United States Department of Labor
Employee's Compensation Appeals Board

JOSEPH W. RYAN, Appellant	)	
	)	**Docket No. 03-1350**
and	)	**Issued: May 25, 2004**
DEPARTMENT OF DEFENSE, Fort Deven, MA, Employer	)	

Appearances:
Joseph W. Ryan, 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
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On May 12, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' April 28, 2003 merit decision and an April 23, 2003 decision which denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case

ISSUES

The issues on appeal are: (1) whether the Office denied appellant's request for reconsideration as untimely and not establishing clear evidence of error; and (2) whether the Office met its burden of proof in reducing appellant's compensation from April 28 to May 28, 2003 based on his failure to undergo vocational rehabilitation.

FACTUAL HISTORY

On November 24, 1978 appellant, then a 30-year-old sales worker, injured his back while lifting a box. The Office accepted his claim for a back strain. Appellant stopped work on

November 24, 1978 and returned December 12 to 15, 1978. On May 1, 1980 he was released to work light duty.

On July 24, 1981 the Office determined appellant's loss of wage-earning capacity effective September 11, 1983, based upon his ability to perform the constructed position of an assembler of small products. He appealed the decision to the Board. On January 19, 1982 the Board vacated the July 24, 1981 decision and remanded the case for referral to appellant's treating physician Dr. Robert Cantu, a Board-certified neurologist, to further address appellant's physical restrictions.[1] In a report dated March 5, 1982, Dr. Cantu stated that appellant could perform only sedentary duties with no heavy work. In a decision dated April 29, 1982, the Office issued a loss of wage-earning determination, finding that appellant could perform the constructed position of a telephone solicitor.

The record indicates that appellant worked as a custodian for the Portsmouth Naval Shipyard from May to June 1983 and as a toll collector for the State of Maine from September 25, 1984. On January 2, 1985 he was restored to his position as a sale worker at the employing establishment.

On January 22, 1985 appellant sustained a recurrence of total disability and received compensation from January 22 to April 17, 1985. He worked intermittently thereafter and the Office paid intermittent compensation on the basis of CA-8 forms for continuing compensation.

By a letter dated July 22, 1986, the Office accepted that appellant sustained a back strain and disc excision at L5-S1. The Office placed him on the periodic compensation rolls August 3, 1986.

Thereafter, the Office developed the appropriateness of further back surgery.[2] On December 21, 1988 the Office denied appellant's request for surgery; however, by decision dated March 15, 1989, the Office vacated the December 21, 1998 decision, finding a conflict in opinion. Appellant was referred to an impartial medical examiner, who determined that surgery was necessitated by his work-related injury. On October 31, 1990 he underwent a bilateral L5-S1 discectomy, posterior lumbar interbody fusion with a right iliac crest bone graft at L5-S1, posterior and posterolateral L5-S1 fusion with Steffee instrumentation and right iliac crest bone graft.

After surgery, appellant came under the care of Dr. Roy Hepner, an orthopedic. In a report dated January 29, 1994, Dr. Hepner released him to restricted duty six hours per day.

Thereafter, appellant worked in the private sector as a dishwasher from October 21 to November 1, 1994 and as a security officer from August 6 to November 20, 1995, when his employment was terminated for failure to report to work.

[1] Docket No. 82-247 (issued January 19, 1982).

[2] This included referring appellant to several physicians for a determination as to the appropriateness of a laminectomy to remove a disc fragment and a lateral fusion at L5-S1.

In a report dated May 17, 1996, Dr. Hepner affirmed that appellant was able to perform the duties of a security guard 30 hours per week.

On June 5, 1996 the Office proposed to reduce appellant's compensation for wage loss on the basis that appellant was no longer totally disabled. The Office noted that appellant had the capacity to earn wages in the constructed position of a full-time security guard and that this position was medically and vocationally suitable in accordance with the factors set forth in 5 U.S.C. § 8115(a). By decision dated July 8, 1996, the Office finalized the wage-earning capacity decision effective July 21, 1996.

Appellant experienced recurrent back and leg pain and was referred to Dr. Frank A. Graf, a Board-certified orthopedic surgeon. In an April 26, 2001 report, he determined that appellant was totally and permanently disabled and unable to work due to the residuals of his accepted work-related injury. He advised that appellant was not likely to be able to function in a security guard position or other light-duty capacity. Based on the second opinion of Dr. Graf, the Office determined that appellant was totally disabled and reinstated compensation benefits for total disability.

Appellant submitted reports from Dr. Vincent P. Herzog, an osteopath, dated March 21, 2002, who diagnosed left S1 radiculopathy, left-sided carpal tunnel syndrome and he advised that no cervical radiculopathy was found but addressed sensory peripheral neuropathy of the upper and lower extremities. In a work capacity evaluation dated June 30, 2002, Dr. William C. Meade, a Board-certified orthopedic surgeon, and appellant's treating physician noted that appellant could return to work for two hours per day and work up to an eight-hour day in six months. He noted limitations on sitting, walking, standing, reaching, reaching above the head for 2 hours per day, no twisting and pushing, pulling and lifting of no more than 20 pounds, 2 hours per day.

By letter dated August 28, 2002, the Office referred appellant to Dr. James P. Frenette, a Board-certified neurologist. The Office provided him with appellant's medical records, a statement of accepted facts and a detailed description of appellant's employment duties. In a September 17, 2002 medical report, Dr. Frenette advised that appellant had not worked since 1995 and had reached maximum medical improvement. He diagnosed status post instrumental L5-S1 spinal fusion, residual left S1 radiculitis and radiculopathy by electromyogram studies, a healed compression fracture of L3, left carpal tunnel syndrome and probable cervical spondylosis. Dr. Frenette advised that appellant's current back condition was aggravated by the November 24, 1978 injury. He advised that appellant could return to a sedentary work, which would involve sitting down for no more than four hours a day with the stipulation that he could change positions frequently. Dr. Frenette noted that neither the security guard nor sales positions would be appropriate as they required appellant to stand and walk around which was not tolerated very well.

On November 19, 2002 the Office referred appellant for vocational rehabilitation. In a status report dated December 19, 2002, a rehabilitation specialist indicated that the employing establishment was unable to accommodate appellant's return to work with his current restrictions. He noted that appellant had only an eighth grade education and few transferable

skills and recommended adult education classes, prerequisite courses for vocational training and that appellant take the General Education Diploma (GED) placement test.

In a vocational rehabilitation report dated December 20, 2002, the rehabilitation specialist noted that appellant had no sedentary skills and there were no sedentary jobs that could utilize his current skills. He noted that the only option for a future placement in a part-time sedentary job would be for appellant to complete the GED degree. Appellant agreed to take the pretests for the GED in January 2003.

In letters dated November 23, 2002 and January 31, 2003, appellant indicated that he wished to appeal the July 8, 1996 loss of wage-earning capacity decision.

On January 22, 2003 the rehabilitation specialist advised that appellant had taken pretests in writing, social studies, science and reading, but did not take the math pretests. It was noted that he expressed some reluctance about working on the GED.

By letters dated February 9, 11 and 14, 2003, appellant again requested reconsideration of the 1996 loss of wage-earning capacity decision.

In a report dated February 10, 2003, the rehabilitation specialist noted that appellant did not take the pretest for math and, therefore, would not be able to start classes for his GED in February 2003 to comply with the December 19, 2002 vocational rehabilitation plan. Rather, appellant would have to wait until April 2003 and it would be unlikely that he could complete the GED to comply with the 12-month limitation of the rehabilitation plan. Appellant advised the rehabilitation specialist on February 5, 2003 that he was not receptive to taking GED courses. In a report of February 24, 2003, the specialist advised that appellant consented to taking the remaining math pretest; however, he did not intend to go to any classes. Appellant was advised that testing was necessary to establish his math level prior and that any rehabilitation plan would have to wait until the testing was completed. The rehabilitation specialist recommended that the file be closed as job placement would not be successful since appellant did not have a GED or high school diploma. On March 3, 2003 the rehabilitation specialist recommended all case activities be suspended due to appellant's refusal to enroll in GED courses and his failure to complete the placement tests.

By letter dated March 24, 2003, the Office notified appellant that it proposed to reduce his compensation to zero because he failed to cooperate fully in the training plan. The Office provided him 30 days to undergo the approved training program or show good cause for his failure to undergo the training program. If the rehabilitation effort was terminated action would be initiated to reduce appellant's compensation to zero until he complied with the Office's directions concerning the vocational training program.

By letter dated March 26, 2003, appellant contended that the GED program would not be worthwhile after 35 years. He noted that he wanted a job, but did not want to participate in the GED program.

In an April 23, 2003 decision, the Office denied appellant's application for reconsideration, finding that the request was not timely and that appellant did not present clear evidence of error in the Office's 1996 wage-earning capacity decision.

By decision dated April 28, 2003, the Office reduced appellant's compensation to zero effective April 28, 2003, finding that he did not cooperate with vocational rehabilitation.[3]

LEGAL PRECEDENT -- ISSUE 1

Section 8128(a) vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[4] It is well established that either a claimant or the Office may seek to modify a formal loss of wage-earning capacity determination.[5] Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.[6] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[7]

ANALYSIS -- ISSUE 1

In letters dated from November 23 to February 14, 2003, appellant requested reconsideration of the July 8, 1996 wage-earning capacity decision. The Office considered his request to be an untimely request for reconsideration under section 8128 and found that appellant failed to present clear evidence that the July 8, 1996 decision was erroneous.

Although appellant used the term "reconsideration" in his correspondence, it is evident from his letters that he sought modification of the July 8, 1996 wage-earning capacity determination. It is well established that either a claimant or the Office may seek to modify a formal loss of wage-earning capacity determination.[8] Appellant's request in this case is not a request for review of the July 8, 1996 decision under 5 U.S.C. § 8128; rather he is seeking modification of the wage-earning capacity determination.[9] The Office improperly characterized appellant's letters as a request for reconsideration subject to the one year time limitation set forth in 20 C.F.R. § 10.607(a). The Board finds that he has requested modification of the July 8, 1996 loss of wage-earning capacity determination and is entitled to a merit decision on that issue.

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[3] The record reflects that compensation was reinstated May 28, 2003, upon appellant's cooperation with the rehabilitation specialist.

[4] *Raj B. Thackurdeen*, 54 ECAB ___ (Docket No. 02-2392, issued February 13, 2003).

[5] *See Gary L. Moreland*, 54 ECAB ___ (Docket No. 03-1063, issued June 20, 2003).

[6] *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

[7] *Tamra McCauley*, 51 ECAB 375, 377 (2000); *Jack E. Rohrabaugh*, 38 ECAB 186, 190 (1986); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(a) (April 1995).

[8] *Id.*

[9] *See Gary L. Moreland, supra* note 5.

On remand the Office should develop the record as necessary and issue an appropriate merit decision with regard to whether appellant's loss of wage-earning capacity should be modified.[10]

LEGAL PRECEDENT -- ISSUE 2

Section 8104(a) of the Federal Employees' Compensation Act[11] 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. The Secretary shall provide for furnishing the vocational rehabilitation services." Under this section of the Act, the Office has developed procedures, by which an emphasis is placed on returning partially disabled employees to suitable employment and/or determining their wage-earning capacity.[12] If it is determined that the injured employee is prevented from returning to the date-of-injury job, vocational rehabilitation services may be provided to assist in returning the employee to suitable employment.[13] Such efforts will be initially directed at returning the partially disabled employee with the employing establishment.[14] Where reemployment at the employing establishment is not possible, the Office will assist the claimant to find work with a new employer and sponsor necessary vocational training.[15]

The Act further provides: "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 [his] wage-earning capacity in the absence of the failure, until the individual in good faith complies" with the direction of the Office.[16] Under this section of the Act, an employee's failure to willingly cooperate with vocational rehabilitation may form the basis for termination of the rehabilitation program and the

[10] *Id.*

[11] 5 U.S.C. § 8104(a).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813 (April 1995).

[13] *Id*. The Office's regulation provide: "In determining what constitutes 'suitable work' for a particular disabled employee, [the Office] considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors." 20 C.F.R. § 10.500(b).

[14] *See supra* note 4 at Chapter 2.813.3. The Office's regulation provide: "The term 'return to work' as used in this subpart is not limited to returning to work at the employee's normal worksite or usual position, but may include returning to work at other locations and in other positions. In general, the employer should make all reasonable efforts to place the employee in his or her former or an equivalent position, in accordance with 5 U.S.C. § 8151(b)(2)…." 20 C.F.R. § 10.505.

[15] *See supra* note 4 at Chapter 2.813.3.

[16] 5 U.S.C. § 8113(b).

reduction of monetary compensation.[17] In this regard, the Office's implementing federal regulations state:

> "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:
>
> > (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 evaluations and work evaluations), [the Office] 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 directions of [the Office]."[18]

ANALYSIS -- ISSUE 2

On November 19, 2002 appellant was referred for vocational rehabilitation in an effort to develop a rehabilitation plan for his return to work. The relevant medical evidence from Dr. Frenette advised that appellant could return to sedentary work four hours per day. In a December 20, 2002 report, the rehabilitation specialist noted that he had no sedentary skills, there did not appear to be any sedentary jobs that could utilize his skills and that the only option for future placement in a part-time sedentary job would be for appellant to complete a GED. He agreed to participate in the plan.

The facts of this case establish that appellant refused to cooperate with the rehabilitation counselor in the early, but necessary stages of the vocational rehabilitation effort. On February 10, 2003 the vocational rehabilitation specialist noted that he did not take the pretest for math as scheduled and was not receptive to taking the GED course. Appellant was not able to start classes for the GED in February 2003 to comply with the December 19, 2002 vocational rehabilitation plan. He was advised that testing was required to establish his math level; however, he declined to attend any further classes. On March 3, 2003 the rehabilitation specialist recommended all case activities be suspended due to appellant's refusal to enroll in GED courses and his failure to complete the placement tests. On March 24, 2003 notified

[17] *See Wayne E. Boyd*, 49 ECAB 202 (1997) (the employee failed to cooperate with the early and necessary stage of developing a training program).

[18] 20 C.F.R. § 10.519.

appellant of the penalty for failing to cooperate with vocational rehabilitation and provided him 30 days within which to comply or provide a written explanation for his failure to cooperate. By letter dated March 26, 2003, she noted that he did not feel as though the GED program would be worthwhile after 35 years and that he did not want to participate in the GED program. Appellant did not submit any evidence to support that he could not participate in the vocational rehabilitation efforts. There is no medical evidence to establish that he was unable to participate in vocational rehabilitation or the GED program. The Office properly followed its regulation and found that appellant's refusal to participate in the early, but necessary stages of vocational rehabilitation was without good cause.[19] The facts establish that he refused or failed to cooperate with the rehabilitation counselor in the early, but necessary stages of the vocational rehabilitation effort. There is no evidence that appellant's failure to cooperate was based on good cause. Consequently, the Office properly reduced his monetary compensation to zero.

CONCLUSION

The Board finds that the Office improperly determined that appellant's February 9, 2003, request for review of the loss of wage-earning capacity determination was an untimely request for reconsideration and the case must be remanded for further development consistent with this decision. The Board further finds that the Office properly reduced appellant's compensation for his refusal to cooperate in vocational rehabilitation efforts.

[19] *See* 5 U.S.C. § 8113(b); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813 (April 1995).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 28, 2003 is affirmed. The April 23, 2003 decision is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: May 25, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member