

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN T. SULLIVAN and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, Nashua, NH

*Docket No. 99-1015; Submitted on the Record;
Issued February 26, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying the rehabilitation benefits requested.

In the prior appeal of this case,¹ the Board found that the Office abused its discretion by failing to consider a December 29, 1994 letter from appellant's employer, who had entered into an agreement with the Office for assisted employment. The Board found that the letter was relevant to the issue before the Office and that a proper exercise of discretion required the Office to base its decision on all the relevant evidence before it. The Board set aside the Office's July 31, 1995 decision and remanded the case. The facts as set forth in the Board's prior opinion are hereby incorporated by reference.

In a vocational rehabilitation report dated June 10, 1995, the Office rehabilitation counselor stated that business had been slow at the employing establishment where appellant worked. He was offered work on a "time and charge" basis until business improved, but appellant refused this option and was terminated. The rehabilitation counselor reported that appellant was considered satisfactorily rehabilitated as he had been employed for two years and two months. Appellant had passed the examination for private investigator and was licensed in Maine. The rehabilitation counselor stated that appellant had the equipment necessary to work at this trade, which the Office had purchased. The rehabilitation counselor closed appellant's vocational rehabilitation file because appellant was considered successfully rehabilitated and was capable of self-employment or employment by a company that used licensed investigators.

In a decision dated June 12, 1998, the Office denied appellant's request for additional supplies, equipment and training on the grounds that securing employment in his chosen field was not contingent on procurement of the requested items. The Office considered the

¹ Docket No. 96-32 (issued March 26, 1998). Appellant sustained injury on February 4, 1982 and subsequently entered an assisted reemployment program as a claims adjuster/investigator.

December 29, 1994 letter referenced in the Board's prior opinion and noted that appellant did obtain his insurance adjustor's license. The Office also noted the rehabilitation counselor's final report and found that appellant's request for a bulletproof vest and periscope was moot "at this time" because appellant's employment had been terminated.

Appellant requested reconsideration. He challenged the Office's finding that he had secured his insurance adjustor's license. Appellant claimed that because he did not have this license and lacked the surveillance tools requested, he was significantly limited as a private investigator. He argued that the lack of a license and the requested equipment refuted the Office's conclusion that he was successfully rehabilitated.

To support his request for reconsideration, appellant submitted three documents, including the December 29, 1994 letter previously considered by the Office and described by the Board in its prior opinion. Appellant also submitted a February 21, 1995 letter from the employing establishment that employed him describing three incidents in which appellant's life was threatened or in which he might have been subject to bodily harm. The employing establishment stated that these incidents could have been avoided if appellant had the appropriate surveillance equipment. Since these incidents, the employing establishment was reluctant to assign any cases to appellant that had a possibility of violence: "As you are aware, in our line of work, every time we go in the field, there is that possibility that a physical altercation could take place."

Appellant also submitted an April 21, 1995 report from his attending physician, Dr. James R. McKendry, Jr., a Board-certified orthopedic surgeon, who stated that appellant had suggested using a periscope to obviate much of the overuse and aggravation of his left shoulder. Dr. McKendry reported that appellant should have some kind of protective vest to protect his painful left shoulder and left posterior chest. "It seems to me important," Dr. McKendry stated, "that [appellant] have these devices in order to prevent him from having any further injury and to allow him to stay at his chosen work."

In a decision dated October 21, 1998, the Office reviewed the merits of appellant's claim and denied modification of its prior decision. The Office found that, although appellant had not obtained his insurance adjustor license, he did obtain his private investigator license, worked for more than two years and was successfully rehabilitated. The Office found that it had fulfilled its obligation to upgrade appellant's skills and education to enable him to qualify for other suitable employment and restore lost earning capacity.

The Board finds that the Office acted within its discretion in denying appellant's request for a periscope, a bulletproof vest and reimbursement for a training course.

As the Board noted on the prior appeal, the vocational rehabilitation provisions of the Federal Employees' Compensation Act² vest the Office with discretionary powers. A decision granting or refusing an application for training will not be set aside by the Board unless it

² 5 U.S.C. §§ 8101-8193.

represents an abuse of discretion, that is, a manifestly unreasonable exercise of judgment.³ The purpose of providing training under the Act is to upgrade the skills or education of beneficiaries who cannot return to their former federal employment, that they may qualify for other suitable employment and restore lost earning capacity.⁴ The Office will sponsor vocational training if needed to furnish the claimant with necessary skills.”⁵

The record in this case establishes that appellant has been vocationally rehabilitated. The Office rehabilitation counselor, who is an expert in such matters, concluded that appellant was satisfactorily rehabilitated. Appellant had been employed for more than two years, had passed the examination for private investigator and was licensed in Maine. The rehabilitation counselor reported that appellant possessed the equipment necessary to work at this trade and was capable of self-employment or employment by a company that used licensed investigators.

Although a periscope and bulletproof vest might make the duties of a private investigator safer, the question is whether the Office’s refusal to provide such supplies, or to reimburse appellant for a training course, constitutes a manifestly unreasonable exercise of judgment. Given the final report of the Office rehabilitation counselor and the fact that the vocational rehabilitation by the Office has upgraded appellant’s skills and allowed him to obtain his license as a private investigator, the Board finds that the Office’s exercise of judgment was not manifestly unreasonable.

³ *Nicholas Slaton*, 13 ECAB 474 (1962); *Stephen Souza*, 27 ECAB 38 (1975).

⁴ *See Mary A. Brown*, 27 ECAB 389 (1976); *Willie S. Bolden*, 33 ECAB 316 (1981).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.3 (December 1993).

The October 21, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
February 26, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member