U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEO THOMAS and DEPARTMENT OF THE AIR FORCE, MacDILL AIR FORCE BASE COMMISARY, MacDill, FL

Docket No. 98-1992; Submitted on the Record;
Issued May 4, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's monetary compensation by 100 percent on the basis that the evidence of record indicated he would have sustained no loss of wage-earning capacity had he undergone vocational rehabilitation as directed by the Office.

On June 26, 1986 appellant, then a 54-year-old meat cutter, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that he injured his shoulder when he slipped and fell while pulling pork. The Office accepted the claim for chronic impingement syndrome and right rotator cuff tear on October 6, 1986.

On March 4, 1992 appellant filed a recurrence claim, commencing on February 28, 1992 due to his June 26, 1986 employment injury, which the Office accepted on June 10, 1992. The Office authorized the September 2, 1992 arthroscopic acromioplasty and open mini-rotator cuff tear repair of the right shoulder surgery. Appellant was placed on the periodic rolls for temporary disability effective September 10, 1994.

On October 25, 1995 the Office referred appellant for vocational rehabilitation.

In a rehabilitation action report dated November 7, 1995, the vocational rehabilitation specialist noted that he had contacted appellant by telephone on October 31, 1995 and that appellant advised him to contact his attorney before contacting him again. The rehabilitation specialist noted that appellant refused to see him "until his attorney has corresponded by letter" with the Office.

In a letter dated December 22, 1995, appellant's counsel objected to the location of the rehabilitation service site on the basis of appellant's age, that the site was a 50-mile round-trip drive from appellant's residence and appellant takes medication which makes him drowsy.

In a rehabilitation action report dated December 29, 1995, the rehabilitation counselor noted the objections of appellant's attorney to the chosen vocational evaluation site. The rehabilitation counselor also noted that it was unknown at that time whether appellant would participate in the vocational rehabilitation.

In a January 2, 1996 memorandum from the rehabilitation specialist it was noted that appellant objected to both the vocational rehabilitation and to the vocational rehabilitation services.

By letter dated May 17, 1996, the Office advised appellant that his compensation would be reduced based upon what he would have earned had he not refused vocational rehabilitation. The Office advised appellant that he had 30 days in which to cooperate with vocational rehabilitation or establish a good cause for failing to cooperate.

In a June 11, 1996 vocational rehabilitation report, the rehabilitation counselor detailed his efforts with appellant from January 2 to June 11, 1996. Appellant noted his various medical and mental complaints including prostate cancer and that he needed to talk with his attorney prior to rescheduling the vocational evaluation.

Appellant's attorney, in a June 12, 1996 letter, denied that appellant was unwilling to undergo vocational rehabilitation, but that appellant felt that he was unable to physically comply with the vocational rehabilitation program due to his prostate cancer.

By decision dated April 3, 1997, the Office found that appellant had failed to cooperate with vocational rehabilitation and reduced appellant's monetary compensation to zero.

In a letter dated April 8, 1997, appellant's counsel requested reconsideration of the decision to reduce his monetary compensation to zero and enclosed a copy of his June 12, 1996 letter. Appellant argued that he had never been unwilling to participate in vocational rehabilitation and noted that, in his June 12, 1996 letter, his counsel had detailed several problems with the rehabilitation counselor.

By merit order dated May 12, 1997, the Office denied modification of the April 3, 1997 decision.

By letter dated August 28, 1997, appellant's counsel requested reconsideration and argued that appellant was too ill to participate in vocational rehabilitation due to medications he was taking. He submitted medical reports dated December 1, 1995 and March 6, 1996, regarding appellant's prostate cancer, an August 27, 1997 note from Dr. Edward R. Feldman, which does not refer to appellant and medication advisories for various drugs in support of his request. In the August 27, 1997 note, Dr. Feldman notes that it was contraindicated for anyone taking pain medications stronger than Schedule III to drive and that he would advise against driving for individuals taking Schedule II medication.

By merit decision dated October 27, 1997, the Office denied reconsideration on the evidence was cumulative.

On December 15, 1997 appellant's, counsel requested reconsideration and submitted a November 11, 1997 report from Dr. Feldman in support of his request. In the November 11, 1997 report, he diagnosed chronic impingement syndrome of the right shoulder and status post rotator cuff tear repair of the right shoulder. Dr. Feldman opined that appellant was unable to perform any work requiring use of appellant's right shoulder and stated that appellant was 100 percent totally disabled from any gainful employment.

By merit decision dated February 10, 1998, the Office found Dr. Feldman's report to be unrationalized and that appellant has failed to present sufficient evidence to show good cause for his failure to cooperate with vocational rehabilitation. The Office denied modification of its prior decisions.

By letter dated March 24, 1998, appellant's counsel requested reconsideration and submitted a March 4, 1998 report from Dr. Feldman, a May 30, 1997 report from SPI Managed Care, a November 29, 1995 report from Radiology Associates, an operative report dated April 30, 1996 concerning appellant's prostate cancer, a surgical chart note dated November 12, 1995 from Urology Health Center recommending biopsy, a newspaper article dated August 13, 1997, detailing medical malpractice charges against Dr. Lowell and a copy of the summons and complaint filed against Dr. Lowell, noting that he was not Board-certified, but Board-eligible. In the March 4, 1998 report, Dr. Feldman stated that the medications appellant takes "do have side effects" and opined that the side effects were "sufficient to cause concern about having to travel significant distances to engage in rehabilitative efforts." In the May 30, 1997 report from SPI Managed Care, Margaret T. McKenna, A.R.N.P., stated that appellant had "been under the care and treatment by a Medical Doctor for Prostate Cancer February 1996 and Radiation Implant Treatment April 1996."

By decision dated April 9, 1998, the Office denied modification of its prior decisions.[1]

The Board finds that Office properly reduced appellant's monetary compensation by 100 percent on the basis that the evidence or record indicated he would have sustained no loss of wage-earning capacity had he undergone vocational rehabilitation as directed by the Office.

Section 8113(b) of the Federal Employees' Compensation Act 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 [Office], 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-

[1] Appellant's counsel requested reconsideration in a letter dated June 2, 1998, but a review of the record does not show that a decision had been issued on the request. The record contains a note that appellant's counsel had been disbarred. Also, subsequent to the April 9, 1998 merit decision and appellant's appeal to the Board, appellant was issued a schedule award on July 23, 1998.

> earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the [Office]."[2]

The regulation implementing this section of the Act, 20 C.F.R. § 10.124(f), restates section 8113 (b) and then states:

> "If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue participation in the early but necessary stages of a vocational rehabilitation effort (*i.e.*, interviews, testing, counseling and work evaluations), the Office cannot determine what would have been the employee's wage-earning capacity had there not been such a 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. Any reduction in the employee's monetary compensation under the provisions of this paragraph shall continue until the employee in good faith complies with the direction of the Office."[3]

The Board has upheld the provisions of 20 C.F.R. § 10.124(f) as an appropriate implementation of section 8113(b) of the Act.[4] The Office, however, has the burden of showing that it invoked these provisions properly and appropriately.[5]

The evidence shows that appellant failed, without good cause, to participate in the preliminary vocational rehabilitation meetings and testing such that he failed to participate in the "early but necessary stages of vocational rehabilitation effort."[6] On October 31, 1995 appellant's vocational rehabilitation specialist contacted appellant by telephone and was informed by appellant to contact his attorney before contacting him again about rehabilitation services. By letter dated December 22, 1995, appellant's attorney objected to the location of the rehabilitation service site as it constituted a 50-mile round-trip from appellant's home. In a January 2, 1996 memorandum, the counselor noted that appellant objected to both vocational rehabilitation and vocational rehabilitation services. On May 17, 1996 the Office advised appellant of the consequences of failing to undergo vocational rehabilitation as directed. The Office informed appellant that he had 30 days to either cooperate with vocational rehabilitation services or provide a good reason for refusing to cooperate. Appellant, in response, argued that he had not refused to cooperate with vocational rehabilitation services, but that he was physically unable to comply due to his prostate cancer. However, the evidence submitted by appellant is not sufficient to establish that appellant was under such physical restrictions for his prostate

[2] 5 U.S.C. § 8113(b).

[3] 20 C.F.R. § 10.124(f).

[4] *Asline Johnson*, 41 ECAB 438 (1990).

[5] *See Michael L. Bowden*, 41 ECAB 672 (1990).

[6] 20 C.F.R. § 10.124(f).

cancer treatment to render him unable to participate in vocational rehabilitation. For this reason, he has failed to establish good cause.

Office procedures regulations provide that, when an employee fails to participate in the early stages of vocational rehabilitation, it cannot be determined what would have been the employee's wage-earning capacity had there been no failure to participate and it is assume, 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.[7] Appellant did not submit sufficient evidence to refute such an assumption and the Office, in its April 3, 1997 decision, had a proper basis to reduce his disability compensation to zero effective April 3, 1997.

By letter dated April 8, 1997, appellant submitted a letter arguing that he was not unwilling to undergo vocational rehabilitation, but was physically unable to comply due to his prostate cancer and submitted a copy of his attorney's June 12, 1996 letter in support of his argument. Appellant failed to submit sufficient supporting documentation to support his contention that his prostate cancer physically prevented him from participating in vocational rehabilitation services.

Appellant also contends that he was too ill to participate in vocational rehabilitation services due to medication he was taking and submitted reports from Dr. Feldman. The Board has carefully reviewed this evidence and notes that it does not establish that appellant was medically restricted from participating in vocational rehabilitation nor that vocational rehabilitation would not have led to his return to work with loss in wage-earning capacity. Appellant submitted medical reports dated December 1, 1995 and March 6, 1996, from Dr. Feldman regarding his prostate cancer and an August 27, 1997 note from Dr. Feldman, which does not refer to appellant but indicates generally that individuals taking certain pain medication should not drive. None of the evidence submitted by appellant provides a sufficient justification for his refusal to participate in vocational rehabilitation.

Appellant submitted a November 11, 1997 report from Dr. Feldman, who opined that appellant was totally disabled from performing any work due to his chronic impingement syndrome of the right shoulder. Dr. Feldman's report is insufficient as the physician failed to provide any medical rationale to support his opinion that appellant was totally disabled which would prevent him from participate in a vocational rehabilitation program.

Appellant submitted an April 30, 1996 operative report concerning his prostate cancer, a November 12, 1995 surgical report recommending a biopsy be performed and the March 30, 1997 letter from SPI Managed Care. This evidence, however, is not sufficient to establish that appellant was unable to participate in vocational rehabilitation or that he was medically prohibited from participation in rehabilitation efforts. The newspaper article and copy of a summons and complaint are irrelevant to the issue of whether appellant's in vocational rehabilitation.

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

For these reasons, the Office properly reduced appellant's compensation to zero effective April 3, 1997 due to his failure, without good cause, to participate in the early stages of vocational rehabilitation.

The decisions of the Office of Workers' Compensation Programs dated April 9 and February 10, 1998 and October 27, 1997 are hereby affirmed.[8]

Dated, Washington, D.C.
May 4, 2000

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[8] The Board notes that appellant has submitted new evidence on appeal. Evidence submitted, subsequent to the Office decision, cannot be considered by the Board.