Alzheimer's disease in his mother.

By decision dated February 12, 1998, the Office hearing representative affirmed the September 25, 1997 decision reducing appellant's compensation based upon his refusal to comply.

The Board finds that the Office properly reduced appellant's compensation for failure to cooperate with rehabilitation efforts.

Section 8113(b) of the Federal Employees' Compensation 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 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]."[4]

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 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 failure or refusal."[5]

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.[6] The Office, however, has the burden of showing that it invoked these provisions properly and appropriately.[7]

In the instant case, appellant was referred to a rehabilitation counselor in December 1996 in an effort to determine appellant's vocational aptitude. The relevant medical evidence includes a February 26, 1996 functional capacity evaluation report and a May 25, 1996 report from Dr. Wilson indicating that appellant was capable of working four hours per day with restrictions. In addition, the vocational rehabilitation counselor noted that Dr. Wilson had been contacted and the physician confirmed that appellant was capable of working in a position that allowed him to work intermittently for four hours with restrictions in an August 23, 1997 vocational rehabilitation report.

[4] 5 U.S.C. § 8113(b).

[5] 20 C.F.R. § 10.124(f).

[6] *Asline Johnson*, 41 ECAB 438 (1990).

[7] *See Michael L. Bowden*, 41 ECAB 672 (1990).

A review of the record indicates that appellant was provided with opportunities to complete the educational programs deemed necessary for his vocational rehabilitation, refused to enroll or continue courses designated by the rehabilitation counselor and was subsequently advised by the Office that his compensation would be reduced if he did not participate in good faith. There is no evidence that his failure to exercise a reasonable standard of cooperation was based on good cause.

The Board finds that the Office properly determined that had appellant completed his vocational rehabilitation effort it would have resulted in a return to work with a loss of wage-earning capacity of four hours per day.

The decision of the Office of Workers' Compensation Programs dated February 12, 1998 is hereby affirmed.

Dated, Washington, D.C.
August 3, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member