U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HENRY E. DISMUKE and U.S. POSTAL SERVICE,
NORTH TEXAS MAIL PROCESSING CENTER, Coppell, TX

Docket No. 99-1156; Submitted on the Record;
Issued April 12, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's monetary compensation by 100 percent on the grounds that he failed to cooperate with vocational rehabilitation efforts without good cause.

The Board has duly reviewed the case record and finds that the Office met its burden of proof to reduce appellant's compensation benefits for refusal to cooperate with vocational rehabilitation.[1]

In this case, the Office accepted that on June 18, 1993 appellant, then a 49-year-old mail handler, sustained a right shoulder strain and rotator cuff tendinitis in the performance of duty. The Office later accepted a herniated cervical disc at C6-7 and a lumbar disc ligament injury with secondary infection. Appellant stopped work on March 30, 1995 and the Office began paying appropriate compensation benefits.

After receiving the results of appellant's functional capacity evaluation, the Office advised appellant on April 17, 1998 to contact his rehabilitation counselor to arrange an initial interview. In a development plan dated May 31, 1998, the rehabilitation counselor noted that he had contacted appellant and scheduled a meeting for May 7, 1998, but that appellant wanted the meeting to take place at his physician's office and in his presence. After consulting with the rehabilitation specialist, the rehabilitation counselor advised appellant that it would not be appropriate to hold the initial meeting in his physician's office. Appellant insisted and the rehabilitation counselor advised him that, while the meeting could be held at his physician's office, his physician could not be present.

On May 6, 1998 the rehabilitation counselor again advised appellant that, as his functional capacity limitations and medical restrictions had already been established, there was

[1] Appellant previously filed an appeal with the Board regarding the Office's denial of appellant's request for a hearing, which the Board affirmed on November 3, 1997 in Docket No. 95-2959.

no need for his physician to be present at the interview. The rehabilitation counselor further suggested that the meeting take place at his own office.

On May 13, 1998 the rehabilitation counselor suggested to appellant that the meeting be held at appellant's counsel's office, but again, appellant insisted on having the initial meeting at his physician's office. On May 21, 1998 the rehabilitation counselor reported to the Office that he had been unable to meet with appellant.

By letter dated May 27, 1998, the Office advised appellant that the rehabilitation specialist had informed the Office that he had failed to cooperate with rehabilitation efforts and had refused to meet or even schedule an appointment with his rehabilitation counselor, despite the fact that the rehabilitation counselor made every attempt to accommodate him. Appellant was advised that, if he failed or refused to participate in vocational rehabilitation without good cause, his compensation benefits would be reduced. Appellant was allowed 30 days to show a good-faith effort or to provide reasons for not cooperating.

In a note dated June 30, 1998, the rehabilitation specialist noted that appellant was still not cooperating with vocational rehabilitation efforts and that his case file had been closed.

By letter decision dated June 30, 1998, the Office reduced appellant's compensation benefits by 100 percent due to his failure to participate in vocational rehabilitation. The Office noted that appellant's entitlement to wage-loss compensation would be restored, upon participation in vocational rehabilitation, without compensation for the period during which he had not cooperated.

In several separate letters dated July 16, 1998, appellant requested reconsideration of the Office's decision reducing his compensation benefits and attempted to explain his actions. He stated that he had been under the impression that he could have his physician present at the vocational rehabilitation meeting as his chosen representative. He also stated that the rehabilitation counselor had told him he could wait to schedule the meeting until appellant, the rehabilitation counselor and appellant's physician, could be present and that he had not received any further letters scheduling the appointment. Appellant indicated a willingness to meet with the rehabilitation counselor.

By letter dated July 20, 1998, the Office acknowledged appellant's willingness to comply with vocational rehabilitation efforts and advised him to contact the rehabilitation counselor to schedule a meeting.

By letter dated July 28, 1998, appellant requested a written review of the record by an Office hearing representative.

On August 6, 1998 the rehabilitation counselor notified the Office that he had met with appellant and completed the initial interview.

By letter dated August 6, 1998, the Office acknowledged appellant's compliance with rehabilitation efforts and reinstated his compensation benefits effective that date.

In a decision dated November 12, 1998, an Office hearing representative affirmed the Office's reduction of appellant's compensation benefits to zero, on the grounds that he refused to participate in vocational rehabilitation efforts.

The Board finds that the Office properly reduced appellant's monetary compensation by 100 percent on the grounds that he failed to cooperate with vocational rehabilitation efforts without good cause.

Section 8113(b) of the Federal Employees' Compensation Act[2] 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."

Section 10.124(f) of Title 20 of the Code of Federal Regulations, the implementing regulation of 5 U.S.C. § 8113(b), 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 employee's wage-earning capacity had there not been such 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 vocation 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

[2] 5 U.S.C. § 8113.

compensation under the provision of this paragraph shall continue until the employee in good faith complies with the direction of the Office."[3] (Emphasis added.)

Rehabilitation reports beginning April 21, 1998, indicated that appellant cooperated, initially with vocational rehabilitation efforts by agreeing over the telephone to meet with the rehabilitation counselor. The reports beginning May 1, 1998, however, indicate that appellant was unwilling to meet with the rehabilitation counselor unless the meeting was held in the presence of his treating physician. Although the rehabilitation counselor advised appellant that this was not appropriate and suggested several alternative venues, appellant remained adamant that his physician must be present and refused to schedule an appointment under any other circumstances.

Following the Office's June 30, 1998 reduction of benefits, appellant contended that he was under the impression that his physician could be present as his representative, that the rehabilitation counselor had agreed to schedule the appointment when all the parties, including appellant's physician, could be present and that he was still waiting for a letter advising him that the meeting had been scheduled.

The Board finds that the evidence does not support appellant's allegations that the rehabilitation specialist had agreed to schedule the meeting in the presence of appellant's physician. The rehabilitation counselor's notes from April 29, 1998 indicate that, during his first conversation with appellant, he learned of appellant's preference that the initial meeting be held at his physician's office and noted that he would have to check with the rehabilitation specialist as to the feasibility of such a meeting. The rehabilitation counselor's notes beginning May 1, 1998 indicate that, while the rehabilitation counselor made several attempts to accommodate appellant's wishes, his supervisor, the rehabilitation specialist, would not allow the meeting to take place in the presence of appellant's treating physician. Having received the final word from the rehabilitation specialist, on May 6 and 13, 1998, the rehabilitation counselor informed appellant that the meeting could not take place in his physician's presence and requested that the appellant contact him by May 20, 1998 to schedule an appointment, which appellant did not do.

The Board notes that the evidence shows that appellant failed, without good cause, to participate in the "early but necessary stages of a vocational rehabilitation effort."[4] The Office referred appellant to a vocational rehabilitation counselor to begin rehabilitation services. The evidence of record shows that appellant did not schedule the necessary appointments with his rehabilitation counselor despite repeated attempts.

Office regulations provide that when an employee fails to participate in the early stages of vocational rehabilitation, it cannot be determined what would have been the employee's wage-earning capacity had there been no failure to participate and it is assumed 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.[5] Appellant did not submit evidence to refute

[3] 20 C.F.R. § 10.124(f).

[4] *See* 20 C.F.R § 10.124(f).

[5] *See* Federal (FECA) Procedures Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Service*,

such an assumption and the Office in its June 30, 1998 decision, had a proper basis to reduce his disability compensation to zero effective June 21, 1998.

The Board further finds, however, that the Office erred in reinstating appellant's benefits effective August 6, 1998, the day he finally met with his rehabilitation counselor.

The Office's Procedure Manual provides that, "if the claimant later complies with the Office's direction to undergo vocational rehabilitation after a formal decision has been issued reducing compensation under section 8113(b), compensation should be reinstated prospectively at the previous rate…. The effective date of reinstatement of the previous rate of compensation should be the date the claimant indicates in writing his or her intent to comply, as long as actual compliance is confirmed" by the rehabilitation specialist or rehabilitation counselor.[6] Compliance is shown by actions such as undergoing interviews or testing.

Therefore, as appellant indicated in his letter dated July 16, 1998, that he was willing to meet with the vocational rehabilitation counselor at any time and at any place and as the Office later confirmed that appellant did meet with the rehabilitation counselor on August 8, 1998 the Office should have reinstated appellant's benefits effective July 16, 1998, the date of his written indication of his willingness to comply with rehabilitation efforts.

The November 12, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed as modified.

Dated, Washington, DC
April 12, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

Chapter 2.813.11(a) (November 1996).

[6] *Id.*