U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY ANN J. AANENSON and U.S. DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Oakland, CA

Docket No. 01-789; Submitted on the Record;
Issued August 23, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation under 5 U.S.C. § 8113(b) to reflect her loss of wage-earning capacity had she continued to participate in vocational rehabilitation.

On July 21, 1995 appellant, then a 52-year-old revenue agent, filed a claim alleging that she suffered from post-traumatic stress disorder due to the fact that on June 19, 1995 she was accosted by another employee in the restroom. The Office accepted appellant's claim for adjustment disorder and paid appropriate benefits. She stopped work on June 20, 1995 and did not return.

Appellant submitted several reports from Dr. Jonathan Tepper, a Board-certified psychiatrist, dated October 2, 1995 to February 21, 1996. His attending physician's report dated October 2, 1995 noted a history of appellant's injury and diagnosed her with adjustment disorder and a preexisting secondary mood disorder. Dr. Tepper noted that appellant's condition was caused by the assault on June 19, 1995. He indicated that she could return to work on January 8, 1996 for 20 hours a week with no contact with the individual who assaulted her.

In a letter dated March 26, 1996, the employing establishment requested that Dr. Tepper review a position description for a revenue agent and determine appellant's suitability for return to work on April 15, 1996. The employing establishment noted that flexiplace was available to accommodate appellant in her transition back to the workplace. In a letter dated April 12, 1996, Dr. Tepper noted that appellant was unable to return to work until September 3, 1996.

Thereafter, appellant submitted reports from Dr. William Seefeldt, a psychologist dated May 1, 1996 to May 21, 1997; and Dr. Tepper dated August 27, 1996. In his report dated May 1, 1996, Dr. Seefeldt noted a history of appellant's injury and diagnosed her with adjustment disorder with mixed anxiety and depressed mood; post-traumatic stress disorder; and mood disorder. He noted that the behavior of her supervisors and organization led to additional trauma and exacerbated her anxiety and caused her recovery time to be delayed. Dr. Seefeldt noted that

he would not recommend participation in vocational rehabilitation or return to work until she could return to a safe and secure work environment. In his September 4, 1996 report, he noted that appellant was unable to participate in any type of rehabilitation program or return to work. Dr. Seefeldt noted that appellant's medical disability was extended to January 6, 1997. His work restriction evaluation dated May 8, 1997 noted that appellant could not work eight hours a day. Dr. Seefeldt indicated that appellant would need vocational rehabilitation and also should be evaluated for cognitive functioning prior to returning to work.

On June 21, 1997 the Office referred appellant for vocational rehabilitation. In a report dated July 16, 1997, the counselor noted that a vocational assessment was required to proceed with rehabilitation.

On August 8, 1997 a vocational assessment report was submitted which revealed appellant's strengths in reasoning, judgment, ingenuity, mathematics, recordkeeping and critical thinking. The vocational rehabilitation counselor noted weakness in memory. Appellant demonstrated potential success in areas related to her former line of work. The vocational rehabilitation counselor recommended that appellant return to work on a part-time basis and gradually increase her hours.

Thereafter, in the course of developing the claim, the Office referred appellant to several second opinion physicians.

Appellant submitted a report from Dr. Seefeldt, dated March 2, 1998, noting his recommendation for a specialized weight-loss program indicating that appellant's weight gain was due to her work-related disability and depression.

On June 22, 1998 the Office referred appellant for a second opinion to Dr. Robert Allen, a psychologist. In his report dated August 3, 1998, Dr. Allen indicated that appellant performed normal to above average in most areas of functioning and intellectual ability. Dr. Allen noted that, due to fear and uncertainty, appellant's return to the employment establishment may not be the best choice. He noted weaknesses in learning abstract new information, verbal memory and sustained concentration; however, there was no implication of brain damage. Dr. Allen indicated that appellant would be able to return to a job in her field and recommended a vocational rehabilitation program with a tenure of six to eight months.

A rehabilitation counselor performed vocational testing on appellant and developed a rehabilitation plan on November 25, 1998. In the rehabilitation plan, the counselor proposed computer classes starting January 4, 1999 and concluding February 23, 1999; a one-day tax seminar update; and an internship for 2 to 3 months; and then a 90-day job search. The counselor indicated that appellant would be employable as a tax accountant and tax specialist. The counselor also indicated that Dr. Seefeldt supported appellant participating in an internship program prior to entering the job market. Additionally, appellant's employing establishment showed interest in pursuing a suitable job offer with appellant.

In a letter dated December 26, 1998, appellant requested that any future contact with herself or her doctors be in writing. She believed the vocational counselors to be unprofessional and indicated that her requested diet plan was unjustly refused by the Office. Appellant, in a

letter dated January 1, 1999, indicated interest in pursuing a rehabilitation program; however, she noted that she was not available until February 1999 because her husband would be on leave through January. She indicated that she found the November 25, 1998 rehabilitation plan lacking and showed no interest in the internship program because it would be meaningless and would not utilize her talents.

In a letter dated January 12, 1999, the Office approved the vocational rehabilitation-training plan for appellant.

In a report dated January 27, 1999, the rehabilitation counselor noted that appellant did not take the tax seminar scheduled in December 1998 nor did she begin the computer classes in January 1999. Appellant rescheduled her courses to begin February 1999 extending her rehabilitation by two weeks. The counselor further noted that appellant would not verbally communicate with her and required all communication be in writing. In a letter to appellant dated February 5, 1999, the counselor notified her that after she completed one month of training the counselor would develop an internship program for her. The counselor further requested confirmation as to whether appellant ever attended a scheduled tax update seminar.

Thereafter, appellant submitted a report from Dr. Tepper dated March 9, 1999. He recommended that appellant attend the specialized dieting program HRM. Dr. Tepper further noted that appellant had been given only two months for rehabilitation which was contrary to the recommendation of her psychologist, Dr. Seefeldt and second opinion physician, Dr. Allen. Dr. Tepper noted that the material taught in the computer classes was covered too quickly for appellant and noted that she benefited from repeating classes. He noted that appellant should be given as much time as needed for rehabilitation before entering the workforce.

On March 12, 1999 the employment establishment offered appellant a temporary, part-time position, four hours a day, five days a week, as an internal revenue agent. The employing establishment noted that training would be provided and after six months, appellant could choose to remain a part-time permanent employee or revert to a full-time permanent position. She had 15 days within which to accept the job offer.

In a letter dated April 7, 1999, the Office responded to Dr. Tepper's letter noting that appellant was referred for rehabilitation services in June 1997, but no progress was made until November 1998 due to appellant's resistance to return to work activity. The Office noted that a rehabilitation plan was developed in accordance with Dr. Allen's recommendations for a six- to eight-month period of training and transition. The plan was to start in December 1998 and conclude in October 1999; the computer classes would take two and a half months; followed by an internship for three months; a job search of 90 days; and concluding with monitoring for two months to assure appellant's assimilation into the workforce. The Office further noted that appellant impeded her program with her refusal to communicate with her counselors directly and her refusal to return telephone calls or letters.

Dr. Seefeldt submitted a report dated March 26, 1999 noting that appellant was still in the rehabilitative process and was not able to return to work at this time. He noted that appellant was taking computer classes and due to her memory and cognitive problems had to retake several of the courses. Dr. Seefeldt further noted that appellant was permanently unable to return

to employment at the employing establishment due to her medical condition. He diagnosed appellant with post-traumatic stress disorder and chronic adjustment disorder with mixed anxiety and depressed mood.

By letter dated April 20, 1999, the Office notified appellant that it proposed to reduce her compensation based on her capacity to earn wages as a tax accountant. The Office noted that appellant's noncooperation in vocational rehabilitation and provided appellant 30 days within which she must "undergo the approved training program" or "show good cause for not undergoing the training program" or the rehabilitation effort would be terminated and action would be initiated to reduce appellant's compensation to reflect the probable wage-earning capacity had she completed the training program.

In a letter dated May 11, 1999, Dr. Seefeldt withdrew appellant from vocational rehabilitation. He noted that she did not have the alertness or capacity to absorb the material and, therefore, he felt it necessary to cancel her rehabilitation for a period of 60 days from May 11 to July 9, 1999.

On May 24, 1999 the vocational rehabilitation counselor indicated that appellant declined the position offered on March 12, 1999 with the employing establishment and that appellant refused to meet with her independently.

In a June 9, 1999 letter, appellant's attorney indicated that during the vocational testing in August 1997 appellant's memory failed her. He further stated that appellant perceived that the rehabilitation counselor threatened her and noted that Dr. Seefeldt did not approve the rehabilitation plan because he believed the course work was too condensed for appellant.

In an August 23, 1999 report, the vocational rehabilitation counselor indicated that rehabilitation services continued to be interrupted. The counselor noted that appellant was withdrawn from the rehabilitation program by Dr. Seefeldt in May 1999 and that appellant had not participated in the plan since April 1999. The progress reports from the computer school indicated that appellant was an above average student.

By decision dated January 3, 2000, the Office reduced appellant's compensation pursuant to section 8113(b) of the Federal Employees' Compensation Act based on her capacity to earn wages as a tax accountant effective December 15, 1999. The Office noted that appellant impeded the rehabilitation effort without good cause. The Office further advised appellant that it would reduce her compensation for wage loss because the evidence established that the constructed position of tax accountant represented her wage-earning capacity.

By letter dated January 12, 2000, appellant requested a hearing before an Office hearing representative. The hearing was held on June 22, 2000. Appellant indicated that she was not able to work as a tax accountant because of her memory problems and her severe stress problems. Dr. Seefeldt testified that appellant was totally disabled and could not return to her position with the employing establishment. He further testified that appellant could not perform any work functions at home nor did she have ability to undergo vocational rehabilitation. Dr. Seefeldt noted that appellant was still suffering from the original injuries and secondary injuries she sustained from dealing with the Office and the employing establishment. He

indicated that appellant experienced secondary injury resulting from the Office's disbelief in her reported anxiety and their judgment she was impeding her rehabilitation. Dr. Seefeldt noted that appellant was unable to carry out the rehabilitation training because the pace was too quick for her and this pace would be far beneath that what would be expected of her in the work environment. He also submitted a report noting that appellant feared her return to the employing establishment because there were no significant changes in their policies regarding employee safety and security.

By decision dated October 11, 2000, finalized October 30, 2000, the hearing representative affirmed the Office's decision dated January 3, 2000.

The Board finds that the Office improperly reduced appellant's compensation to reflect a loss of wage-earning capacity for her failure 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."[1]

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 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."[2]

A review of the record indicates that appellant was referred for rehabilitative services in June 1997 but no progress was made until November 1998. On August 8, 1997 a vocational

[1] 5 U.S.C. § 8113(b).

[2] 20 C.F.R. § 519. *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment Vocational Rehabilitation Services*, Chapter 2.813.11 (November 1996).

assessment report demonstrated potential success in areas related to her former line of work. The evaluator recommended that appellant return to work on a part-time basis and gradually increase her hours. The second opinion referral physician, Dr. Allen, in his report dated August 3, 1998, indicated that appellant would be able to return to a job in her field and recommended a vocational rehabilitation program with a tenure of six to eight months. The Office noted that a rehabilitation plan was developed on November 25, 1998 in accordance with Dr. Allen's recommendations for a six- to eight-month period of training and transition. The plan was to start in December 1998 and conclude in October 1999; the computer classes would take two and one-half months; followed by an internship for three months; a job search of 90 days; and concluding with monitoring for two months to assure appellant's assimilation into the workforce.

Although the Office attempted to accommodate appellant with vocational rehabilitation, the Office did so in direct contradiction to the orders of Dr. Seefeldt. The record reflected that on March 26, 1999 Dr. Seefeldt noted that appellant was still in the rehabilitative process and was not able to return to work at this time. He noted that appellant was taking computer classes and due to her memory and cognitive problems had to retake several of the courses. Dr. Seefeldt further noted that appellant was permanently unable to return to employment at the employing establishment due to her medical condition. Thereafter, the Office proposed to reduce appellant's compensation noting her noncooperation with vocational rehabilitation; however, appellant's noncooperation was due to Dr. Seefeldt's recommendations that appellant was unable to return to work. Thereafter, on May 11, 1999, Dr. Seefeldt withdrew appellant from vocational rehabilitation. He noted that appellant did not have the alertness or capacity to absorb the material and, therefore, he felt it necessary to cancel her rehabilitation for a period of 60 days from May 11 to July 9, 1999. The Board finds that appellant's failure to cooperate with vocational rehabilitation was due to Dr. Seefeldt's recommendation that she not do so. The record indicates that appellant was enrolled in a training program which would lead to a tax accountant position. However, she did not continue participation in this training on the recommendation of Dr. Seefeldt who determined that appellant was totally disabled due to her adjustment disorder and secondary wounding. This evidence supports that appellant's failure to continue the training program was with "good cause."[3]

Accordingly, the Board finds that the Office did not properly reduce appellant's compensation under 5 U.S.C. § 8113(b) to reflect a loss of wage-earning capacity for failure to cooperate with vocational rehabilitation.

[3] *See Patrick A. Santucci*, 40 ECAB 151 (1988).

The October 30, 2000 decision of the Office of Workers' Compensation Programs decision is reversed.

Dated, Washington, DC
August 23, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member