United States Department of Labor
Employees' Compensation Appeals Board

JOSEPH M. SCHENNA, Appellant	)	
and	)	**Docket No. 04-1792**
	)	**Issued: April 5, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Winston-Salem, NC, Employer	)	

Appearances:
Ted Sink, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On July 8, 2004 appellant filed a timely appeal of a March 19, 2004 decision of an Office of Workers' Compensation Programs' hearing representative which found that the Office properly reduced appellant's compensation due to his failure to cooperate with vocational rehabilitation efforts. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation under 5 U.S.C. § 8113(b).

FACTUAL HISTORY

On March 27, 1991 appellant, then a 37-year-old mail carrier, filed an occupational disease claim for stress. Appellant stopped work on that date and did not return. By letter dated October 7, 1991, appellant's claim was accepted for an adjustment disorder with depressed mood.

By letter dated January 23, 2001, the Office asked that Dr. Stephen W. Hebert, an attending Board-certified psychiatrist, respond to questions with regard to appellant. In a medical report dated March 15, 2001, Dr. Hebert diagnosed an adjustment disorder with depressed mood progressing to chronic recurrent major depression. He opined that this condition was attributed to his treatment by his supervisors at the employing establishment. Dr. Hebert stated that appellant could return to work in a supportive environment where he was not unduly stressed. Due to a 10-year absence from work, he recommended that when appellant returned to work, he start at 4 to 5 hours a day and gradually increase these hours. Dr. Hebert indicated that within six months appellant should be able to do his regular job.

On or about June 1, 2003, the Office assigned appellant to a vocational rehabilitation counselor. Appellant successfully completed a work-hardening program. Although appellant expressed an interest in returning to work for the employing establishment, it chose not to rehire him. The vocational rehabilitation counselor recommended that appellant attend Forsyth Technical Community College for a two-year curriculum in information systems/network administration which would prepare him to secure employment as a microcomputer support specialist with earnings of approximately $33,280.00 a year. In a progress note dated January 8, 2002, the rehabilitation counselor indicated that he had registered for classes and picked up his books. After trying to reach appellant for two weeks, the rehabilitation counselor contacted him on January 24, 2002. Appellant indicated that he had dropped all but two classes. He noted that he felt overwhelmed and that Dr. Hebert recommended that he cut back to part time.

Appellant continued to be treated on a regular basis by Dr. Hebert. On April 3, 2002 he indicated that appellant continued to do well in school, making B's to high C's, but worried about his ability to pass the curriculum. On May 8, 2002 Dr. Hebert indicated that appellant had completed his first two courses and was proud of this. On May 15, 2002 he noted that appellant just began his summer schedule and that a psychology teacher told the students that the course was not entry level and would be difficult. In a May 22, 2002 note, he indicated that appellant was unable to attend class for the prior week. Appellant noted that a networking class that he is signed up for was almost impossible to do without a fast network connection. He became discouraged and stopped attending all his classes. Dr. Hebert indicated that he was going to try to get appellant to go back to school, and believed that appellant had a good chance of being successful. In a May 29, 2002 note, appellant indicated that he was somewhat relieved over not having to go to school and was preparing to return to work.

The rehabilitation counselor contacted appellant on May 27 and June 10, 2002 and requested that he call her. She reached appellant on June 17, 2002. Appellant informed her that he had dropped out of school three weeks prior in order to go to New York to be with his mother, who was critically ill and stayed for 10 days. He did not believe that he could handle a full load of courses even if he was given another chance. In a June 18, 2002 note, the rehabilitation specialist advised the Office that appellant had withdrawn from the summer session due to family illness. The counselor noted that appellant did not contact her prior to leaving and that he was away for 10 days and was unable to resume classes. She noted that starting school again in the fall semester would delay completion of the training plan by two semesters or eight months.

In a June 26, 2002 note, Dr. Hebert indicated that appellant believed that he could handle a limited school schedule, but not a full load.

By letter dated August 1, 2002, the Office advised appellant that he had refused to participate in rehabilitation efforts. Appellant was notified that he had 30 days from the date of the letter to give his reasons for noncompliance and submit evidence. If he did not show good cause for not undergoing vocational rehabilitation when directed, the Office noted that it could prospectively reduce his compensation, based on what probably would have been his wage-earning capacity had he not failed to apply for and undergo vocation rehabilitation. The Office noted that if appellant subsequently complied with the vocational rehabilitation counselor he would again be paid, but payment would not be made for the period of noncompliance.

On August 23, 2002 appellant indicated that he was unaware of any scheduled appointments that he failed to keep, that his mother became critically ill and was hospitalized on May 27, 2002 and he went to be with her and that he had not refused to cooperate in any way. Appellant submitted a note from a health care facility indicating that his mother had been at their facility since August 12, 1997, that on May 27, 2002 she became acutely ill and was sent to the hospital where her prognosis was grave, and that all family members were contacted and advised that it would be appropriate for them to come to New York to be with her. Once her condition improved, appellant returned home.

By decision dated December 27, 2002, the Office determined that appellant had, without good cause, failed to undergo vocational rehabilitation as directed. The Office determined that had he cooperated with vocational rehabilitation, he would have been able to perform the position of microcomputer support. The Office reduced his compensation accordingly.[1] Appellant's reduced compensation rates were to start December 29, 2002.

By letter dated January 7, 2003, appellant requested an oral hearing.

In a November 26, 2003 report, Dr. Hebert indicated that in the spring of 2002 appellant returned to school and was trying to carry a full load of courses and that he was able to manage two courses but had difficulty with the addition of a third course to his workload. Appellant's confidence in his abilities was shaky due to a long absence from formal education, and this was compounded by depressive symptoms which were complicated by a large academic load. All these factors were in a precarious balance when he received a telephone call saying his mother became ill and requesting his presence in New York. Dr. Hebert opined that it would have been impossible for appellant to carry a full class load, and his rehabilitation counselor was unwilling to make adjustments for his very stressful circumstances, depression and long absence from school in prescribing a rehabilitation regimen for appellant.

At a hearing held on December 18, 2003, appellant indicated that he told the rehabilitation counselor about his mother on July 17, 2002 and that he did not talk to the counselor after that as she had told him that she would call back.

[1] The Office noted that appellant's weekly pay rate was $590.87 and that his adjusted earning capacity in the new position would be $135.91, which would yield a compensation rate of $90.61. The Office noted that this rate was to be increased by applicable cost-of-living adjustments to $115.25, making appellant's new compensation rate every four weeks $461.000 for a net compensation every four weeks of $350.84 (minus $110.16 for health benefits premium).

In a December 31, 2003 report, Dr. Hebert noted that he had treated appellant since 1991 and that appellant had worked hard to overcome his depression and returned to work. He noted that appellant had low self-confidence, but that he had worked very hard in school and did not drop out until his mother became ill.

In a statement dated December 24, 2003, appellant contended that he always did what the Office asked and was very disappointed when he was told that he could not go back to work for the employing establishment. He stated that he could handle a light course load but that the summer courses were very demanding and felt overwhelmed when summer school started. He indicated that he did not have the appropriate computer equipment at home for one of his classes.

By decision dated March 19, 2004, the hearing representative found that appellant's compensation was properly pursuant to 5 U.S.C. § 8113(b) and affirmed the December 27, 2002 decision.

LEGAL PRECEDENT

Section 8104(a) of the Federal Employees' Compensation 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. The Secretary shall provide for furnishing the vocational rehabilitation services."[2] 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.[3] 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 returning the employee to suitable employment.[4] 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.[5]

The Act 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. Under this section of the Act, an employee's failure to willingly cooperate with vocational rehabilitation

[2] 5 U.S.C. § 8104(a).

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.2 (December 1993).

[4] *Id.* The Office's regulations 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. § 10.505.

[5] *See supra* note 3 at Chapter 2.813.3.

may form the basis for termination of the rehabilitation program and the reduction of monetary compensation. 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:
>
> > (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]."[6]

The Office is required, prior to the reduction of compensation to notify a claimant of the provisions of section 8113(b) and provide an opportunity to either resume participation in vocational rehabilitation or provide reasons for not continuing participation.[7]

ANALYSIS

The Board finds that the Office properly reduced appellant's compensation benefits due to his failure to comply with the vocational rehabilitation program. The Office assigned appellant a vocational rehabilitation counselor on or about June 1, 2003, who developed to a two-year curriculum in information systems/network administration that commenced in January 2002. The Office found that appellant dropped classes that were arranged by his vocational rehabilitation counselor in May 2002 and that he did not show good cause for stopping the classes. Accordingly, the Office reduced appellant's benefits by the wages he could have earned had he completed the education program.

The Board notes that Office procedures require that prior to reduction of compensation a claimant be notified of the provisions of section 8113(b) and provided an opportunity to either resume participation in vocational rehabilitation or provide reasons for not continuing participation.[8] By letter dated August 1, 2002, the Office properly advised appellant of the provisions of section 8113(b) and informed him that he had 30 days to provide documentation regarding his dropping classes. In response, appellant noted that his mother was hospitalized on May 27, 2002 and he went to New York to be with her. Appellant submitted supporting documentation indicating that his mother was hospitalized and that he went to be with her.

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[6] 20 C.F.R. § 10.519.

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.11(b) (December 1993).

[8] *Id.*

Appellant's inability to attend class due to his mother's illness would ostensibly represent good cause for his failure to attend classes for 10 days after May 27, 2002. Nevertheless, the evidence of record does not establish that his mother's illness was the reason why appellant dropped out of classes. Dr. Hebert's May 22, 2002 note indicated that appellant was unable to attend classes for the prior week. Appellant contended that he experienced various problems, including not having the proper computer equipment at home, his psychology class was too difficult and feelings of inadequacy. In a May 29, 2002 report, Dr. Hebert indicated that appellant was relieved to not be going to school anymore. Dr. Hebert did not mention appellant's mother in this report. Furthermore, appellant did not keep in reasonable contact with the vocational rehabilitation specialist. The counselor left appellant a message to call her on May 27 and June 10, 2002 but he did not return the call. When she contacted him on June 17, 2002, he told her that he had dropped out of school. Appellant never called the counselor after this date.

The record reflects that, if appellant had participated in good faith in vocational rehabilitation, he would have been able to perform the duties of a microcomputer support. For these reasons, the Board finds that the Office properly reduced appellant's compensation to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts.[9]

CONCLUSION

The Office properly reduced appellant's compensation under 5 U.S.C. § 8113(b).

[9] *See Kevin M. Fatzer*, 51 ECAB 407 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 19, 2004 is hereby affirmed.

Issued: April 5, 2005
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member