United States Department of Labor
Employees' Compensation Appeals Board

T.P., Appellant	)	
and	)	**Docket No. 10-572**
	)	**Issued: November 8, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Pittsburgh, PA, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 28, 2009 appellant filed a timely appeal from a November 18, 2009 merit decision of the Office of Workers' Compensation Programs. 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 to zero pursuant to 5 U.S.C. § 8113(b) based on his failure to cooperate with vocational rehabilitation.

FACTUAL HISTORY

The case was before the Board on a prior appeal. By decision dated February 4, 1998, the Board reversed Office decisions dated July 12 and August 17, 1995, finding that it did not meet its burden of proof to terminate compensation effective July 23, 1995 on the grounds he had refused an offer of suitable work.[1] In a decision dated January 12, 2005, the Office issued a

[1] Docket No. 95-2849 (issued February 4, 1998). The accepted condition was a bilateral shoulder impingement.

schedule award for 27 percent left arm and 19 percent right arm permanent impairment. Following the schedule award decision, the Office further developed the medical evidence with respect to a continuing employment-related disability. Appellant was referred to Dr. Robert Kleinman, a Board-certified orthopedic surgeon, to resolve a conflict in the medical evidence under 5 U.S.C. § 8123(a). In a report dated April 4, 2009, Dr. Kleinman diagnosed bilateral shoulder impingement and indicated that appellant could work with restrictions such as 35 pounds of lifting.

The Office referred appellant to a rehabilitation counselor for vocational rehabilitation services. In a report dated August 11, 2009, the rehabilitation counselor indicated that an initial interview was held on July 21, 2009 and appellant indicated that he did not believe he could work in any capacity. In a September 11, 2009 report, the rehabilitation counselor noted that appellant submitted medical reports which he stated prevented him from participating in vocational rehabilitation. By letter dated October 5, 2009, the rehabilitation counselor recommended a comprehensive vocational evaluation to determine feasible vocational goals. In an OWCP-3 status report dated October 13, 2009, an Office rehabilitation specialist indicated that appellant had cancelled vocational testing and would not participate in vocational rehabilitation.

In a letter dated October 13, 2009, the Office notified appellant that he had cancelled a scheduled appointment for vocational testing. It advised him of the provisions of 5 U.S.C. § 8113(b) and to contact the claims examiner and the rehabilitation specialist within 30 days to make a good effort to participate in vocational rehabilitation, or provide reasons for not participating in vocational rehabilitation services.

On October 19, 2009 appellant submitted an undated letter stating that he would not participate in the vocational rehabilitation program. He contended that he was 69 years old and had multiple conditions that prevented his reentry into the workforce. With respect to the medical evidence, appellant submitted an October 9, 2009 report from Dr. Craig Ferris, a family practitioner, who stated that appellant was "unable to [accept] significant improvement in a physical rehab[ilitation] program due to injuries of his neck, low back, wrist, legs and feet." In a report dated July 31, 2009, Dr. Ferris provided results on examination and diagnosed chronic pain in neck, low back and shoulders.

By decision dated November 18, 2009, the Office reduced appellant's compensation to zero on the grounds he had, without good cause, failed to undergo vocational rehabilitation when so directed under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.

LEGAL PRECEDENT

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."

20 C.F.R. § 10.519 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 [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]."

The Office's procedure manual states that specific instances of noncooperation include a failure to appear for the initial interview, counseling sessions, a functional capacity evaluation, other interviews conducted by the rehabilitation counselor, vocational testing sessions, and work evaluations, as well as lack of response or inappropriate response to directions in a testing session after several attempts at instruction.[2]

ANALYSIS

In this case, the Office developed the medical evidence regarding appellant's work restrictions. Dr. Kleinman advised in an April 9, 2009 report that appellant could work with a 35-pound lifting restriction. The Office referred appellant for vocational rehabilitation services to develop a vocational plan and assist him in returning to gainful employment within his medical limitations.

After an initial interview, the rehabilitation counselor scheduled a vocational testing session. Appellant cancelled the appointment and noted that he would not participate in

[2] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.11(a) (November 1996); *see Sam S. Wright*, 56 ECAB 358 (2005).

vocational rehabilitation. The Office's procedures recognize that failure to attend a vocational testing session is a specific instance of noncooperation in vocational rehabilitation.

The issue is whether his failure to participate was "without good cause" under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519. Appellant stated that he was too old and was physically incapable of returning to work, but his own belief that rehabilitation efforts would be unsuccessful does not establish "good cause."[3] No probative evidence was submitted to establish that there was "good cause" for his failure to continue participation in vocational rehabilitation. A rehabilitation counselor had scheduled vocational testing, and none of the medical reports indicated that appellant was physically unable to attend the testing session. Dr. Ferris referred briefly to chronic pain and a number of injuries, without discussing the relevant issue. If a suitable job was subsequently identified, appellant would have an opportunity to submit relevant evidence as to the medical or vocational suitability of the position. The Board accordingly finds that appellant's failure to participate in vocational rehabilitation was "without good cause."

In this case, the failure to participate was clearly in the "early but necessary" stage of vocational rehabilitation, prior to the identification of a suitable job. Under this circumstance the Office will assume, in the absence of contrary evidence that the rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity. Pursuant to 20 C.F.R. § 10.519, the Office will reduce compensation to zero until such time as appellant in good faith complies with the direction of the Office. The Board finds the Office properly applied the provisions of the Act and the implementing regulations in reducing appellant's compensation to zero.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation to zero pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.

[3] *See Jonathan Gibbs*, 52 ECAB 91 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 18, 2009 is affirmed.

Issued: November 8, 2010
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board