U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL G. WILLIS and DEPARTMENT OF THE NAVY, NAVAL SEA SYSTEMS COMMAND, Arlington, VA

Docket No. 00-1422; Submitted on the Record;
Issued October 29, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation by 100 percent effective April 30, 1998 on the grounds that he 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 May 1, 1995 appellant, a 32-year-old warehouseman, was struck in the head and left shoulder by a box of paper. He filed a claim for compensation, which the Office accepted on July 26, 1995 for contusion of the neck and cervical strain. The Office subsequently expanded its acceptance to include disc herniation at C6-7 and surgery on September 6, 1995 for cervical fusion and refashion. The Office paid appellant compensation for temporary total disability and placed appellant on the periodic rolls. He has not returned to work since his injury.

In a report dated March 24, 1997, Dr. Neil Kahanovitz, a Board-certified orthopedic surgeon and appellant's treating physician, stated that appellant should be a candidate for a work hardening program but if he failed to participate, he should still be able to return to work for eight hours a day, with restrictions on lifting more than 10 pounds. Dr. Kahanovitz advised that if appellant were to pursue the work hardening program, he had significant potential to increase his functional capacity.

On April 1, 1997 the Office authorized appellant's referral for vocational rehabilitation.

By letter dated September 11, 1997, the employing establishment informed appellant that it was considering his removal from his position of warehouseman due to his failure to follow instructions resulting in his ineligibility for employment. The employing establishment stated that Dr. Kahanovitz had advised the Office that appellant could return to work at a sedentary to light-duty level and that his vocational counselor had agreed that he could return to work and had approved a light-duty position. The employing establishment noted that appellant had

indicated his willingness to follow instructions and return to work, but stated that his physical restrictions had limited his opportunity to complete the security package in a timely manner. Appellant completed the package, which was forwarded to the employing establishment. The employing establishment indicated that once appellant's security clearance was favorably adjudicated, he would be assigned as a supply technician.

By letter dated September 25, 1997, the Office advised appellant that he had impeded vocational rehabilitation efforts by not having completed the top secret security clearance application form for reemployment. The Office advised appellant that he would be given 30 days to make a good faith effort to participate in vocational rehabilitation efforts, or it would reduce his compensation to zero pursuant to section 8113(b).[1]

In a letter received by the Office on September 25, 1997, appellant informed the Office that he had attempted to obtain authorization to change physicians, but that his efforts to telephone the Office and request the change had been unsuccessful. He stated that he continued to experience serious problems with his neck, back and arm and was trying to regain the ability to manage his pain. Appellant indicated that he was fully cooperating with the Office and the physicians who had treated him. Accompanying the letter was a September 16, 1997 disability certificate from Dr. Daniel W. Robinson, a chiropractor, who checked a box indicating that appellant was totally disabled because he had two ruptured cervical discs.

In a memorandum dated January 21, 1998, the employing establishment noted that vocational rehabilitation efforts had been resumed.

In a vocational rehabilitation report to the Office dated February 5, 1998, a vocational rehabilitation specialist stated:

> "[Appellant] has failed to cooperate with [the Office] efforts to return to alternative [reemployment] with [the employing establishment]. Since opening [his] case file for the second time on [January 16, 1998], I spoke with appellant on [January 16, 1998]. We agreed to meet on [January 20, 1998], the location to be determined on [January 19, 1998], by telephone. I subsequently attempted to contact [appellant] on [January 19, 1998] by telephone, to no avail. I [tele]phoned [appellant's] pager number on ten ... different occasions with no return call from [him]. I have also forwarded [appellant] the attached correspondence requesting that he contact me."

The vocational counselor further noted that he had attempted to contact appellant on 11 additional occasions, but that he had failed to return any of his messages.

On February 23, 1998 the Office advised appellant that it proposed to reduce his compensation for wage loss to zero pursuant to section 8113(b),[2] because he had failed to participate in the vocational rehabilitation program. Appellant was advised that, if he failed or

[1] 5 U.S.C. § 8113(b)

[2] 5 U.S.C. § 8113(b).

refused to participate in vocational rehabilitation without good cause, his compensation benefits would be reduced to zero. The Office informed appellant that he had 30 days to provide good cause or submit additional medical evidence. He did not respond within 30 days.

An April 29, 1998 Office memorandum indicates that the Office telephoned appellant on April 29, 1998 and left a message on his voice mail, indicating the reason for the call. Appellant did not return the Office telephone call.

By decision dated May 15, 1998,[3] the Office reduced appellant's wage-loss compensation benefits to zero on the grounds that he refused to participate in vocational rehabilitation without good cause.

By letter dated May 29, 1998, appellant requested an oral hearing, which was held on December 8, 1998. In addition, he indicated his new address and asserted that he never received the February 23, 1998 letter from the Office containing the proposed reduction of benefits. Appellant stated that he had sent several certified letters to the Office indicating his new address, but that his compensation had been reduced to zero without notice because the proposed reduction letter had been sent to his former address.

In a letter received by the Office on June 17, 1998, appellant formally informed the Office that he had a new address.

In a report dated November 12, 1998, Dr. Robinson indicated that appellant had a cervical subluxation at C5, that his condition was related to his work-related injury and that the severity of his condition restricted him from performing his duties at work.

In a report dated December 18, 1998, Dr. Michael A. Proctor, a specialist in orthopedic surgery, stated findings on examination and reiterated the previous diagnosis of post C6-7 cervical fusion, with degenerative disc disease of the cervical spine and chronic cervical myofascial strain with upper extremity radiculopathy. Dr. Proctor advised that the pain appellant was experiencing was probably due to the C5-6 degeneration and that he remained temporarily totally disabled. He also submitted January 7 and February 2, 1999 progress reports pertaining to appellant's cervical condition.

By decision dated March 15, 1999, an Office hearing representative affirmed the previous decision.

By letter dated September 13, 1999, appellant requested reconsideration. He reiterated his previous contention that he sent correspondence to the Office indicating his home address had changed, but that the Office failed to take notice of this change. Appellant also submitted additional progress reports from Dr. Proctor.

By decision dated November 16, 1999, the Office denied appellant's claim, finding that he did not submit evidence sufficient to warrant modification of the March 15, 1999 decision.

[3] The Office indicated that the date of the original decision, April 30, 1998, had been changed because the Office became aware that appellant had changed his address, after having a letter returned in the mail.

By letter received by the Office on January 4, 2000, appellant requested reconsideration. Accompanying the request was a December 28, 1999 report from Dr. Proctor, who essentially reiterated his previous findings and conclusions.

By decision dated January 12, 2000, 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 April 30, 1998.

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 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 10.519 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, O[ffice] 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 OWCP nurse, interviews, testing, counseling, functional capacity evaluations and work evaluations), OWCP 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]."[4]

[4] 20 C.F.R. § 10.519(b), (c).

In this case, appellant verbally agreed to cooperate with the vocational counselor, but never acted in accordance with his stated willingness to undergo vocational testing. He asserted that the Office failed to afford him proper notice of the proposed reduction of compensation because the Office failed to acknowledge his change of address. It was appellant's duty, however, to inform the Office of his change of address and he has submitted no evidence to support his contention that the Office was made aware of the change prior to the May 15, 1998 reduction of compensation. In addition, the record contains evidence that appellant failed to respond to the vocational counselor's efforts to schedule an initial evaluation, thereby indicating his unwillingness to cooperate. The February 5, 1998 letter from the vocational counselor indicates that, although appellant initially agreed to report for a complete vocational evaluation, he failed to return numerous telephone messages from the vocational rehabilitation counselor. Appellant thus had ample opportunity to either schedule vocational rehabilitation training or to formally inform the Office that he had changed his address prior to the February 5, 1998 letter proposing a reduction of his compensation, as well as the May 15, 1998 Office decision, which finalized the reduction. Thus, appellant effectively refused to participate in vocational testing with the vocational counselor.

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.[5] However, the reports from Drs. Robinson and Proctor do not constitute sufficient medical evidence that appellant was medically unable to participate in vocational rehabilitation. These reports contain findings on examination regarding appellant's chronic cervical condition and indicate that he is totally disabled, but do not contain a probative, rationalized opinion establishing that his work-related cervical condition prohibited him from engaging in vocational rehabilitation. Appellant's treating physician, Dr. Kahanovitz, indicated in his March 24, 1997 report that appellant was capable of light duty and released him to begin vocational rehabilitation. Although he initially indicated his willingness to participate, appellant subsequently failed to cooperate with the vocational rehabilitation counselor.

The Office advised appellant in its February 23, 1998 letter that he had failed to participate in the early stages of vocational rehabilitation efforts; that he had 30 days to participate in such efforts or provide good cause for not doing so; and that his compensation would be reduced to zero if he 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 February 23, 1998 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."[6] 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

[5] *Carolyn M. Leek*, 47 ECAB 3745 (1996); *Linda M. McCormick*, 44 ECAB 958 (1993).

[6] *See* 20 C.F.R. § 10.519(b).

capacity.[7] Appellant did not submit sufficient evidence to refute such an assumption. Thus, the Office had a proper basis to reduce his disability compensation to zero effective April 30, 1998.[8]

The Board finds that the Office acted within its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 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.[9]

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.[10]

In this case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law; he has not advanced a relevant legal argument not previously considered by the Office; and he has not submitted relevant and pertinent evidence not previously considered by the Office. Dr. Proctor'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 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 or fact not previously considered by the Office. Although appellant generally contended that he did not fail to cooperate with vocational rehabilitation efforts, he failed to submit new and relevant medical evidence in support of this contention. Therefore, the Office acted within its discretion in refusing to reopen appellant's claim for a review on the merits.

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

[8] *See William F. McMahon*, 47 ECAB 526 (1996).

[9] 20 C.F.R. § 10.607(b)(1). *See generally* 5 U.S.C. § 8128(a).

[10] *Howard A. Williams*, 45 ECAB 853 (1994).

The decisions of the Office of Workers' Compensation Programs dated January 12, 2000, November 16 and March 15, 1999 are hereby affirmed.

Dated, Washington, DC
October 29, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member