

FACTUAL HISTORY

On October 19, 1998 appellant, then a 38-year-old small parcel sorter operator, filed a claim for an emotional condition due to the suspension he received for raising his voice to a supervisor. In a subsequent statement, appellant indicated that his condition began when a new supervisor, Chester McQuillen came to the employing establishment in May 1994.

The Office accepted appellant's claim for depression on April 5, 1999 and began payment of appropriate compensation benefits.

Appellant was referred for vocational rehabilitation. In a November 29, 1999 report, a rehabilitation counselor indicated that appellant was determined to pursue his plan to establish a martial arts training business. He noted that appellant had been informed by the Office that he had to demonstrate that he was capable of obtaining and maintaining salaried employment for at least 60 days before it would consider self-employment. The counselor noted that appellant had some experience in supervision but did not have any managerial work experience which would be similar to management of a small business. He indicated that appellant did not want to pursue jobs for which he had no interest. The counselor stated that, if appellant was unable to pursue his business idea, appellant preferred training and would prefer to pursue jobs within the federal government. He reported that appellant, based on his education and work experience, would be qualified to perform several jobs that were reasonably available in the local area, including stock clerk, parts clerk and manager of a retail store.

In a January 28, 2002 letter, an Office rehabilitation specialist stated that, of the three rehabilitation plans offered by appellant, only one could be provided. He indicated that federal employment could not be targeted because federal jobs were not considered reasonably available within appellant's commuting area. He commented that sponsoring appellant's efforts to start a martial arts studio was not an allowable option for his next rehabilitation step. The rehabilitation counselor stated that appellant's next expected rehabilitation step was to seek and obtain salaried employment. He stated that training might be provided. The counselor stated that appellant's upcoming rehabilitation plan could sponsor retraining for him if the training was less than two years in length and qualified him for available salaried occupations that paid more than appellant could earn at that time.

In a July 19, 2001 email, the rehabilitation counselor indicated that he met with appellant on July 18, 2001. He related that appellant questioned the counselor's authority to tell him what to do. The rehabilitation counselor refused to cooperate any further in the vocational rehabilitation plan. He presented appellant with a document with identified rehabilitation goals, but appellant refused to sign it. The counselor commented that appellant's body language was threatening. When he asked appellant whether he was threatening the counselor, appellant responded affirmatively. The counselor thereupon terminated the meeting. In a July 18, 2001 letter, appellant stated that the counselor wanted him to sign a document in which he was to state that he would accept a stock clerk position. Appellant refused to sign the document. He indicated that he would only discuss the specific issues that the Office had instructed him to follow. Appellant noted that the meeting lasted five minutes.

In a July 19, 2001 letter, the Office informed appellant that he was not fully cooperating in the vocational rehabilitation plan. It noted that appellant had refused to consider any rehabilitation program except to return to work for the federal government, take college business courses or startup money for a business. It also related that in the July 18, 2001 meeting, he used abusive language, indicated that he would only consider his plan, and admitted that he was threatening the counselor. The Office noted that all rehabilitation plans developed by a counselor were reviewed by the Office for consistency with the guidelines of the Act and were not approved unless the plans were realistic and focused on reemployment in a suitable job which was reasonably available locally and represented his wage-earning capacity. The Office stated that reemployment preferences would be considered but the claimant must be realistic in that the preferred job must be reasonably available, consistent with the claimant's restrictions, skills, knowledge and ability and provide earnings as close as possible to his earnings in the Federal Government. It indicated that federal employment was unrealistic because employment was limited and conducted through a merit system. The Office informed appellant that training was provided only when it was necessary to obtain employment which was reasonably available and within his restrictions. It commented that appellant's plan for the martial arts academy did not show how the self-employment would result in actual earnings close to what he earned at the employing establishment. It stated that there was no independent analysis of the plan, showing the need for such a business, the probability of success as a paying business, or the amount of income appellant would receive from the business. The Office indicated that there was no documentation that the martial arts academy would result in positive earnings close to what appellant received before his injury. The Office declared that appellant's statements that he would only consider his own rehabilitation plan showed that he was inflexible which constituted noncooperation. The Office warned that appellant's noncooperation could lead to a decision reducing his compensation based on a job that was within his restrictions. The Office also noted that failure to cooperate in the early stages of rehabilitation could result in his compensation to be set to zero. The Office directed appellant to cooperate with the rehabilitation counselor, taking part in testing and other efforts to facilitate efforts to find reemployment. The Office warned appellant that, if he did not respond within 30 days, his compensation would be terminated.

In a July 23, 2001 letter, appellant submitted a rehabilitation plan for him to teach martial arts. He estimated the costs at \$18,300.00. He stated that, if he was given the money, he would not seek further payment from the Office. In a July 27, 2001 letter, the Office rehabilitation specialist stated that the Federal Employees' Compensation Act did not contain a settlement feature for the situation that appellant posed. He declared that self-employment would not be sponsored as a part of his rehabilitation plan. He commented that while appellant may qualify for teaching martial arts, such a job was not reasonably available in appellant's commuting area as a salaried job.

The Office determined that the job of retail store manager was representative of appellant's wage-earning capacity. The Office indicated that the job was light work, requiring the ability to frequently lift 10 pounds and occasionally lift 20 pounds. The Office noted that the job required three to four years of vocational preparation. It concluded that appellant's experience in managing his own business and in managing over 40 people in several positions at the employing establishment gave him the experience to perform the duties of the position. The Office found that the job was performed in sufficient numbers so as to be reasonably available

full-time within appellant's commuting area. The Office calculated that, based on the salary of a retail store manager, appellant had a 35 percent loss of wage-earning capacity. In a September 14, 2001 decision, the Office informed appellant that it found that he could perform the duties of a retail store manager and therefore his compensation would be reduced. In an October 4, 2001 letter, appellant requested a hearing before an Office hearing representative. In an October 9, 2001 decision, the Office reissued its September 14, 2001 decision.

The hearing was conducted on July 17, 2002. In a September 15, 2002 decision, the Office hearing representative found that the Office had met its burden of proof in reducing appellant's compensation, noting that appellant had not fully cooperated with the Office vocational rehabilitation efforts.

In a March 31, 2003 letter, appellant requested reconsideration. Appellant's attorney stated that appellant's inability to work with others in the vocational rehabilitation efforts was the exact inability that formed the basis for his depressive disorder. He submitted a March 24, 2003 report from Dr. Andre who stated that appellant had not acted out in violent ways. The attorney added, however, that appellant's emotional condition had been brittle in the past and anger had been a prominent concern. He, therefore, hesitated to recommend appellant for a position with ready access to weapons. The attorney commented that there probably were many federal jobs that were suitable for appellant.

In a May 2, 2003 report, Dr. Andre stated that in an April 11, 2003 examination, appellant was doing relatively well with respect to his mood disorder. He concluded that appellant's depression was in remission. Dr. Andre noted that appellant was doing extremely well as a university student. He indicated that appellant was unable to return to work with the employing establishment because of the emotional injuries incurred in his work. Dr. Andre stated that appellant's depression had slowly remitted and he was now free of active symptoms. He reported that appellant was capable of working in other jobs, either in the private sector or the Federal Government.

In a February 23, 2004 merit decision, the Office denied appellant's request for modification of the prior decision.

In a May 20, 2004 decision, appellant again requested reconsideration. His attorney argued that appellant was denied his right to due process because he could not question his accusers during the hearing. He added that appellant's testimony was uncontested at the hearing by the employing establishment and the rehabilitation counselor. The attorney contended that appellant's testimony should have been given more weight than the materials submitted by the employing establishment and the rehabilitation counselor. He also argued that appellant was denied his right to return to employment with the employing establishment. Finally, the attorney suggested that the terrorist attack on September 11, 2001, affected the decision making process of the Office supervisory claims examiner who issued the September 14, 2001 decision. In a June 14, 2004 decision, the Office denied appellant's request for reconsideration.¹

¹ In a December 18, 2004 letter, the Office proposed to terminate appellant's compensation. As there is no final decision in the record on this issue, the Board has no jurisdiction over that issue. 20 C.F.R. § 501.2(a).

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.² Section 8113(b) of the 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.”³

Under section 10.519 of the Office’s regulations, if a recipient of compensation fails or refuses to undergo and participate in vocational rehabilitation efforts when a suitable job has been identified, the Office will reduce the recipient’s compensation based on the amount that would likely have been his wage-earning capacity based on the identified suitable job.⁴

ANALYSIS -- ISSUE 1

After the Office accepted that appellant was totally disabled due to the employment-related emotional condition, vocational rehabilitation was authorized for appellant and a vocational rehabilitation specialist was assigned.

In his initial report dated November 29, 1999 the vocational rehabilitation specialist identified three positions which were suitable for appellant, including manager of a retail store.

Appellant gave three alternatives for his vocational rehabilitation; funding to start his own business, return to employment with the Federal Government, or taking courses in business at a community college. The Office explained to appellant in numerous letters that it could not provide funding for a new business because, based on the Office’s past experience, such funding rarely resulted in a claimant reaching the wage-earning capacity that he had in his former federal position. It indicated that the difficulty in getting federal employment made such employment not reasonably available to appellant. The Office commented that vocational rehabilitation was intended to provide a claimant with sufficient training to return to work at a job he could perform. Whether or not to provide vocational rehabilitation services is within the Office’s discretion.⁵ Based on these reasons, the Office properly exercised its discretion in refusing to agree to any of appellant’s proposals. There is no evidence that the Office abused its discretion.

² *Kevin M. Ratzner*, 51 ECAB 407, 410 (2000).

³ 5 U.S.C. § 8113(b).

⁴ 20 C.F.R. § 10.519.

⁵ 20 C.F.R. § 10.518(a).

After the Office rejected appellant's proposals for vocational rehabilitation, appellant refused to participate any further in the vocational rehabilitation efforts. Based on those facts, the Office acted properly on September 14, 2001 in determining appellant's wage-earning capacity, based on the earnings of the position of retail store manager that had been previously identified by the vocational rehabilitation specialist. There is no evidence of record suggesting that appellant had any physical problems that would limit his employment. The only restriction placed on appellant was Dr. Andre's restriction that appellant could not return to work at the employing establishment due to effects of his emotional condition. Appellant, therefore, could perform the physical duties of a retail store manager. The state employment agency indicated that the job was performed in such numbers in appellant's commuting area so as to make it reasonably available. The Office indicated that appellant had sufficient experience from prior work to assume the job of a retail store manager. The Board finds that the Office properly reduced appellant's compensation benefits based upon his wage-earning capacity as a retail store manager.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant. Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁶ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁷ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.⁸

While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.⁹

ANALYSIS -- ISSUE 2

In the request for reconsideration, appellant's attorney raised several issues, none of which have any legal color of validity. The attorney contended that appellant was denied his right to due process because he could not question his accusers during the hearing. The Act, however, created a nonadversarial workers' compensation program. The Office, as stated in

⁶ 20 C.F.R. § 10.608(b).

⁷ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

⁸ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

⁹ *Robert P. Mitchel*, 52 ECAB 116, 119 (2000).

section 8124(2)(b)(2), is not bound by common law or statutory rules of evidence or by technical or formal rules of evidence. The Office is given discretion in such a manner as to best ascertain the right of the claimant. There is no evidence that the Office hearing representative abused his discretion in conducting the hearing. The attorney argued that appellant's uncontested testimony should have been given more weight than the materials submitted by the employing establishment and the rehabilitation counselor. The decision on how to weigh the evidence is in the discretion of the Office and the Office hearing representative. There is no indication in the record that the Office abused its discretion in determining that appellant could perform the duties of a retail store manager and therefore had a 35 percent loss of wage-earning capacity. The attorney claimed that appellant was denied his right to return to his employment at the employing establishment. Section 8151(b)¹⁰ clearly provides that this issue is to be considered pursuant to federal regulations issued by the Civil Service Commission. In turn, the Office of Personnel Management (OPM) has promulgated federal regulations that set forth the placement assistance the OPM will provide to employees returning from a compensable injury sustained under 5 U.S.C. § 8151. An employee seeking to appeal an "agency's failure to restore or improper restoration" is to make such appeal to the Merit Systems Protection Board.¹¹ This Board has no jurisdiction on this issue. The attorney's suggestion that the terrorist attack of September 11, 2001 may have influenced the decisions in the case is sheer, unfounded, speculation unsupported by any evidence in the case record. Such an unsubstantiated statement insults the integrity of the employees of the employing establishment and should not have been raised in the first place. Since the legal contentions advanced by appellant's attorney have no reasonable color of validity, the Office properly exercised its discretion in denying appellant's request for reconsideration.

CONCLUSION

The Office has met its burden of proof in finding that appellant had refused to cooperate with vocational rehabilitation efforts and in reducing appellant's compensation due to appellant's failure to cooperate in vocational rehabilitation efforts.

¹⁰ 5 U.S.C. § 8151.

¹¹ *Nathan Stelly*, 46 ECAB 396, 401 (1995).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs, dated June 16 and February 23, 2004, be affirmed.

Issued: June 17, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member