

**United States Department of Labor
Employees' Compensation Appeals Board**

TIMOTHY A. PAYTON, Appellant

and

**DEPARTMENT OF DEFENSE, PUGET SOUND
NAVAL SHIPYARD, Bremerton, WA, Employer**

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**Docket No. 04-1491
Issued: November 26, 2004**

Appearances:

*John E. Goodwin, Esq., for the appellant
Office of the 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 17, 2004 appellant filed a timely appeal of an April 21, 2004 decision of the Office of Workers' Compensation Programs, modifying its April 5, 2004 decision that reinstated appellant's compensation benefits effective January 29, 2004. The April 5, 2004 decision affirmed a January 6, 2003 decision reducing appellant's compensation to zero for failure to cooperate with vocational rehabilitation. 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 are: (1) whether the Office properly reduced appellant's compensation to zero on the grounds that he failed to cooperate with vocational rehabilitation; and (2) whether the Office properly issued appeal rights with respect to the April 21, 2004 decision, and if so, whether the Office properly determined that appellant was not entitled to reinstatement of compensation benefits as of January 29, 2004, the date of a hearing before an Office hearing representative.

FACTUAL HISTORY

Appellant has numerous claims for traumatic injury to his lower back, including April 12, 1985, December 1, 1986, February 22 and March 23, 1988, July 6, 1989, October 11, 1989 and March 25, 1996. The Office accepted low back strains and appellant stopped working in June 1996. He filed a recurrence of disability (Form CA-2a) as of August 7, 1998 and began receiving compensation for wage loss.

The Office referred appellant for vocational rehabilitation services. A June 26, 2002 report from an Office rehabilitation specialist indicated that a rehabilitation plan was being developed. A vocational rehabilitation consultant submitted monthly reports as of July 6, 2002 with respect to vocational rehabilitation efforts. In a report dated September 4, 2002, the rehabilitation consultant reported that appellant participated “minimally” in the vocational rehabilitation plan development (PD), noting that he had rescheduled some appointments and had been granted a 60-day extension to complete the PD in a timely manner. An October 4, 2002 report indicated that appellant was “minimally cooperative” in that he procured a student identification number at Olympic College but did not meet with school counselors to explore academic programs.

In a rehabilitation action report (Form OWCP-44) dated October 16, 2002, the rehabilitation consultant noted that appellant had cancelled appointments on June 24, July 30, and August 14, 2002, and had failed to appear for an October 10, 2002 appointment. The consultant reported that appellant had built barriers to rehabilitation by exploring only training at Olympic College, working only in the Bremerton area, failing to conduct information interviews with employers as assigned, and failing to pay a nominal fee for school placement and testing. According to the consultant, appellant often displayed a negative attitude and after four months a vocational goal had yet to be identified. By report dated November 3, 2002, the rehabilitation consultant reported that appellant had not participated satisfactorily in the PD process and a rehabilitation plan had not been developed.

In a letter dated November 26, 2002, the Office advised appellant of the provisions of 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 regarding cooperation with vocational rehabilitation. The Office stated that appellant should contact both the Office claims examiner and the rehabilitation specialist within 30 days to make a good effort to participate in vocational rehabilitation.

By decision dated January 6, 2003, the Office determined that appellant had failed to continue participation in vocational rehabilitation and had not shown good cause for such failure. The Office reduced appellant’s compensation to zero pursuant to 20 C.F.R. § 10.519(c).

Appellant requested a hearing, which was held on January 29, 2004. In a decision dated April 5, 2004, an Office hearing representative affirmed the January 6, 2003 decision. The hearing representative noted that at the hearing appellant’s representative indicated that appellant was willing to participate fully in vocational rehabilitation, and therefore the decision was modified to reflect that compensation benefits should be reinstated as of January 29, 2004.

In a decision dated April 21, 2004, the hearing representative indicated that he was reopening the case under section 8128(a) and modifying the prior decision. The hearing representative found that under Office procedures compensation was not reinstated until actual compliance was confirmed by the rehabilitation specialist, and therefore compensation should not be reinstated on January 29, 2004. The appeal rights accompanying the decision indicated that appellant could request reconsideration with the Office or an appeal with the Board.

LEGAL PRECEDENT -- ISSUE 1

Section 8113(b) of the Federal Employees' Compensation Act provides:

“If an individual without good cause fails to apply for or 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.”

Section 10.519 of the implementing regulations of 5 U.S.C. § 8113(b), 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:”

* * *

(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 direction of [the Office].”

ANALYSIS -- ISSUE 1

The reports of the vocational consultant in this case establish appellant's lack of cooperation with vocational rehabilitation efforts. The consultant had granted appellant time extensions to facilitate the development of a rehabilitation plan. The October 16, 2002 report indicated that appellant had repeatedly cancelled appointments and failed to appear for an October 10, 2002 appointment. The Office advised appellant in a November 26, 2002 letter of the consequences of failure to cooperate with vocational rehabilitation and that he must contact the Office and the rehabilitation consultant within 30 days. There is no indication that appellant contacted either party.

Based on the evidence of record, the Board finds that appellant failed to continue to participate in a vocational rehabilitation effort. With respect to whether there was good cause for the failure to participate, appellant did not provide reasons for his failure to attend meetings or contact the Office. At the January 29, 2004 hearing it was argued that appellant's representative did not receive information regarding scheduled meetings, but the record indicates that the representative was sent copies of the vocational consultant's reports and there is no evidence that appellant himself was unaware of scheduled meetings. The Board finds no evidence of good cause for his failure to participate. Under the provisions of section 8113, his compensation may be reduced.

In the present case, a suitable job had not been identified as the failure to participate occurred in the early but necessary stages before a rehabilitation plan was properly developed. Under section 10.519, the Office can assume, in the absence of contrary evidence, that the vocational rehabilitation would have resulted in no loss of wage-earning capacity. There is no evidence contrary to the assumption in this case. Accordingly, the Office reduced appellant's compensation to zero.

LEGAL PRECEDENT -- ISSUE 2

There are three methods for reviewing a formal decision of the Office: a reconsideration by the district office; a hearing before an Office hearing representative; and an appeal to the Board.¹ A claimant who has received a final adverse decision by the Office may request a hearing pursuant to 20 C.F.R. § 10.616; the claimant must not have previously requested reconsideration on the same decision.²

ANALYSIS -- ISSUE 2

In this case, the Office hearing representative indicated in the April 21, 2004 decision that he was reopening the case under 5 U.S.C. § 8128(a)³ and modifying the April 5, 2004 decision. On appeal, appellant's representative noted that the April 21, 2004 decision did not provide

¹ 20 C.F.R § 10.600.

² 20 C.F.R. § 10.616(a).

³ 5 U.S.C. § 8128(a) provides that the Secretary of Labor may review a decision at any time on his own motion.

appeal rights that included the right to a hearing on the decision. The representative indicated that he wanted an oral hearing to address the findings of the hearing representative with respect to reinstatement of benefits.

Under the Office's regulation, a claimant would not be entitled to a hearing if he had previously requested reconsideration on the decision, but appellant had not requested reconsideration in this case. If a claimant had previously had an oral hearing on the issue, then he would not be entitled to a hearing.⁴ In this case, the April 21, 2004 decision made an adverse finding that appellant's compensation would not be reinstated as of January 29, 2004 because Office procedures require that reinstatement is dependent on confirmation from a rehabilitation specialist that appellant has resumed participation. On this issue appellant had not previously had a hearing.

There is no regulation or Board precedent that would limit a claimant's appeal rights in this situation. All three methods of further review should have been available to appellant: reconsideration, hearing before an Office hearing representative, or appeal to the Board. A decision is not properly issued if it effectively denies the claimant a full opportunity to exercise his appeal rights in a timely fashion.⁵ Since the April 21, 2004 decision did not include appropriate appeal rights, it was not properly issued and the case will be remanded to the Office to issue a proper decision with full appeal rights.

CONCLUSION

The Board finds that the record established that appellant failed to continue participation in vocational rehabilitation without good cause. Pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, his compensation was properly reduced to zero. The April 21, 2004 Office decision on reinstatement of benefits was not properly issued as it failed to advise appellant of all of his available appeal rights.

⁴ See *Mary G. Allen*, 40 ECAB 190, 193 (1988).

⁵ See *Sara K. Pearce*, 51 ECAB 517 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 5, 2004 is affirmed with respect to the reduction of compensation. The April 21, 2004 decision is set aside and the case remanded for further action consistent with this decision of the Board with respect to reinstatement of benefits.

Issued: November 26, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member