U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEFFREY RILEY and The DEPARTMENT OF THE ARMY
ARMY CORP OF ENGINEERS, Jacksonville, FL

Docket No. 02-976; Submitted on the Record;
Issued August 27, 2002

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective August 5, 2001, due to his failure, without good cause, to cooperate with rehabilitation efforts; and (2) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

On June 5, 1996 appellant, a hydrological technician for the employing establishment, submitted a notice of occupational illness and claim for compensation, alleging that he was repeatedly exposed to contaminated water.

On February 3, 1996 appellant, was terminated because he was physically unable to perform his job.

On October 7, 1996 the Office denied the claim and later denied three additional reconsideration requests dated August 14 and December 3, 1997 and March 8, 1998.

In a November 19, 1999 decision, the Board reversed the Office's prior decisions.[1] Appellant received appropriate compensation his disability after the Office accepted the claim for streptococcal septicemia and aggravation of dermatitis herpetiforms.

In an April 17, 2001 letter, appellant's treating physician, Dr. Brent Schillinger wrote that appellant's condition, though permanent, was mostly under control, that he would have occasional flare-ups but those were controlled through medication. He recommended vocational rehabilitation services.

In an April 12, 2001 letter, a vocational rehabilitation specialist wrote appellant to notify him that services were available. Appellant did not respond.

[1] Docket 98-1039.

In an April 24, 2001 letter, the Office assigned a vocational rehabilitation specialist to appellant. The rehabilitation specialist was unsuccessful in his attempts to reach appellant via letters and telephone calls.

In a May 22, 2001 letter, Dr. Schillinger wrote that "Due to the severity of his medical condition [appellant] can no longer perform the duties of his former position and indicates [that] [appellant] is unable to work in his trained occupation or any related job at the present time due to [appellant's] psychological and physical factors."

In a June 1, 2001 letter, the Office notified appellant of the penalties for failing to participate in vocational rehabilitation, that his refusal without good cause to participate in the essential preparatory efforts, such as interviews, testing, counseling, guidance and work evaluations, may subject him to the penalties. Appellant was given 30 days to either contact his vocational rehabilitation specialist or submit his reasons for not doing so along with supporting evidence.

In a June 22, 2001 letter, appellant requested that the Office approve his college education in geographic information systems as his vocational rehabilitation. In support of his request appellant submitted his acceptance letter, from Florida Atlantic University, tuition bills and housing information.

In a July 2, 2001 letter, the rehabilitation specialist wrote appellant requesting they work together on his rehabilitation plan including identifying jobs, goals and compatible vocational and educational capabilities.

Appellant did not respond.

In a July 31, 2001 letter, the Office notified appellant that pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 that effective August 5, 2001, his wage-loss compensation was reduced to zero, for failure to participate in the preparatory efforts of vocational testing. Appellant was further told the reduction would continue until he either made a good faith effort to undergo the testing or show good cause why he could not participate.

In an August 30, 2001 letter, appellant requested a hearing.

In support of his request appellant submitted an August 29, 2001 letter, from Professor Ronald R. Schultz, Chairman of the Florida Atlantic University College of Science and Department of Geography and Geology. Professor Schultz wrote:

> "[Appellant] asked me to write a letter stating that he is a student in a degree program and that this program can lead to employment. I do here so affirm the previous statement. In particular our geography program stresses the latest computational and visualization advances in geographic information systems (GIS) and remote sensing/digital image analysis. Our students are in demand. [Appellant] is beginning this upper division program and based on his attitude and previous academic track record I would expect him to excel."

In a January 2, 2001 decision, the hearing representative affirmed the Office's July 31, 2001 decision, finding appellant refused to even meet with the rehabilitation counselor.

In an October 15, 2001 letter, appellant requested reconsideration.

In support of his request, appellant submitted a March 12, 2002 letter, from Dr. Schillinger. In his report Dr. Schillinger stated:

> "[Appellant] was seen in my office today. His dermatitis is inflamed and represents a recurrent condition of his occupational disease. Ideal conditions for [appellant's] improvement will require control with prescription medication … periodic medical evaluation and blood-work as Medically Necessary (emphasis in the original). During acute flares [appellant] requires an increase in medication dosage, which in his case sometimes results in undesirable side effects *i.e.*, blurred or abnormal vision, sore throat and swollen glands and severe headaches."

At this time, due to the severity of his medical condition he can no longer keep pace in his vocational rehabilitation program. It is requested that he be allowed additional time in his coursework and indicates additional psychological and physical factors disrupting his academic progress towards the completion date of this years spring term.

In a March 27, 2002 decision, the Office denied appellant's request for reconsideration finding the evidence appellant submitted repetitious.

The Board finds that the Office properly reduced appellant's compensation effective August 5, 2001, due to his failure without good cause to cooperate with rehabilitation efforts.

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."[2]

Section 10.519(b) of the Office's regulations further provides:

> "(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 evaluation, and work evaluations), [the Office] cannot determine what would have been the employee's wage-earning capacity.

[2] 5 U.S.C. § 8113(b).

> "(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]

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."[4]

Appellant in this case, was attending college and had a career objective in mind. But that does not excuse his failure to participate in the interview process and other elements of the vocational rehabilitation efforts.

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.[5] Appellant did not submit sufficient evidence to refute such an assumption and the Office had a proper basis to reduce his disability compensation to zero effective August 5, 2002.

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

Under section 8128(a) of the Act,[6] 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,[7] which provides that a claimant may obtain review of the merits if his written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> "(ii) Advances a relevant legal argument not previously considered by [the Office], or

[3] 20 C.F.R. § 10.519(b)(c).

[4] *See Id.*

[5] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11a (December 1993).

[6] 5 U.S.C. § 8128(a).

[7] 20 C.F.R. § 10.606(b) (1999).

"(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."

Section 10.608(b) provides that any application for review of the merits of the claim which fails to meet at least one of the standards described in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[8]

The Board has held that the submission of evidence, which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[9]

In support of his reconsideration request, appellant submitted a March 12, 2002 letter, from his Dr. Schillinger. The letter is repetitious of the points he raised in his two previous reports and, therefore, insufficient to require the Office to conduct a merit review.

The March 27 and January 1, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
August 27, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[8] 5 U.S.C. § 10.608(b).

[9] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).