United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 07-74**
	)	**Issued: August 16, 2007**
DEPARTMENT OF THE AIR FORCE, McCLELLAN AIR FORCE BASE, Sacramento, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 10, 2006 appellant filed a timely appeal from an August 15, 2006 merit decision of the Office of Workers' Compensation Programs reducing his compensation to zero for failing 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.

ISSUE

The issue is whether the Office properly reduced appellant's monetary compensation to zero under 5 U.S.C. § 8113(b) effective September 3, 2006 on the grounds that he did not cooperate with the preliminary stages of vocational rehabilitation.

FACTUAL HISTORY

This case is before the Board for the third time. In the first appeal, the Board reversed a November 14, 1991 decision reducing appellant's compensation benefits.[1] The Board determined that the Office had not established that he had the vocational training to perform the constructed position of graphics stripper. On appeal for the second time, the Board reversed January 23 and May 1, 1997 decisions after finding that the Office did not meet its burden of proof to show that appellant could perform the duties of a hotel/motel clerk.[2] The Board found that the Office did not determine whether the position of hotel/motel clerk was available on a part-time basis in appellant's commuting area. The findings of fact and conclusions of law from the prior decisions are hereby incorporated by reference.

On July 15, 1999 the Office resumed payment of total disability. In a report dated November 1, 2005, Dr. Raymond L. Craemer, a Board-certified orthopedic surgeon and appellant's attending physician, diagnosed an exacerbation of lumbar disc derangement and a L4-5 herniated disc with right L5 radiculopathy. He found that appellant's work restrictions were unchanged. In a February 15, 2006 work restriction evaluation, Dr. Craemer opined that appellant could work for 6 hours per day with limitations on sitting of 30 minutes at a time, walking 30 minutes at a time, twisting and standing 1 hour, bending 6 hours per day and pushing, pulling and lifting under 25 pounds. He further opined that he could operate a motor vehicle both at work and to and from work six hours per day.

On March 27, 2006 the Office referred appellant to Joseph Sahli, a rehabilitation counselor, for vocational rehabilitation.[3] By letter dated April 1, 2006, Mr. Sahli requested that appellant contact him to schedule an appointment. On April 11, 2006 he rescheduled an appointment for appellant at his request. In a letter dated April 20, 2006, Mr. Sahli noted that he had cancelled two scheduled initial appointments and informed him that he was required to participate in rehabilitation efforts. He rescheduled an appointment for May 2, 2006.

By letter dated May 9, 2006, appellant related that he had provided the information sought by Mr. Sahli to a prior rehabilitation counselor. He asserted that he was unable to work five days per week.

In a vocational rehabilitation report dated May 31, 2006, Mr. Sahli described his contact with appellant on April 17, 2006 as follows:

> "[Appellant] called to say he would not be able to keep tomorrow's appointment for the initial interview. He said that he could not drive, and added that he was not going to pay $3.00 for a gallon of gas. I told him that, if distance was an

[1] *Ray H. Harp*, 44 ECAB 409 (1993). The Office accepted that appellant sustained lumbosacral strain due to an April 10, 1984 employment injury.

[2] *Ray H. Harp*, Docket No. 97-2043 (issued May 25, 1999).

[3] The Office attempted vocational rehabilitation in 2004. On April 14, 2005 the Office noted that appellant had not cooperated with rehabilitation efforts and provided him 30 days to either cooperate or provide adequate reasons for his noncooperation. The Office subsequently ceased rehabilitation efforts.

issue, that I would meet him somewhere closer to his residence. I asked if he was residing away from Corona, perhaps in the Palm Springs area. He would not tell me where he lives. He said that he would not agree to meet me 'even if it were around the corner.' He felt that all of this was unnecessary, as he was not able to participate in eight hours of activity."

Mr. Sahli noted that he had not spoken with appellant since April 17, 2006 despite repeated attempts at contact. He stated: "[Appellant] has cancelled appointments and has refused to meet with this counselor. Appellant has not returned phone calls."

By letter dated July 6, 2006, the Office advised appellant that he had impeded the efforts of the rehabilitation counselor. The Office informed him of the provisions of section 8113(b) of the Federal Employees' Compensation Act[4] and directed him to make a good faith effort to participate in the rehabilitation effort within 30 days or, if he believed he had good cause for not participating in the effort, to provide reasons and supporting evidence of such good cause within 30 days. The Office advised him that, if he failed to cooperate without good cause, his monetary compensation benefits could be reduced on the assumption that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity.

In a July 24, 2006 response, appellant asserted that a prior rehabilitation counselor told him to attend school full time and he was not able to do that. He maintained that he was unable to meet with Mr. Sahli or drive to work due to his medication. Appellant also contended that his compensation should not be reduced to zero because he would be unable to earn the wages that he received from the Office even if he worked. He submitted a prescription for a narcotic painkiller from Dr. Craemer which indicated that the person taking the medication should not drive or work.

By decision dated August 15, 2006, the Office reduced appellant's compensation to zero under section 8113(b) effective September 3, 2006 on the grounds that he failed to cooperate with vocational rehabilitation and failed to provide sufficient reasons for his failure to cooperate. The Office found that he had not participated in the early but necessary stages of vocational rehabilitation thereby not permitting the Office to determine what his wage-earning capacity would have been had he participated. The Office further found that appellant had not shown that he was unable to attend appointments using a form of transportation other than his vehicle and that he had not submitted sufficient medical evidence supporting that he was unable to drive.

LEGAL PRECEDENT

Section 8104(a) of the Act[5] 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 which emphasize returning partially disabled employees to suitable

[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8104(a).

employment and determining their wage-earning capacity.[6] 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.[7]

Section 8113(b) of 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 such failure the wage-earning capacity of the individual would likely have increased substantially, "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 directions of the Office.[8] 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.[9] Under section 8104 of the Act, the employee's failure to willingly cooperate with vocational rehabilitation may form the basis for terminating the rehabilitation program and the reduction of monetary compensation.[10] The Office's implementing regulations state:

> "If an employee without good cause fails or refusing to apply for, undergo, participate in or continue to participate in a vocational rehabilitation effort when so directed, [the Office] will act as follows:
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> * * *
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> "(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.
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> "(c) Under the circumstance identified in paragraph (b) of this section, in the absence of evidence to the contrary, [the Office] will assume that the

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

[7] *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. § 10.500(b).

[8] 5 U.S.C. § 8113(b).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11(b) (November 1996).

[10] *See Wayne E. Boyd*, 49 ECAB 202 (1997) (the Board found that the Office properly reduced the claimant's wage-loss compensation benefits as he failed to cooperate with the early and necessary stages of developing an appropriate training program).

> 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). The reduction will remain in effect until such time as the employee acts in good faith to comply with the directions of [the Office]."[11]

ANALYSIS

In a work restriction evaluation dated February 15, 2006, Dr. Craemer opined that appellant could work six hours per day with permanent restrictions. He also found that he could operative a motor vehicle both at work and to and from work for six hours per day. Based on Dr. Craemer's February 15, 2006 work restriction evaluation, the Office properly referred appellant to Mr. Sahli, a rehabilitation counselor.

By letters dated April 1, 11 and 20, 2006, the rehabilitation counselor attempted to schedule an initial appointment with appellant to discuss vocational rehabilitation efforts. In a vocational rehabilitation report dated May 31, 2006, Mr. Sahli related that on April 17, 2006 he spoke with him on the telephone. Appellant declined to drive to meet with him and Mr. Sahli offered to meet him closer to his residence. He refused to meet with the rehabilitation counselor "even if it were around the corner." Mr. Sahli continued to attempt to contact appellant but he did not return his telephone calls.

The Office notified appellant by letter dated July 6, 2006 that his compensation would be reduced if he did not cooperate with vocational rehabilitation or provide adequate reasons for his refusal within 30 days. In a letter dated July 24, 2006, appellant argued that he was unable to attend school full time as instructed by a prior rehabilitation counselor. His contention, however, has no relevance as he did not meet with the current rehabilitation counselor and thus had no knowledge of his recommendations for vocational rehabilitation.

Appellant also asserted that he was unable to meet with Mr. Sahli or drive to work due to his medication. He submitted a prescription for a narcotic painkiller prescribed by Dr. Craemer which indicated that anyone taking the painkiller should not drive or work. Appellant did not, however, submit any medical evidence from his physician supporting his contention that he was unable to drive or meet with the rehabilitation counselor. Dr. Craemer specifically advised that he was able to operate a motor vehicle for six hours per day at work and commuting to and from work. The opinion of appellant's attending physician supports his capacity for employment. Further, appellant has not shown that alternative forms of transportation, such as public transportation, were not available for him to use to attend the scheduled appointments with his rehabilitation counselor.

Appellant also noted that his compensation should not be reduced to zero because he would be unable to earn the wages that received from the Office even if he worked. The Office,

[11] 20 C.F.R. § 10.519.

however, would reimburse him for any loss in his wage-earning capacity.[12] Appellant, therefore, did not show good cause for his failure to participate in vocational rehabilitation.

Appellant failed to cooperate in the early stages of vocational rehabilitation. The Act's implementing regulation provides that, when an employee fails to participate in the early stages of vocational rehabilitation, it cannot be determined what his or her wage-earning capacity would have been had there been no failure to participate.[13] It is thus assumed, absent evidence to the contrary, that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity.[14] Appellant did not submit any evidence to refute this assumption. The Office therefore properly found that he had no loss of wage-earning capacity and reduced his monetary compensation to zero.[15]

CONCLUSION

The Board finds that the Office properly reduced appellant's monetary compensation to zero under section 8113(b) as he did not cooperate with the preliminary stages of vocational rehabilitation.

[12] An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity. 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

[13] 20 C.F.R. § 10.519(b).

[14] 20 C.F.R. § 10.519(c).

[15] *See F.R.*, 58 ECAB ___ (Docket No. 05-15, issued July 10, 2007).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 15, 2006 is affirmed.

Issued: August 16, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board