

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH A. AMO and DEPARTMENT OF THE NAVY,
PUGET SOUND NAVAL SHIPYARD, Bremerton, WA

*Docket No. 01-527; Submitted on the Record;
Issued October 11, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had no loss of wage-earning capacity based on his failure to continue participation in vocational rehabilitation.

The Office accepted that appellant sustained a lumbar sprain, and aggravation of a herniated nucleus pulposus, in the performance of duty on September 11, 1998. On November 23, 1998 the employing establishment offered appellant a light-duty job as a toolroom laborer. On March 25, 1999 appellant indicated that he would accept the position, and appellant returned to work.

In a decision dated March 31, 1999, the Office determined that appellant had failed to cooperate with vocational rehabilitation by not maintaining contact with the Office field nurse assigned to the case. The Office stated that it was reducing his compensation to zero under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519. By decision dated December 1, 1999, an Office hearing representative affirmed the prior decision.

The Board finds that the Office did not properly determine appellant's wage-earning capacity should be calculated pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.

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 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.”

20 C.F.R. § 10.519 provides in pertinent part:

“If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue to participate in a vocational rehabilitation effort when so directed, [the Office] will act as follows:

“(a) Where a suitable job has been identified, [the Office] will reduce the employee’s 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. [The Office] will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with the [Office] nurse and the employer. The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of [the Office].”

In the present case the record indicates that, on December 9, 1998, the Office determined that intervention of a field nurse would facilitate appellant’s return to work. The field nurse opened the case on December 14, 1998 and submitted an initial report on December 31, 1998, indicating that she had met with appellant on December 30, 1998. Following further development of the evidence, the Office issued a letter dated February 3, 1999, advising appellant that the offered light-duty position was considered suitable work.

In a letter dated February 25, 1999, the Office noted that the field nurse had attempted to contact appellant several times by telephone, without success. Appellant was advised to contact the Office within 30 days to make a good faith effort to participate in the nurse’s “efforts to return you to gainful employment.” In a letter dated March 22, 1999, received by the Office on March 26, 1999, appellant’s representative stated that appellant accepted the job offer and would report to work as instructed by the employing establishment. On March 29, 1999 the Office received a note dated March 25, 1999 from appellant that he accepted the job as a toolroom laborer. In its March 31, 1999 decision, the Office indicated that appellant had returned to work on March 24, 1999.

Under these circumstances, the Board finds that the Office cannot invoke 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519(a). The referral to the field nurse was an attempt to facilitate appellant’s return to work at the employing establishment. When the Office receives evidence from appellant that he was accepting the offered position, that is clear evidence of an intent to cooperate with the goals of vocational rehabilitation. Appellant indicated his intent to accept the position, and this indicates his intent to cooperate with vocational rehabilitation. His acceptance of the position is inconsistent with a finding that he is not continuing to participate in vocational rehabilitation.

Moreover, application of sections 8113(b) and 10.519(a) is inconsistent with appellant’s actual return to work at the offered position in this case. Section 10.519(a) provides that compensation is based on “the amount which would likely have been his or her wage-earning capacity had he or she undergone vocational rehabilitation.” The underlying assumption is that the employee currently has some loss of wage-earning capacity and is not working at the identified suitable job; therefore it must be determined what “would likely” have been his wage-

earning capacity had the job been taken. In this case appellant was earning the wages of his date-of-injury job in the full-time position of toolroom laborer, the position identified as suitable by the Office, at the time of the March 31, 1999 decision. The language of section 10.519(a) indicates that it was not intended to be invoked in such a case. The Board accordingly finds that the wage-earning capacity determination under sections 8113(b) and 10.519(a) was not appropriate under the circumstances of this case.

The decision of the Office of Workers' Compensation Programs dated December 1, 1999 is reversed.

Dated, Washington, DC
October 11, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member