U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEMETRIUS BEVERLY and DEFENSE LOGISTICS AGENCY, DEF DIST REGION WEST, Stockton, CA

Docket No. 00-2011; Submitted on the Record;
Issued January 25, 2002

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly suspended appellant's compensation effective May 21, 2000 for failure to submit forms for reporting his financial status; and (2) whether 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 Office accepted that appellant, then a 50-year-old motor vehicle operator (messenger), sustained a left groin strain and a left ankle injury with a subsequent surgery as a result of a February 24, 1989 industrial injury. On March 1, 1993 appellant returned to work in a clerk position until he was separated from his employment on June 28, 1996 as a result of a reduction-in-force. On July 22, 1997 he underwent surgical exploration for his ankle injury and began to receive temporary total disability compensation. In a March 17, 1998 medical report, Dr. Robert A. Panacci, appellant's podiatrist, opined that appellant could work an eight-hour day with restrictions. In April 1998 appellant was referred for vocational rehabilitation services as the limitations on his walking rendered him unable to hold the job held at the time of injury.

In a March 31, 2000 letter, the Office requested that appellant complete and submit the attached CA-1032 form to report on his employment and dependent status for the prior 15 months. Appellant was warned that if he did not completely answer all questions and return the form within 30 days, his compensation would be suspended. The Office noted that it had sent a similar letter in January 2000 also requesting information to substantiate the benefits being received and warning appellant of the consequences to his benefits if the requested information was not received within 30 days, but stated that the completed CA-1032 form had not been received.

By letter dated April 21, 1999, the Office advised appellant that the plan developed by him and his rehabilitation counselor for his return to work as a computer assisted drafter (CAD) drafter or customer service representative was medically suitable as the job duties are within his

medical limitations. The Office advised that it would provide any necessary training or preparation so that appellant may return to work in the specified job or one similar to it and that 90 days of placement services would be provided after the training is completed to help appellant reach that goal. The Office noted that based on the rehabilitation counselor's vocational evaluation and a survey of the local labor market, appellant would have a wage-earning capacity of $22,000.00 per year. Appellant was advised that at the end of the rehabilitation program, whether or not he is actually employed, the Office would in all likelihood reduce his compensation based on his wage-earning capacity in the selected position. Appellant was further advised that the Federal Employees' Compensation Act provided penalties if he did not cooperate with vocational rehabilitation efforts.

By decision dated May 17, 2000, the Office suspended appellant's compensation on the grounds that he had neglected to submit an affidavit or other report of earnings as required by Office regulations. The Office suspended compensation effective May 21, 2000. The Office indicated that compensation would be reinstated retroactively to the date they were suspended once appellant submitted a completed Form CA-1032. A copy of Form CA-1032 was enclosed. By decision dated May 22, 2000, the Office advised that appellant's compensation was terminated effective June 18, 2000.[1]

By decision dated May 24, 2000, the Office reduced appellant's compensation effective the same date 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 computer assisted drafter.

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

Under the Office's regulations, an employee in receipt of compensation is required periodically to submit an affidavit or other report of earnings.[2] The regulations states that if an employee, when required, fails within 30 days of the date of the request to submit the affidavit or report, his or her right to compensation will be suspended until such time as he or she submits the affidavit or report. The regulations, as stated, apply to any request for the affidavit or report, and makes no distinction between a first request for the information and any subsequent requests for the same information for the same period after the first request has been made. In its March 31, 2000 letter, the Office gave appellant 30 days to submit the requested information. The record reflects that appellant's EN-1032 form was received by the Office on April 27, 2000. The regulation requires that appellant be allowed 30 days to submit the requested information. As the Office received the requested information before appellant's 30-day period for responding

[1] The Board notes that the May 22, 2000 "decision" references a Memorandum to the Director dated May 17, 2000 which is not of record. Moreover, although the May 22, 2000 "decision" notes that enclosures were provided, the referenced enclosures are also not of record. As the Board can not decipher the basis upon which the Office terminated appellant's compensation, the Board hereby vacates the decision of the Office dated May 22, 2000.

[2] 20 C.F.R. § 10.528.

had expired, the Office's action in suspending appellants' compensation was premature before the expiration of the 30-day period for submission of the material as requested. The Office's action in this case was therefore contrary to the time limit imposed by the regulation. Accordingly, the decision of the Office dated May 17, 2000 is hereby reversed.

The Board further 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.[3]

Section 8113(b) of the Federal Employees' Compensation 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."[4]

Section 10.519 of Title 20 of the Code of Federal Regulations details the actions the Office will take when 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. Section 10.519(a) provides in pertinent part:

> "Where a suitable job has been identified, [the Office] will reduce the employee's future monetary compensation based on the amount which would likely have been his or her wage-earning capacity had he or she undergone vocational rehabilitation. [The Office] will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with the [Office] nurse and the employer. The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of [the Office]."[5]

A review of the record indicates that appellant was offered repeated opportunities to complete the agreed upon vocational rehabilitation plan. On April 23, 1999 the Office approved a training program for appellant to become either a CAD or a customer service representative. The record reflects that appellant indicated that he would not be starting school as scheduled as

[3] *Bettye F. Wade*, 37 ECAB 556, 565 (1986).

[4] 5 U.S.C. § 8113(b).

[5] 20 C.F.R. § 10.519(a).

he wished to pursue his interest in being a professional baseball scout. In a February 4, 1999 report, appellant's vocational rehabilitation counselor noted that he had completed some preliminary research into the occupation of baseball scout and determined that it would be a very difficult program to support since it would essentially be self-employment. The counselor additionally noted that in the February 4, 1999 meeting with appellant, he was intent upon self-employment as a baseball scout and was not interested in discussing any other vocational goals. The counselor noted that appellant said that he realized that there was a chance that he would be sanctioned by the Office for this singular-mindedness. The counselor stated that appellant had no concrete contacts or any other specific plans on how to pursue self-employment as a baseball scout and, when he told appellant that he would support his plan for CAD, appellant declined. The counselor advised appellant that he would be contacting the Office and it was likely that they would send him a letter for noncooperation. Appellant indicated that he understood. The record indicates that appellant's vocational rehabilitation counselor contacted appellant several times to encourage him to take the CAD program, but appellant refused to start the approved training as scheduled. In its April 21, 1999 letter, the Office advised appellant regarding the consequences of not continuing with vocational rehabilitation efforts, but appellant did not respond to this letter.

There is no evidence, therefore, that appellant's failure to fully participate in the vocational rehabilitation program was based on "good cause."[6] Appellant chose not to participate in the Office's approved training program and decided to pursue another vocational option. The record reflects that he likely would have been able to perform the identified position of CAD. As the record indicates that appellant's current pay rate for his date-of-injury job is $18,360.00 per annum and the current labor market survey noted that entry level CAD positions which are available in appellant's commuting area and which comply to his physical restrictions pay $480.00 per week with a $24,960.00 yearly salary, appellant has no loss of wage-earning capacity. 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.

[6] *See Michael D. Snay*, 45 ECAB 403, 410-12 (1994). It should be noted that the training program was designed for appellant with the goal of becoming a CAD or a customer service clerk. It is noted that the CAD position is sedentary and there is no medical evidence of record which shows that appellant could not meet the physical requirements of the position.

The decision of the Office of Workers' Compensation Programs dated May 24, 2000 is affirmed. The decision of the Office dated May 17, 2000 is vacated.

Dated, Washington, DC
January 25, 2002

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member