U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KEVIN M. FATZER and DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Stockton, CA

Docket No. 98-47; Submitted on the Record;
Issued March 27, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation under 5 U.S.C. § 8113(b) to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts; and (2) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

On August 15, 1986 appellant, then a 32-year-old warehouseman, sustained an employment-related back strain, herniated nucleus pulposus at L5-S1 and subluxations at L1 and L5.[1] Appellant worked in various light-duty positions before stopping work on March 16, 1992.

In a report dated January 11, 1995, Dr. Moris Senegor, appellant's attending Board-certified neurosurgeon, indicated that appellant did not have any complaints other than intermittent low level back pain. Dr. Senegor stated that appellant's condition was permanent and stationary and indicated that he had a permanent disability due to his back injury. He noted that appellant could not lift over 20 pounds, continuously sit for more than 2 hours at a time, or engage in excessive bending. Dr. Senegor recommended that appellant participate in a vocational rehabilitation program.

In a report dated May 15, 1995, Dr. Peter Grossgart, a Board-certified orthopedic surgeon, to whom the Office referred appellant, diagnosed status post decompression of a central disc herniation at L5-S1, and L4-S1 fusion with spinal instrumentation. Dr. Grossgart indicated that appellant was able to return to limited-duty work or to participate in a vocational rehabilitation program. He stated that appellant had lost approximately half of his preinjury capacity for bending, lifting, pushing, pulling and climbing.

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[1] The Office authorized back surgery, a decompressive laminectomy of a central disc herniation at L5-S1 and a L4-S1 fusion with spinal instrumentation, which was performed on December 13, 1993. Appellant also sustained other employment injuries, an acute neck strain on April 12, 1991 and herniated lumbar discs on October 30, 1991.

In a report dated December 19, 1995, Dr. Senegor provided an assessment of appellant's work restrictions, which was identical to that contained in his January 11, 1995 report. He continued to treat appellant through mid 1997; Dr. Senegor noted that appellant still had chronic low back pain which necessitated work restrictions.[2]

In August 1995, appellant began participating in a vocational rehabilitation program which was authorized by the Office. In October 1995, appellant underwent vocational training which revealed that, with additional computer training, he was capable of performing a variety of positions, including bookkeeper, self-storage warehouse manager, dispatcher, computer terminal operator, inventory clerk and shipping and receiving clerk. In a letter dated April 11, 1996, the Office advised appellant that the Federal Employees' Compensation Act provided penalties for claimants who did not cooperate with vocational rehabilitation efforts.

As part of his rehabilitation program, appellant began participating in May 1996 in a computer training program at the Modesto Computer Academy. Beginning in August 1996, appellant increasingly missed appointments with John Van Gossen to discuss his vocational rehabilitation efforts. In September 1996, appellant completed his computer training program and, during the period following the completion of this program, he failed to respond to more than a dozen telephone messages left by Mr. Van Gossen, his rehabilitation counselor, for the purpose of arranging meetings to discuss his job placement activities.

In addition to leaving telephone messages, Mr. Van Gossen mailed letters to appellant advising him of appointments for rehabilitation counseling. Appellant kept only one of seven appointments scheduled for October 1996.[3] During an October 15, 1996 meeting, Mr. Van Gossen advised appellant that he should visit the rehabilitation office at least twice a week and contact five employers per day in order to secure employment. He informed appellant that his benefits could be adversely affected if he did not fully participate in the vocational rehabilitation process. In November 1996, after determining that appellant had not elected to fully participate in job placement activities, Mr. Van Gossen began to send appellant's resume to potential employers.[4] In reports dated between December 1996 and February 1997, Mr. Van Gossen indicated that he did not receive any response from appellant concerning any follow-up activities he might have conducted in connection with these resume mailings.

In a letter dated January 3, 1997, the Office advised appellant of its determination that he had refused to participate in vocational rehabilitation efforts with Mr. Van Gossen. The Office informed appellant that an individual who refuses or impedes a vocational rehabilitation effort without good cause after testing has been accomplished will have his compensation reduced based on what would have been his wage-earning capacity had the training been successfully completed. The Office directed appellant to make a good faith effort to participate in the

[2] In a report dated December 9, 1996, Dr. Senegor indicated that appellant remained unable to sit for prolonged periods of time.

[3] Appellant provided reasons for missing two of the appointments, but did not call or otherwise provide reasons for missing four of the appointments.

[4] Mr. Van Gossen sent out resumes for such positions as dispatcher, shipping clerk and purchasing clerk.

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 stated that if these instructions were not followed within 30 days action would be taken to reduce his compensation.

Appellant did not respond in writing to the Office's January 3, 1997 letter. On January 13, 1997 appellant spoke with an Office claims officer and stated that he felt his rehabilitation counselor had "unrealistic expectations" for him particularly with regard to his "sitting limitation."

By decision dated February 28, 1997, the Office reduced appellant's compensation under 5 U.S.C. § 8113(b) to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts. The Office determined that appellant had failed, without good cause, to undergo vocational rehabilitation as directed. With respect to his wage-earning capacity, it further found that, if appellant had participated in good faith in vocational rehabilitation, he would have been able to perform the position of purchasing clerk. Appellant requested reconsideration of his claim in June 1997 and, by decision dated July 3, 1997, the Office denied appellant's request for merit review.[5]

The Board finds that the Office properly reduced appellant's compensation under 5 U.S.C. § 8113(b) to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts.

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.[6]

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."[7]

Section 10.124(f) of Title 20 of the Code of Federal Regulations, the implementing regulations of 5 U.S.C. § 8113(b), further provides in pertinent part:

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[5] The Office noted in its July 3, 1997 decision that the evidence submitted by appellant required the performance of a merit review, but the decision read as a whole reveals that the Office did not in fact consider the evidence sufficient to require the performance of a merit review.

[6] *Betty F. Wade*, 37 ECAB 556, 565 (1986).

[7] 5 U.S.C. § 8113(b).

> "Pursuant to 5 U.S.C. § 8104(a), the Office may direct a permanently disabled employee to undergo vocational rehabilitation. If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue participation in a vocational rehabilitation effort when so directed, the Office will, in accordance with 5 U.S.C. § 8113(b), reduce prospectively the employee's monetary compensation based on what would probably have been the employee's wage-earning capacity had there not been such failure or refusal."[8]

A review of the record indicates that appellant was offered repeated opportunities to complete the agreed upon vocational rehabilitation plan. Over a period of five or six months, appellant displayed on numerous occasions his unwillingness to fully participate in vocational rehabilitation efforts. Appellant missed numerous appointments with his rehabilitation counselor, Mr. Van Gossen, which were intended to advance his vocational rehabilitation efforts; often times appellant did not provide any explanation for missing such meetings. For example, in October 1996 appellant missed six of seven appointments and only provided an explanation for his absence on two occasions. In late 1996, appellant failed to respond to more than a dozen telephone messages that Mr. Van Gossen left for the purpose of arranging vocational rehabilitation meetings; appellant also failed to respond to letters which were mailed for the purpose of advising him regarding such meetings. After Mr. Van Gossen began mailing resumes to potential employers, appellant did not provide any indication that he performed any follow-up efforts with respect to these mailings. Nor did appellant indicate that he was otherwise pursuing an effort to become reemployed. Appellant was advised on several occasions that his level of participation was unacceptable, but he did not make any notable efforts to increase his participation. Therefore, the evidence shows that appellant failed to adequately participate in vocational rehabilitation efforts.

In arguing that he had good cause to not participate in vocational rehabilitation efforts, appellant suggested that he was medically unfit to pursue employment. Appellant indicated that Mr. Van Gossen had "unrealistic expectations" for him particularly with regard to his "sitting limitation." Appellant did not, however, adequately articulate this argument or provide evidence in support thereof. The evidence of record, including reports of Dr. Senegor, appellant's attending Board-certified neurosurgeon, reveal that appellant was only partially disabled from work.[9] A review of the record does not show that appellant was medically or otherwise unable to perform the types of positions, in which Mr. Van Gossen was attempting to place him.[10] There is no evidence, therefore, that appellant's failure to fully participate in the rehabilitation

[8] 20 C.F.R. § 10.124(f).

[9] Dr. Senegor indicated that appellant could not lift more than 20 pounds or sit continuously for more than 2 hours at a time.

[10] Mr. Van Gossen attempted to place appellant in positions such as dispatcher, shipping clerk and purchasing clerk. These positions did not require heavy lifting or extended continuous sitting. The Board notes that the position of purchasing clerk reflects appellant's wage-earning capacity in that he was vocationally and medically able to perform the position which was shown by labor surveys to be reasonably available. The position did not require lifting more 10 pounds or extended continuous sitting; Mr. Van Gossen made a determination, based on appellant's history and vocational testing, that appellant was vocationally able to perform the position.

program, particularly in his clear failure to exercise a reasonable standard of cooperation in applying for positions, which would return him to the workforce, was based on "good cause."[11] For these reasons, the Office properly reduced appellant's compensation under 5 U.S.C. § 8113(b) to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts.

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[12] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[13] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his application for review within one year of the date of that decision.[14] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[15]

In support of his June 1997 reconsideration request, appellant submitted a May 6, 1997 report, in which Dr. Senegor stated that he "will be permanently disabled from engaging in gainful employment." In addition to the fact that this report contains a vague and unrationalized opinion regarding appellant's disability, it does not provide any opinion regarding his condition in late 1996 and early 1997 when he failed to participate in vocational rehabilitation efforts. As noted above, the medical evidence shows that appellant had only partial disability during that period. Therefore, the evidence submitted by appellant upon reconsideration is not relevant to the main issue of the present case, *i.e.*, whether he had good cause to not participate in vocational rehabilitation efforts in late 1996 and early 1997. The Board has held that the submission of evidence, which does not address the particular issue involved, does not constitute a basis for reopening a case.[16]

In the present case, appellant has not established that the Office abused its discretion in its July 3, 1997 decision, by denying his request for a review on the merits of its February 28, 1997 decision, under section 8128(a) of the Act, because he has failed to show that the Office

[11] *See Michael D. Snay*, 45 ECAB 403, 410-12 (1994).

[12] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[13] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

[14] 20 C.F.R. § 10.138(b)(2).

[15] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[16] *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office or that he submitted relevant and pertinent evidence not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated July 3 and February 28, 1997 are affirmed.

Dated, Washington, D.C.
March 27, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member