U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ERIC GLOVER and NATIONAL ARCHIVES RECORDS ADMINISTRATION, FEDERAL RECORDS CENTER, Bayonne, N.J.

Docket No. 97-2302; Submitted on the Record;
Issued July 16, 1999

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly suspended appellant's entitlement to monetary compensation benefits on the grounds that he failed to cooperate with rehabilitation efforts.

The Board finds that the Office improperly suspended appellant's compensation entitlement.

5 U.S.C. § 8113(b) states:

> "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."

20 C.F.R § 10.124(f) additionally states, regarding an individual's failure to undergo, participate in, or continue participation in the early stages of a vocational rehabilitation effort, such that the Office cannot determine what would have been his wage-earning capacity had there not been such failure or refusal:

> "It will be assumed, therefore, in the absence of evidence to the contrary, 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."

The Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services,* Chapter 2.813.11 (November 1996) states that failure to cooperate with vocational rehabilitation efforts may include noncooperation such as the lack of response to letters or phone calls from the rehabilitation counselor, and repeated failure to keep appointments or interviews arranged by the rehabilitation counselor. The Office found that appellant employed such noncooperation in this case. However, the Board does not find such evidence of appellant's repeated noncooperation.

Appellant was receiving compensation on the periodic roll at an address given as: 45 E. 18th Street, Bayonne, N.J. 07002. However, by letter to the Office dated October 11, 1995 appellant advised the Office: "I [appellant] request a change of address from 45 E. 18th Street to P.O. Box 1948, Bayonne, N.J. 07002 because of stolen checks."

On October 19, 1995 appellant also completed a direct deposit form for his compensation checks to be directly transferred to his New Jersey bank account. Appellant's address on that form was noted to be P.O. Box 1948, Bayonne, N.J. 07002. However, the Office failed to change appellant's address in its computer and continued to incorrectly list his correspondence address as: 45 E. 18th Street, Bayonne, N.J. 07002.

On December 18, 1995 the Office referred appellant for rehabilitation counseling, and provided the rehabilitation counselor with the incorrect address. On December 21 and December 22, 1995 the rehabilitation counselor called appellant at his sister's residence and was advised that he no longer lived there but had moved to Jamaica, Queens. On December 22, 1995 the rehabilitation counselor called appellant at 201-433-5024 and was advised that this was his mother's residence. Appellant returned the rehabilitation counselor's call that date, and gave his current number as 201-858-8672.

On December 27, 1995 the rehabilitation counselor called appellant at the given number and his son answered and took a message. On December 29, 1995 appellant returned the telephone call from the rehabilitation counselor and advised that he was staying with his son and did not have a car.

By report dated January 5, 1996, the rehabilitation counselor indicated that a meeting with appellant on January 4, 1996 took place at: 45 E. 18th Street, Bayonne, N.J. 07002. The Office, however, continued to send correspondence to appellant at the incorrect mailing address.

On January 15, 1996 the rehabilitation counselor called appellant, but left a message with his son, Ali, who stated that he would convey the message to his father. On January 17, 1996 the rehabilitation counselor left a message for appellant on his son's answering machine. She also sent appellant a certified letter at the incorrect address and requested that he contact her. On January 19, 1996 the rehabilitation counselor sent appellant another certified letter addressed with the incorrect address, which scheduled an appointment for January 24, 1996.

By letter to appellant dated January 24, 1996 and mailed to the incorrect address, the rehabilitation counselor advised appellant that this was his second notice with a new appointment date of February 1, 1996. The rehabilitation counselor advised that if appellant did

not keep this second appointment, the Office would be advised and appropriate action would be considered.

On January 25, 1996 the rehabilitation counselor left a message for appellant with a female named Shanell at a number that was not annotated.

On a rehabilitation action report noting obstruction the rehabilitation counselor advised that appellant had not kept appointments on January 24 or February 1, 1996 for vocational testing and had not called in response to telephone messages left on his son's answering machine on January 15, 17 and 25 and February 5, 1996.

By form letter CA-1657 dated February 6, 1996 and addressed to the incorrect address, the Office advised appellant that it had determined that he had refused to participate in rehabilitation efforts and it directed him to contact the Office within 30 days to discuss his reasons for noncompliance.

By letter dated February 13, 1996 and addressed to the correct address, the rehabilitation counselor advised appellant of an appointment scheduled for February 23, 1996. By letter dated March 1, 1996 and addressed to the correct address, the rehabilitation counselor noted that the assessment had begun on February 23, 1996 and that she had discussed with appellant his need for reading glasses for test taking and she scheduled an appointment for March 15, 1996.

However, by letter dated March 4, 1996 and again addressed to the incorrect address, the Office advised appellant of the scheduled March 15, 1996 appointment and advised appellant of the provisions of 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.124(f) regarding compensation reduction for failure to undergo vocational rehabilitation.

In an April 4, 1996 vocational rehabilitation report, the rehabilitation counselor noted that the Bayonne post office advised her on February 5, 1996 that appellant had not responded to the two misaddressed certified letters about which information was sought. The most recent misaddressed letter was thought to be in transit. The rehabilitation counselor noted that on February 8, 1996 appellant responded stating that he did not receive the letters and did not see any notifications from the post office regarding them. The rehabilitation counselor also noted that on February 13, 1996 appellant advised her of his P.O. Box for receipt of mail and advised that he had given the Office this address also, due to problems he had receiving checks. The rehabilitation counselor noted that appellant additionally spoke with her or her office on February 16, 1996 and twice on February 28, 1996 and she met with him on February 23 and March 15, 1996. The rehabilitation counselor noted that "numerous" delays were due to appellant not keeping the two appointments and that it was not easy contacting him on the telephone. The rehabilitation counselor opined that when confronted about these "problems" appellant became defensive and irritated and that he had many problems such as the lack of glasses and transportation. In a May 8, 1996 vocational rehabilitation report, the rehabilitation counselor noted that there had been no delays within this reporting period, but reiterated the earlier delays due to appellant's nonresponse to unreceived letters and telephone calls. The rehabilitation counselor further noted that she had left appellant two messages with his son and his girlfriend on April 26 and May 8, 1996, to which he had not yet responded.

By letter dated May 20, 1996 and addressed again to the incorrect address, the Office advised appellant that he had consistently failed to demonstrate a good faith effort in vocational rehabilitation and that therefore, they were reducing his compensation to zero effective May 26, 1996. The Office implicated appellant's nonattendance at the misaddressed appointments on January 24 and February 1, 1996, the unanswered misaddressed letters of January 19 and 24, 1996, and the unanswered telephone messages left with relatives and friends on January 15, 17 and 25 and February 5, 1996. The Office concluded that these enumerated actions demonstrated a pattern of behavior that established an unwillingness to show a good faith effort in vocational rehabilitation.

On May 20, 1996 appellant attempted to contact the rehabilitation counselor who was not in and he left a message with a telephone number where he would be for one hour. A later call to appellant resulted in the rehabilitation counselor hanging up because she refused to listen to appellant's son's answering machine message.

On May 22, 1996 appellant called the rehabilitation counselor and advised that he had mailed the signed vocational rehabilitation plan the week prior and stated that he had called the previous week, but the rehabilitation counselor advised that she never got the message.

By letter dated June 1, 1996, appellant stated that he did intend to show a good faith effort in his rehabilitation process and that he had not failed to keep his appointments. Appellant advised the rehabilitation counselor that she had mailed the notices of appointment to the wrong address numerous times and that he had trouble with trains on the day he was 40 minutes late for testing, of which he had notified Ken Hamlett. He claimed that he came in for testing even though he had no glasses and tried to do the best he could. Appellant claimed that he told the rehabilitation counselor about the computer school no longer being there and claimed that the rehabilitation counselor insisted that he did not have a magnetic resonance imaging scan, which he stated he had undergone and which was in his file and that was the cause of the disagreement. He stated that the rehabilitation counselor hung up on him on April 19, 1996 when she got mad. Appellant again noted his changed address and advised that was why he got letters late or not at all and he requested that this be corrected.

On June 4, 1996 appellant contacted the rehabilitation counselor and advised that he wished to continue the program and indicated that he would follow through and cooperate as necessary. The rehabilitation counselor noted on June 4, 1996 that appellant had indeed advised that he had reported that the computer training school he knew of and was supposed to investigate had closed down and she noted that she had omitted this from her May 8, 1996 report to the Office. Appellant also advised the rehabilitation counselor that when he was going to be late for testing he had called the Office to advise that he was having a problem with trains.

On June 6, 1996 the rehabilitation counselor called appellant to cancel the June 7, 1996 appointment and left messages on appellant's girlfriend's and son's answering machines. On June 7, 1996 the girlfriend advised the rehabilitation counselor in response to another call that there was no prior message on her machine.

By letter sent to the correct address dated June 25, 1996, but not sent certified, the rehabilitation counselor advised appellant that an appointment was being scheduled for July 10, 1996 to review his rehabilitation plan.

By letter dated July 1, 1996, appellant requested reconsideration of the suspension of his compensation benefits.

On July 15, 1996 the Office rehabilitation specialist noted that appellant did not keep the July 10, 1996 scheduled appointment with the rehabilitation counselor and he determined that appellant's compensation payments would not be reinstated, due to lack of cooperation.

However, by vocational rehabilitation report dated July 19, 1996 the rehabilitation counselor noted that appellant called her almost one hour past the scheduled appointment time on July 10, 1996 and advised her that he had not received the June 25, 1996 letter scheduling the appointment. Appellant stated that he only learned of the appointment through a telephone conversation that date with an Office claims examiner.

By decision dated September 17, 1996, the Office denied modification of its prior suspension of compensation finding that the evidence submitted in support of the request was insufficient to warrant modification. The Office restated that there were numerous instances in which appellant did not return phone calls, did not respond to letters and avoided contact with the rehabilitation counselor. The Office dismissed appellant's argument about not receiving the misaddressed letters and claimed, incorrectly, that he did not notify the Office of the address change in writing. The Office also claimed that the letters were not returned to the Office as undeliverable.

By letter dated October 1, 1996, appellant again requested reconsideration. Appellant insisted that he had notified the Office of his address change.

By letter dated October 23, 1996, the rehabilitation counselor advised the Office that letters dated January 17, 19 and 24, 1996 were incorrectly addressed, such that this might be the reason for his nonresponse, but she also noted that he failed to answer telephone calls left on his son's answering machine on January 15, 17 and 25 and February 5, 1996. The rehabilitation counselor also submitted to the record copies of the certified letters incorrectly addressed to appellant and marked unclaimed.

By decision dated November 1, 1996, the Office denied appellant's request for a review of his case on its merits, finding that the evidence submitted in support was immaterial.

The Board finds that the Office overlooked appellant's October 11, 1995 letter requesting that his mailing address be changed. The Board has noted that it is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by the individual.[1] This presumption arises when it appears from the record that the notice was properly addressed and duly mailed. However, in the absence of evidence of a

[1] *See Michelle R. Littlejohn*, 42 ECAB 463 (1991) (notices not properly addressed do not support the presumption that the notice was received).

properly addressed notice, the presumption cannot arise. The Board therefore finds that the letters from both the rehabilitation counselor and the Office dated January 17, 19 and 24, February 6, March 4 and May 20, 1996 were incorrectly addressed, such that the Office cannot presume or demonstrate that they were timely received by appellant. Accordingly, his lack of response to them cannot be considered as obstruction. The record also supports that appellant resided at several different addresses during the initiation of vocational rehabilitation; with his mother, with his sister and with his son. The rehabilitation counselor left appellant multiple telephone messages on a variety of telephones; however, none of these telephones belonged to appellant, such that he apparently had no regular and dependable receipt of messages, either recorded or left with others, which could be considered problematic. The rehabilitation counselor called appellant and left messages on January 15, 17 and 25, February 5, April 26 and May 8, 1996. Appellant responded, speaking with the rehabilitation counselor on January 2, February 8, 13, 16, 1996 and twice on the February 28 and April 9, 17 and 19, 1996, and meeting with her on January 4, February 23 and March 15, 1996. The Board finds that this does not support that appellant was obstructing rehabilitation efforts, as he continued to communicate with the rehabilitation counselor and met with her when properly advised of the scheduled appointment.

As the Office improperly suspended appellant's compensation entitlement, the suspension decision must be reversed; as the subsequent decisions denied modification and merit review, respectively, of the decision being reversed, they become moot and need not now be addressed.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated November 1 and September 17, 1996 are hereby reversed.

Dated, Washington, D.C.
July 16, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member