United States Department of Labor
Employees' Compensation Appeals Board

DONNA M. ROBINSON, Appellant	)	
and	)	**Docket No. 04-645**
	)	**Issued: April 9, 2004**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Greensboro, NC, Employer	)	

Appearances:
Donna M. Robinson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On January 12, 2004 appellant filed a timely appeal from the January 8, 2004 decision of the Office of Workers' Compensation Programs, which denied modification of its prior decision to reduce appellant's compensation for wage loss for failure to participate in an Office sponsored training program without good cause. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this issue.

ISSUE

The issue is whether the Office properly reduced appellant's compensation for wage loss pursuant to 5 U.S.C. § 8113(b) on the grounds that she failed to participate in a vocational rehabilitation effort without good cause.

FACTUAL HISTORY

On July 13, 2000 appellant, then a 37-year-old mail handler, filed a claim alleging that she sustained mental stress, depression and anxiety as a result of harassment at work. She

stopped work on November 15, 2000 and did not return. The Office evaluated the factual evidence and found that a supervisor harassed appellant when he ran his hand through her hair. The Office accepted appellant's claim for the condition of acute reaction to stress and paid compensation for temporary total disability on the periodic rolls.

On September 8, 2001 appellant's attending psychiatrist, Dr. Rupinder Kaur, reported that appellant's mood had improved a great deal, but the supervisor who harassed her was still on the same shift. He stated that appellant could return to work if that were resolved. Dr. Kaur completed a work capacity evaluation on October 1, 2001. He advised that appellant could work full time at her usual job only if the supervisor transferred. The employing establishment advised that it was unable to accommodate appellant because she had implicated, in addition to her supervisor, the entire management team as responsible for her accepted condition. The employing establishment recommended that appellant be placed in the private sector.

The Office referred appellant to rehabilitation services for development of a rehabilitation plan for placement in the open labor market. On August 30, 2002 the rehabilitation counselor reported as follows:

> "I had spoken [with] [appellant] and scheduled an initial evaluation for August 21, 2002. I waited at her home and even telephoned from her driveway with no response. I then both left her a message on her answering machine and sent a certified letter. The letter has been returned and signed by the client (see attached). She signed for the letter on Monday and this note is being written on Friday, with no response from [appellant]. I will place this file in interrupted status. If she should call me, I will immediately alert [the vocational rehabilitation specialist]."

On September 11, 2002 the Office notified appellant that she had impeded the rehabilitation efforts of her vocational rehabilitation counselor. The Office advised that her refusal, without good cause shown, to take the steps needed to prepare her for and to assist her in returning to gainful employment could be construed as a refusal to apply for or undergo rehabilitation under 5 U.S.C. § 8113(b). The Office notified appellant of the statutory and regulatory penalty for noncompliance with vocational rehabilitation efforts and directed her to contact both the Office and the rehabilitation specialist within 30 days to make a good faith effort to participate in the rehabilitation program.

Appellant contacted the rehabilitation counselor on October 10, 2002 and met with the counselor on October 16, 2002. Among other things, they discussed appellant's responsibilities in the rehabilitation program. The counselor reported that appellant was very interested in retraining opportunities and tentative plans were made. On November 14, 2002, however, the Office rehabilitation specialist reported the following:

> "In response to the notification that [appellant] had failed to cooperate in the vocational rehabilitation (VR) process, a sanction letter was issued on September 11, 2002.

> "Based on an update from VRC [rehabilitation counselor], [appellant] continues to obstruct the VR process. After two cancelled sessions for vocational testing a third appointment was scheduled for November 13, 2002. This RS [rehabilitation specialist] was notified by [the rehabilitation counselor] on November 14, 2002, that [appellant] failed to keep a third appointment for vocational testing scheduled for November 13, 2002. In addition, [appellant] did not notify the evaluator or the VRC to cancel the appointment. It has been over 90 days since [appellant] was referred for VR services and due to her failure to participate in the process, a VR plan has not been developed. It is the recommendation of this RS that due to [appellant's] continued failure to cooperate in the early stages of the VR process that her compensation should be reduced to zero."

In a letter dated November 15, 2002, the Office again warned appellant of the consequences for impeding vocational rehabilitation efforts. Appellant was given another 30 days to make a good faith effort to participate or advise of any good reason for not doing so. The Office added: "If you do not comply with the instructions contained in this letter within 30 days, the rehabilitation effort will be terminated and action will be taken to reduce your compensation under the provision of [s]ection 8113(b) of the FECA [Federal Employees' Compensation Act] and [s]ection 10.519 of the regulations described above."

Appellant kept her appointment for vocational testing on November 19, 2002. Based on a prior labor market survey and preliminary test results, the rehabilitation counselor recommended training in medical billing and coding through Guilford Technical College. A semester of prevocational training was recommended to upgrade appellant's academic skills prior to beginning the formal training program. Appellant was to begin the prevocational training program in January 2003 and begin the certificate program by May 2003, with a projected completion date of July 2004. The projected job goals included medical secretary, with a starting salary of $10.24 per hour and medical and billing coding, with a starting salary of $10.30 per hour.

On November 22, 2002 the vocational rehabilitation counselor discussed with appellant the need to submit her application to the school and to schedule placement testing prior to December 13, 2002. She advised appellant that she would be forwarding a Form OWCP-16 for her signature and urged appellant to complete this quickly, as she needed to approach the business office regarding payment authorization before school broke. Subsequent efforts to contact appellant failed. The counselor attempted to call appellant on November 25, 2002 sent a letter on November 26, 2002 called appellant's home telephone and cellular telephone numbers on December 3, 2002 and sent a certified letter that same date, all to no avail.

On December 30, 2002 the Office telephoned appellant about her obstruction. Appellant confirmed that she had not yet gone to the college to take the placement examination or to register for classes. Appellant advised that she would do these things "this week." The registration deadline was January 4, 2003. The Office again warned appellant of the consequences for impeding vocational rehabilitation efforts and advised that if she did not comply with instructions to undergo the approved training program and successfully register by January 4, 2003, or if she did not show good cause for failing to do so, the rehabilitation effort would be terminated and action initiated to reduce her compensation.

On January 13, 2003 the vocational rehabilitation specialist notified the Office as follows:

> "Per telephone call from RC [rehabilitation counselor] this morning, [appellant] was supposed to sign and return the [Form] OWCP-16 (rehab[ilitation] plan and award) on January 6, 2003. She did not, nor did she return the RC's [tele]phone calls since the 6th. In other words, [appellant] has AGAIN failed to cooperate in the VR process. To the best of my knowledge, she is not enrolled in school."

In a decision dated February 5, 2003, the Office reduced appellant's compensation for failing to participate in an Office sponsored training program. The Office noted as follows:

> "The [r]ehabilitation [c]ounselor directed you to take the placement exam[ination] at Guilford Community College and to register for classes. You ceased to maintain contact with [the rehabilitation counselor]. [The claims examiner] called you on December 30, 2002 giving you a verbal warning that you would be sanctioned if you did not go to the college and take the placement exam[ination] and register for classes by January 4, 2003. You indicated that you understood that your failure to do so would be considered refusal to participate in the [v]ocational [r]ehabilitation program. A letter regarding this same issue was also sent to you on December 30, 2002.
>
> "You had agreed to sign the [Form] OWCP-16 (rehab[ilitation] plan and award) and return it to [the rehabilitation counselor] by January 6, 2003. On January 13, 2003 [the rehabilitation counselor] notified our office that you did return the signed rehab[ilitation] plan and you had not returned her [tele]phone calls since January 6, 2003. You have not registered at Guilford College as of this date. You continue to obstruct the rehabilitation process by your failure to participate in a training program."

The Office noted that vocational testing, a labor market survey and a review of the medical evidence indicated that appellant was capable of performing the duties of a Medical Biller/Coder and that the position was performed in sufficient numbers in her commuting areas so as to be considered reasonably available. The Office determined that this position fairly and reasonably represented appellant's capacity to earn wages. Because completion of college training would have enabled appellant to obtain employment as a Medical Biller/Coder and earn $412.00 per week, the Office reduced appellant's compensation for wage loss accordingly.

On February 17, 2003 the vocational rehabilitation counselor reported that she had received a message from appellant on January 3, 2003 that she was faxing some information, including the name of the person to contact to pay the school bill. The counselor's report continued as follows:

> "January 6, 2003 [a]lerted [the Office] that the client had left me a message and faxed some information. I noted that [appellant] had not returned the [Form] OWCP-16. [The Office] stated that this would be necessary prior to enrolling in school. I added that I did not believe that the client had taken the placement

courses as requested and that she signed up for only five credit hours. [The Office] said that rehabilitation candidates must be enrolled full time in prevocational training, unless she had preapproved extenuating circumstances. [Appellant] must also remain in contact with me to be considered compliant with the rehabilitation program, according to [the Office]. .30 h[ou]rs.

"January 6, 2003 [s]poke to [appellant] who said that she had sent me the signed [Form] OWCP-16. I indicated that I had not received it. She agreed to faxed [sic] me a copy. We also discussed the need for placement testing to determine any need for precollege level [m]ath or [e]nglish courses. I reminded her that we had discussed these issues before. I requested that she take these tests and fax me her results. I reminded her that the time is usually limited to one week to add classes. Following this information, we would discuss a class schedule. She will be required to sign up for a full course load and that she must work with me prior to adding any classes. I said that I would next have to contact the school regarding billing. [Appellant] said that she had received a letter from claims. She stated that the letter told her that she was to call the claims examiner if she was unable to start school by this January 2003. It seems that [appellant] was under the impression that if she missed the January deadline for school, she would be able to enroll the next semester area instead. I advised her that she needed to complete all my requests in order to register this semester, as she was in risk of noncompliance with the program. [Appellant] agreed to follow up with my requests immediately. .50 h[ou]rs."

On or about March 10, 1993 appellant requested that the Office reconsider the merits of her case. She explained:

"I did take the placement exam[ination] at the college and they gave me an itinerary of courses I needed to take based on the score of my exam[ination] and based on the field of study that was chosen. When I notified [the rehabilitation counselor] I could not reach her so I left her a voicemail message letting her know that she was to call Ms. Pam Stiles to make arrangements for payments. I told her to call me back also because I was sending her a fax with proof of registration and what she needed to do also. And even though payment was to be received within 24 hours it did not apply to me as long as [the rehabilitation counselor] called as instructed, they would send a bill for payment to be paid later. Given the history of this situation I really believe that I am justified in getting an approved reconsideration. I am enclosing proof of my statements made."

Appellant attached a copy of a fax she sent to the rehabilitation counselor on January 1, 2003. In addition to providing a college contact for completion of payment, appellant sent a copy of a college billing statement showing that she was enrolled in two classes, for a total of five credits.

On March 28, 2003 the rehabilitation specialist reported that the counselor had not yet received a faxed or mailed copy of the Form OWCP-16, that the college admissions office

confirmed that appellant had applied for but had not taken placement tests and that she enrolled for 5 credits instead of a full course load of 12 credits.

In a decision dated April 8, 2003, the Office reviewed the merits of appellant's claim and denied modification of its prior decision. The Office found that appellant continually obstructed the vocational rehabilitation process: She submitted no proof that she had taken the college placement tests, she did not sign and return the Form OWCP-16 that was sent to her on November 22, 2002, she made herself unavailable to the rehabilitation counselor and she did not sign up for the 12 credit hours required.

On April 15, 2003 appellant requested reconsideration. She stated that as soon as she received the Form OWCP-16 she signed it and sent it back by mail. Appellant submitted a copy of the placement test required for medical coding and billing and explained:

> "You will not see a score because you had to key in enough characters in the computer in order that a score will show. I keyed below the required amount. But you can contact the school yourself if in doubt. The number is on the cover sheet of the fax that I had requested of the test scores."

Appellant submitted a test score information sheet showing a keyboard score of 10 on January 3, 2003. Appellant also sent a copy of the Form OWCP-16, which she signed and dated November 25, 2002. She stated that she submitted the form to the rehabilitation counselor on the same day she signed it.

In a decision dated June 5, 2003, the Office denied a reopening of appellant's claim for further merit review. The Office found that appellant's request for reconsideration neither raised substantive legal questions nor included new and relevant evidence and, therefore, did not warrant a review of the merits of her case.

On December 12, 2003 the Board issued an order remanding case, finding that appellant had submitted relevant and pertinent new evidence that bore directly on the issue of her cooperation and on the Office's finding that she obstructed the vocational rehabilitation effort. The Board remanded the case for a review of the merits and an appropriate final decision.[1]

In a decision dated January 8, 2004, the Office evaluated the evidence appellant submitted to support her April 15, 2003 request for reconsideration, reviewed the merits of her claim and denied modification of its prior decision. The Office found that the submitted evidence proved that appellant signed her Form OWCP-16 and that she scored a 10 on the keyboard portion of the placement test. Evidence previously submitted, however, confirmed that she registered for 5 semester credit hours, while her rehabilitation plan required her to register for a minimum of 12. As appellant's failure to meet the minimum requirements of her rehabilitation training program was considered an obstruction, the Office found the reduction of her compensation under 5 U.S.C. § 8113(b) appropriate. The Office noted that a complete review of the case file failed to show that appellant complied with the minimum requirement for registering for 12 semester credit hours.

[1] Docket No. 03-2259 (issued December 12, 2003).

LEGAL PRECEDENT

Section 8104(a) of the Act pertains to vocational rehabilitation and provides: "The Secretary of Labor may direct a permanently disabled individual whose disability is compensable under this subchapter to undergo vocational rehabilitation."[2] The Act further provides at section 8113(b): "If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed under section 8104" the Office, 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 [her] wage-earning capacity in the absence of the failure, until the individual in good faith complies" with the direction of the Office.[3]

Regulations implementing the Act provide as follows:

> "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]."[4]

ANALYSIS

As the Board noted in the prior appeal, the Office justified the reduction of appellant's compensation, in part, on the grounds that she submitted no proof that she took the required college placement test and she did not sign and return the Form OWCP-16 sent to her on November 22, 2002. When the Office reviewed the merits of her claim on January 8, 2004 it determined that appellant had submitted proof that she took the keyboard portion of the placement test and proof that she signed her Form OWCP-16. Nevertheless, evidence previously submitted confirmed that she had registered for only 5 semester credit hours instead of the 12 required by the rehabilitation plan. This noncompliance with minimum requirements of the rehabilitation training program was considered an obstruction, the Office found and, therefore, a reduction of compensation under 5 U.S.C. § 8113(b) was appropriate.

---

[2] 5 U.S.C. § 8104(a).

[3] *Id*. § 8113(b).

[4] 20 C.F.R. § 10.519 (1999).

The Board finds that the Office's January 8, 2004 decision is not sufficiently supported by the evidence. It was never clear that the vocational rehabilitation plan required appellant to take 12 semester credit hours, much less that it required her to do so regardless of placement testing. Further, if the plan required 12 semester credit hours, neither the Office nor the vocational rehabilitation counselor communicated this to appellant in a straightforward manner. On January 6, 2003 when the vocational rehabilitation counselor advised the Office that appellant had signed up for only five credit hours, the Office informed the counselor that rehabilitation candidates must be enrolled full time in prevocational training, unless there were preapproved extenuating circumstances. The Office did not explain to the counselor what was considered "full-time enrollment." The Office did not advise the counselor that appellant was required to register for 12 semester credit hours regardless of placement testing results. That same day, the rehabilitation counselor informed appellant that she would be required to sign up for a "full course load." The counselor did not explain to appellant what constituted a "full course load." The counselor did not instruct appellant to register for 12 semester credit hours regardless of placement testing results. Indeed, she advised appellant that placement testing would determine any need for precollege level math or science courses.

On March 10, 1993 appellant stated that she took the placement test at the college and received an itinerary of courses she needed to take "based on the score of my exam[ination] and based on the field of study that was chosen." There is no evidence to the contrary. The object was for appellant to obtain a semester of prevocational training in medical billing and coding at Guilford Technical College to upgrade her academic skills prior to beginning the formal certificate program. If, after college placement testing, only two classes or five semester credit hours were deemed necessary for appellant to complete that prevocational training, then the Office has not shown how appellant's failure to take an additional seven semester credit hours of course work constituted noncompliance with minimum requirements of the vocational rehabilitation plan or obstruction of the vocational rehabilitation effort.

It is well established that once the Office accepts a claim, it has the burden of proof to justify a termination or modification of compensation benefits.[5] As the evidence is insufficient to establish that appellant's failure to register for 12 semester credit hours constituted noncompliance or obstruction warranting a reduction of compensation under 5 U.S.C. § 8113(b), the Office has not met its burden.

CONCLUSION

The Board finds that the Office improperly reduced appellant's compensation for wage loss pursuant to 5 U.S.C. § 8113(b). The evidence is insufficient to establish the noncompliance or obstruction found in the Office's January 8, 2004 decision.

[5] It is well established that once the Office accepts a claim, it has the burden of proof to justify a termination or modification of compensation benefits. *E.g., Harold S. McGough*, 36 ECAB 332 (1984).

ORDER

IT IS HEREBY ORDERED THAT the January 8, 2004 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 9, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member