

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LETHER M. WRIGHT and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, East Orange, NJ

*Docket No. 99-1894; Submitted on the Record;
Issued July 9, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation by 100 percent effective February 12, 1999 on the grounds that she did not cooperate with vocational rehabilitation efforts without good cause; and (2) whether the Office abused its discretion by refusing to reopen appellant's claim for further review on the merits under 5 U.S.C. § 8128(a).

On December 18, 1996 appellant, a 32-year-old file clerk, filed a claim for benefits, alleging that her emotional stress resulted from a physical assault by her supervisor on December 13, 1996. On May 13, 1997 the Office accepted appellant's claim for post-traumatic stress disorder (PTSD). Appellant stopped working on December 16, 1996.

By letter dated June 30, 1997, the Office advised appellant that a suitable position was available within the work restrictions outlined by her treating physician. The Office warned appellant that if she refused the employment or failed to report for work when scheduled without reasonable cause then her compensation benefits would be terminated.

In a report dated July 3, 1997, Dr. Pamela Y. Williams, a specialist in psychiatry who treated appellant for emotional stress resulting from her December 13, 1996 work injury, stated:

"I have recommendations to the [employing establishment] and the [Office] that [appellant] is able to return to work part time. The part-time position should minimize contact with her former co-workers and supervisor. [Appellant] recently received a letter stating that she is offered a position of [f]ile [c]lerk located in the Health Management Section. [Appellant] reports that this is the section in which the physical altercation occurred. Although her hours were changed to minimize contact with former co-workers, she is having a great deal of anxiety about returning to this department. If possible, she should be placed into a position other than [m]edical [a]dministration. Return to the [m]edical

[a]dministration may cause unnecessary emotional distress and may precipitate panic attacks.”

Dr. Williams also submitted a March 28, 1997 psychiatric evaluation in which she related that appellant became symptomatic only when she returned to her former worksite, which would make it very difficult for her to return to her previous job. She advised that appellant wanted to return to part-time work in another area of the hospital, and believed she was capable of returning to work in a low stress environment where she would experience minimal interactions with her former supervisor and co-workers.

By letter dated July 14, 1997, appellant refused the job offer, stating that working in the same location where she sustained the assault by her former supervisor would trigger memories of the December 13, 1996 incident and cause an exacerbation of her accepted post-traumatic stress condition.

On August 7, 1997 the Office authorized appellant’s referral for vocational rehabilitation.

In a vocational rehabilitation report received by the Office on February 5, 1999, a vocational rehabilitation specialist stated:

“This file was reopened to continue the recommended case management goals of plan development. [Appellant] had originally been requested to participate in a vocational training plan, but had indicated continued medical [and] psychiatric concerns which prohibited her from going out of her home. I contacted [appellant] and [her treating hospital]. I found that [appellant] was noncompliant with psychiatric care and had actually terminated ... her own treatment. The worker agreed to participate in plan development; yet [she claimed she suffered from] ... agoraphobia and [was unable] to go out of her home or [travel to attend] an interview unless accompanied by someone. She had no medical documentation to back up her self[-]diagnosis and statements. I advised her of being noncooperative with the plan development phase and advised her [to submit new medical evidence]. I also completed an OWCP Action Report documenting the lack of compliance with plan development.

“I have maintained contact with [appellant] over the past few months by telephone and reviewed with her the current medical status and her statements about her ability to return to work or participate in a training program. [Appellant] has indicated ongoing psychiatric issues which have not been documented as viable. She has refused to participate in training or return to work goals stating agoraphobic reactions and continued fear of going out of her home. She has no ongoing treatment and was advised by [the Office] to document if there [was] a change in her medical status.

“[Appellant] stated ongoing medical issues which preclude her from participating in plan development. She remains noncompliant as there is no evidence of the above. Her statement about needing someone to travel with her at all times and

fears of going outside hinder the likely success of any educational, training or work goals plan at this time.”

On January 11, 1999 the Office advised appellant that it proposed to reduce her compensation for wage loss to zero pursuant to section 8113(b),¹ because she had failed to participate in the vocational rehabilitation program² and there was no objective medical evidence that she was unable to participate in such a program. Appellant was advised that, if she failed or refused to participate in vocational rehabilitation without good cause, her compensation benefits would be reduced to zero. The Office informed appellant that she had 30 days to provide good cause or submit additional medical evidence. Appellant did not respond within 30 days.

By decision dated February 12, 1999, the Office reduced appellant’s wage-loss compensation benefits to zero on the grounds that she refused to participate in vocational rehabilitation without good cause.

By letter dated April 7, 1999, appellant requested reconsideration. Appellant submitted a March 18, 1999 report from Dr. Sanjay Varma, her current treating psychiatrist, who restated the diagnosis of PTSD and opined that appellant had adjustment disorder with mixed anxiety and depressed mood. Dr. Varma, however, ruled out agoraphobia without history of panic disorder as well as delusional disorder, unspecified type. He recommended that appellant reenter the vocational rehabilitation program for appropriate job placement and reiterated Dr. Williams’ recommendation to avoid working in her former division and interacting with her former supervisor.

Appellant also submitted a letter, received by the Office on March 15, 1999, in which she claimed to have cooperated with the vocational counselor, but was unable to attend training sessions because she needed to have someone accompany her when she commuted to these sessions and was unable to do so.

By decision dated April 13, 1999, the Office denied appellant’s application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

The Board finds that the Office properly reduced appellant’s compensation by 100 percent effective February 11, 1999.

Section 8113(b) of the Federal Employees’ Compensation Act provides:

“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

¹ 5 U.S.C. § 8113(b).

² The Office indicated that it had been advised by the vocational counselor that appellant had refused to cooperate with rehabilitation efforts. Although the vocational counselor’s report was not received by the Office until February 5, 1999, a date subsequent to the proposed notice of termination, the vocational counselor included in his report a program summary which indicated that he contacted the Office regarding appellant’s progress on December 21, 1998 and January 5, 1999.

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 10.519 of Title 20 of the Code of Federal Regulations further provides:

“Under 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 act as follows:

(b) Where a suitable job has not been identified, because the failure or refusal occurred in the early but necessary stages of a vocational rehabilitation effort (that is, meetings with the [Office] nurse, interviews, testing, counseling, functional capacity evaluations and work evaluations), [the Office] cannot determine what would have been the employee’s wage-earning capacity.

(c) Under the circumstances identified in paragraph (b) of this section, in the absence of evidence to the contrary, [the Office] will assume 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 (that is, to zero). This reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of [the Office].”³

In this case, appellant verbally agreed to cooperate with the vocational counselor, but never acted in accordance with her stated willingness to undergo vocational testing. Thus, appellant effectively refused to participate.

The Board has previously recognized that medical inability to participate in vocational rehabilitation, if properly substantiated, may constitute good cause for failure to participate in vocational rehabilitation.⁴ Appellant alleged that she was agoraphobic and could not participate in vocational rehabilitation efforts because she was unable to venture out in public without having someone accompany her. However, Dr. Williams, appellant’s former psychiatrist, indicated that appellant could work part time as long as she was placed in a low-stress environment where she would have minimal contact with her former supervisor and co-workers. Dr. Williams did not diagnose agoraphobia. In addition, Dr. Varma, appellant’s current treating psychiatrist, explicitly ruled out a diagnosis of agoraphobia without a history of panic disorder,

³ 20 C.F.R. § 10.519(b), (c).

⁴ *Carolyn M. Leek*, 47 ECAB 374 (1996); *Linda M. McCormick*, 44 ECAB 958 (1993).

and recommended only that appellant avoid working in her former workplace division and interacting with her former supervisor.

The Office advised appellant in its January 11, 1999 letter that she had failed to participate in the early stages of vocational rehabilitation efforts; that she had not established that her medical condition justified such failure; that she had 30 days to participate in such efforts or provide good cause for not doing so; and that her compensation would be reduced to 0 if she did not comply within 30 days with the instructions contained in the letter. Appellant did not, however, participate in vocational rehabilitation efforts or provide good cause for not doing so within 30 days of the Office's January 11, 1999 letter.

Appellant's failure without good cause to participate in preliminary vocational meetings and testing constitutes a failure to participate in the "early but necessary stages of a vocational rehabilitation effort."⁵ Office regulations provide that, in such a case, 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.⁶ Appellant did not submit sufficient evidence to refute such an assumption. Thus, the Office had a proper basis to reduce her disability compensation to zero effective February 12, 1999.⁷

The Board finds that the Office acted within its discretion by refusing to reopen appellant's case for further review.

Under section 10.607, a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.⁸ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁹

In this case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law, she has not advanced a relevant legal argument not previously considered by the Office, and she has not submitted relevant and pertinent evidence not previously considered by the Office. Dr. Varma's March 18, 1999 report was repetitious of evidence which had already been reviewed by the Office in previous decisions. All the other medical evidence submitted by appellant was previously of record and considered by the Office in reaching prior

⁵ See 20 C.F.R. § 10.519(b).

⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.5 (December 1993).

⁷ See *William F. McMahon*, 47 ECAB 526 (1996).

⁸ 20 C.F.R. § 10.607(b)(1). See generally 5 U.S.C. § 8128(a).

⁹ *Howard A. Williams*, 45 ECAB 853 (1994).

decisions. Additionally, appellant's letter failed to show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law nor fact not previously considered by the Office. Although appellant generally contended that she did not fail to cooperate with vocational rehabilitation efforts, she failed to submit new and relevant medical evidence in support of this contention.

Appellant contended that she was willing to participate in vocational rehabilitation efforts but was unable to attend the training sessions proposed by the vocational counselor because she needed someone to accompany her while commuting to these sessions. However, Dr. Varma stated in his March 18, 1999 report that appellant did not suffer from agoraphobia, and reiterated Dr. Williams' opinion that she could perform part-time work as long as she did not return to her former division and interact with her former supervisor. Therefore, the Office acted within its discretion in refusing to reopen appellant's claim for a review on the merits.

The decisions of the Office of Workers' Compensation Programs dated February 12 and April 13, 1999 are hereby affirmed.

Dated, Washington, DC
July 9, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member