

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN R. PRATT and DEPARTMENT OF THE NAVY,
NAVAL AIR WARFARE CENTER AIRCRAFT DIVISION
Patuxent River, MD

*Docket No. 98-1689; Submitted on the Record;
Issued January 19, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

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

On July 28, 1992 appellant, then a 39-year-old painter, filed a claim for a bruised left hip sustained on July 10, 1992 when he fell off a five-gallon bucket. The Office accepted that this injury resulted in a neck sprain, hip, and thigh contusions and aggravation of a paranoid personality disorder. Appellant received continuation of pay from September 29 to October 6, 1992 and on October 7, 1992 returned to light duty, which he performed until he again stopped work on November 1, 1993. After a period of sick leave, the Office began payment of compensation for temporary total disability on June 6, 1994. Appellant resigned his position with the employing establishment on July 1, 1994.

The Office referred appellant to a private rehabilitation counselor. In a January 29, 1997 report, this counselor stated that he had attempted to communicate with appellant via telephone and discovered that it was disconnected and that appellant had not responded to letters to his last known address. By letter dated February 11, 1997, the Office advised appellant that the unsuccessful attempts of the rehabilitation counselor to reach him supported a finding that he was refusing to cooperate with the Office's vocational rehabilitation efforts. The Office further advised appellant that refusal to undergo vocational rehabilitation could result in a reduction of his compensation to 0 and allotted him 30 days to make a good faith effort to participate in vocational rehabilitation, provide good reason for not participating, or submit evidence that vocational rehabilitation would not reduce his loss of wage-earning capacity to 0.

In a memorandum of a telephone call from appellant on February 21, 1997, the Office reported that appellant stated that he had changed his telephone number, that he did not receive the letters from the rehabilitation counselor and that he received a copy of the Office's

February 11, 1997 letter from the employing establishment. The memorandum then states: “He said he was willing to participate, but he would need the assistance of a counselor to draft a letter, since ‘I can’t read or write.’” By letter dated March 11, 1997, appellant’s case manager at the Mental Health Authority of St. Mary’s, Inc. submitted evidence on appellant’s ability to hold gainful employment, including a report from a psychiatrist, a psychological evaluation and a report from a rehabilitation specialist at the Maryland State Department of Education, Division of Rehabilitation Services.

By decision dated March 25, 1997, the Office reduced appellant’s compensation for disability to zero effective March 30, 1997 on the basis that he failed to participate in vocational rehabilitation services. Following a hearing held on December 1, 1997 at appellant’s request, an Office hearing representative affirmed this decision in a decision dated February 13, 1998.

Section 8113(b) of the Federal Employees’ Compensation Act¹ 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 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.”

The Office 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.”

The Board finds that the Office improperly reduced appellant’s compensation for disability to zero for failure to cooperate with vocational rehabilitation.

Appellant responded to the Office’s February 11, 1997 notice that he was refusing to undergo vocational rehabilitation by a telephone call on February 21, 1997. According to the

¹ 5 U.S.C. § 8113(b).

Office's memorandum of this call, appellant expressed his willingness to participate in vocational rehabilitation. Despite this, the Office did not make any further attempt to have appellant interviewed, tested, counseled or evaluated before reducing his compensation for disability to zero. As there is no evidence that appellant failed or refused to comply with rehabilitation efforts between February 11, 1997, when the Office warned him of the penalties for failure to cooperate, and March 25, 1997, when the Office invoked the penalties of sections 8113(b) and 10.124(f), the Office's invocation of these penalties was improper.²

The decision of the Office of Workers' Compensation Programs dated February 13, 1998 is reversed and the case remanded to the Office for reinstatement of compensation for disability effective March 30, 1997.

Dated, Washington, D.C.
January 19, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

² *Michael L. Bowden*, 41 ECAB 672 (1990).