U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIE J. BAILEY and DEPARTMENT OF AGRICULTURE, WAYNE POULTRY, Albertville, GA

Docket No. 99-2155; Submitted on the Record;
Issued January 2, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in reducing appellant's compensation based on his failure to undergo vocational rehabilitation; and (2) whether the Office properly refused to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

On May 3, 1990 appellant, then a 40-year-old food inspector, filed a traumatic injury claim, alleging that he tripped over a hose and hurt his left arm and shoulder.[1] The Office accepted appellant's claim for left shoulder strain and left labral tear on April 14, 1992[2] and paid appropriate compensation for intermittent periods of disability. Appellant completely stopped work on February 27, 1993.

In a letter dated April 15, 1993, the Office requested that appellant submit a physician's reasoned opinion addressing the relationship of his shoulder condition and specific employment factors as well as the feasibility of appellant returning to regular duty.

In a letter dated May 10, 1993, Dr. Eric W. Janssen, an orthopedic surgeon, opined that appellant's continued shoulder condition was causally related to his fall in May 1990. He indicated that appellant could work within permanent physical restrictions of no lifting, pushing or pulling more than 20 pounds two hours per day.

On August 11, 1993 the employing establishment notified the Office that light duty within Dr. Janssen's recommended restrictions was not available for appellant. On September 1, 1994 the Office referred appellant for vocational rehabilitation.

The rehabilitation counselor administered vocational testing to appellant in February 1995 and developed a rehabilitation plan. Appellant initially wanted to return to his previous employment and indicated that the job of food inspector was now less strenuous than previously.

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[1] Appellant sustained a gunshot injury to his left shoulder in 1970 while in military service in Vietnam.

[2] Appellant filed several notices of recurrence from September 11, 1990 through March 22, 1993, alleging pain and stiffness in the left shoulder.

He sought Dr. Janssen's release and approval to return to this position[3] but in a report dated July 22, 1994, Dr. Janssen indicated that appellant had reached maximum medical improvement and recommended permanent restrictions of no lifting, pushing, or pulling more than 25 pounds and no climbing.

On July 31, 1995 the rehabilitation counselor indicated that appellant was unable to return to his prior employment because of the permanent restrictions recommended by Dr. Janssen. Appellant then indicated a desire to return to college to complete his degree in marketing and sales. In a report dated November 7, 1995, the rehabilitation counselor submitted a labor market survey dated November 7, 1995 which identified the position of sales representative as within appellant's physical restrictions and available in sufficient numbers within his commuting area. The counselor noted appellant was approved for a sales training program at Snead State College, from January 1995 through March 1998. Vocational rehabilitation reports dating from November 1995 to November 1997 indicated appellant was progressing well in his course work.

In a May 1, 1998 vocational rehabilitation closure report, the case manager indicated that appellant had complained about having problems with post-traumatic stress disorder (PTSD) and was heavily medicated, which was preventing him from continuing his rehabilitation training. The case manager indicated that the case should be closed because further vocational rehabilitation services would produce no additional benefits to appellant.

The Office requested that appellant provide medical documentation of the PTSD, which would prevent him from participating in the rehabilitation services.[4] He never produced medical evidence documenting this condition.

By letter dated December 11, 1998, the Office notified appellant that it proposed to reduce his compensation based on his capacity to earn wages as a sales representative. The Office discussed appellant's failure to provide the medical evidence documenting his mental condition which prevented him from continuing in the rehabilitation training program. The Office provided appellant 30 days within which he must "undergo the approved training program" or show good cause for not doing so. Otherwise the rehabilitation effort would be terminated and the Office would reduce appellant's compensation to reflect the probable wage-earning capacity had he completed the program. Appellant submitted a September 28, 1998 treatment note from Dr. Janssen, who stated that he would provide an updated report but did not address appellant's ability to undergo vocational rehabilitation.

By decision dated March 1, 1999, the Office reduced appellant's compensation based on his capacity to earn wages as a sales representative effective February 28, 1998.

By letter dated March 18, 1999, appellant requested reconsideration of the Office's decision. He indicated that he was experiencing a nervous disorder and hypertension in addition

[3] On January 3, 1995 appellant applied for disability retirement, which was approved on May 18, 1995.

[4] The rehabilitation counselor asked the Veteran's Administration hospital to provide a statement of disability and treatment records which document appellant's PTSD. The counselor was unable to obtain this information because of Veteran Administration department policy. However, appellant was advised to submit medical records from his treating physician documenting his treatment for PTSD.

to his left arm condition. Appellant asserted he could not maintain passing grades in his course work and that he did not refuse rehabilitation training.

By decision dated April 12, 1999, the Office denied appellant's request for review on the grounds that the evidence submitted was immaterial and not sufficient to warrant review of its prior decision. The Office noted that appellant had submitted no evidence supporting his allegations regarding PSTD or his course work.

The Board finds that the Office properly reduced appellant's compensation for his refusal to cooperate in vocational rehabilitation efforts.

Section 8113(b) of the 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 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."[5]

Section 10.519 of Title 20 of the Code of Federal Regulations, the implementing regulations of 5 U.S.C. § 8113(b), further provides in pertinent part:

> "Under to 5 U.S.C. § 8104(a), [the Office] may direct a permanently disabled employee to undergo vocational rehabilitation. To ensure that vocational rehabilitation services are available to all who might be entitled to benefit from them, an injured employee who has a loss of wage-earning capacity shall be presumed to be 'permanently disabled' for purposes of this section only, unless and until the employee proves that the disability is not permanent. 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 act as follows:
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> > [The Office] reduce the employees' future monetary compensation based on the amount which would likely have been his or her wage-earning capacity had he or she undergone vocational rehabilitation…."[6]

In this case, appellant was referred to a rehabilitation counselor on September 1, 1994 in an effort to find employment for him. The relevant medical evidence includes a medical report dated July 22, 1994, in which his treating Board-certified orthopedic surgeon, Dr. Janssen, indicated that appellant had reached maximum medical improvement and recommended permanent restriction of no lifting, pushing or pulling of greater than 25 pounds and no climbing.

[5] 5 U.S.C. § 8113(b).

[6] 5 U.S.C. § 8113(b); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment Vocational Rehabilitation Services,* Chapter 2.813 (April 1995).

He issued similar restrictions on September 28, 1998. Although appellant wanted to return to his previous employment, the employing establishment indicated that the existing position was not light duty and would not comply with the doctor's restrictions.

Subsequently, appellant attended Snead State College from January 1995 through March 1998, being trained for a position as a sales representative. However, in May 1998 appellant indicated that he was experiencing PTSD and because of his medication could not continue with the training program.

The rehabilitation counselor asked appellant to produce medical evidence to support his condition and identify how his PTSD would prevent him from continuing with his training. He provided no information.

The Office, in a letter dated December 11, 1998, notified appellant of the penalty for failing to cooperate with vocational rehabilitation and provided him 30 days within which to comply or provide a written explanation for his failure to cooperate. He did not submit any evidence showing that he could not participate in vocational rehabilitation. While the record indicates that appellant received veterans' benefits for service-connected PTSD and appellant stated that he would sign a release for medical information from the Department of Veterans Affairs, no evidence documenting the effects of his PTSD was ever received. Without such evidence, the Office properly found that appellant's refusal to continue rehabilitation was without good cause.[7] The Board thus concludes that appellant refused to cooperate in vocational rehabilitation.

The Board further finds that the Office properly refused to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

Under section 8128(a) of the Act,[8] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[9] which provides that a claimant may obtain review of the merits if her written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
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> (ii) Advances a relevant legal argument not previously considered by [the Office]; or
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> (iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."

[7] *See* 5 U.S.C. § 8113(b); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment Vocational Rehabilitation Services*, Chapter 2.813 (April 1995).

[8] 5 U.S.C. § 8128(a).

[9] 20 C.F.R. § 10.606(b) (1999).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[10]

As the only limitation on the Offices' authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgement or actions taken which are contrary to both logic and probable deductions from established facts.[11]

In this case, appellant submitted no new and relevant medical evidence with his March 18, 1999 reconsideration request. The outstanding issue of whether appellant's PTSD or any other condition made him unable to participate in vocational rehabilitation is medical in nature yet appellant asserted that he was unable to maintain passing grades. However, he provided no proof of this contention.

Additionally, appellant's March 18, 1999 request did not otherwise show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. For these reasons, the Office properly denied appellant's reconsideration request without conducting a merit review of the record.

The April 12 and March 1, 1999 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
January 2, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

[10] 20 C.F.R. § 10.608(b).

[11] *Daniel J. Perea,* 42 ECAB 214 (1990).