United States Department of Labor
Employees' Compensation Appeals Board

D.E., Appellant	)	
and	)	**Docket No. 06-859**
	)	**Issued: February 23, 2007**
DEPARTMENT OF THE NAVY, MILITARY SEALIFT COMMAND, Virginia Beach, VA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 6, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated January 20, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly reduced appellant's compensation effective August 7, 2005 pursuant to 5 U.S.C. § 8113(b); (2) whether an overpayment of $2,301.88 was created from August 7 to October 1, 2005; and (3) whether the Office properly denied waiver of the overpayment.

FACTUAL HISTORY

Appellant filed a traumatic injury claim alleging that he sustained a back injury while lifting items on the flight deck in the performance of duty on March 8, 2003. The claim was accepted for lumbar and thoracic back strain and permanent aggravation of preexisting thoracic

and lumbar degenerative disc disease. Appellant stopped working and began receiving compensation for wage loss.

On June 21, 2004 appellant notified the Office that he had moved to Clearwater, Florida. By letter dated August 13, 2004, the Office notified him that it proposed to suspend compensation as correspondence sent to the Clearwater address was returned as undeliverable. Appellant provided a new Clearwater mailing address on August 20 and September 13, 2004.

The Office referred appellant to a private vocational rehabilitation counselor for development of a vocational rehabilitation plan in November 2004. In a report dated December 30, 2004, Glenn Ellis, the rehabilitation counselor, indicated that he met with appellant on November 16, 2004 and they discussed a rehabilitation plan. The counselor indicated that a vocational evaluation would be completed and appellant indicated that he intended to live aboard his recently purchased sailboat and would move to the Fort Lauderdale area. According to the counselor, appellant would investigate the requirements for obtaining a sea captain's license and the availability of jobs.

A vocational evaluation report dated December 28, 2004 was submitted on January 28, 2005. The evaluator stated that appellant believed that he could find a sea captain's position once he obtained his license. A number of other nautical occupations were also discussed. On February 10, 2005 appellant advised the Office that he had moved and provided an address in Key West, Florida.

In a vocational rehabilitation report dated February 15, 2005, the counselor stated that appellant was willing to work in a marina in a lesser paying job if he could not immediately get a sea captain job after completing training. The counselor reported that, since appellant had moved to Key West, the file would be transferred to a more local vocational counselor. An Office rehabilitation specialist indicated on April 1, 2005 that appellant was being referred to a new vocational counselor.

By letter from an Office claims examiner to appellant dated May 10, 2005, the Office stated, "We have been advised that you have IMPEDED the rehabilitation efforts of your assigned vocational rehabilitation counselor.… Specifically, we have been advised that you are planning to move. It is noted that every time the Office's rehabilitation branch is approaching with a plan, you decide to move." (Emphasis in the original.) Appellant was advised of the provisions of 5 U.S.C. § 8113(b) and was directed to contact both the claims examiner and the rehabilitation specialist within 30 days.

The record indicates that appellant met with the new vocational counselor, Alicia F. Soto, on May 18, 2005. The report from the counselor indicated that vocational goals regarding obtaining a sea captain's license was discussed. The counselor reported that appellant's sailboat was in dry dock being repaired and appellant's current address was in Moore Haven, Florida. According to the counselor, the case would be placed on hold until further contact from the Office; she stated, "Since [appellant] is planning to stay in the Fort Myers area, on May 18, 2005 he chose not to develop a job placement plan in Key West."

A memorandum dated May 20, 2005 from Gregory A. Price, an Office rehabilitation specialist, to the claims examiner, stated that appellant "has not cooperated in the development of his [vocational rehabilitation] program since he has relocated on several occasions following initiation of [vocational rehabilitation] efforts in Florida." The specialist stated that occupations aboard a sea vessel would exceed his current work restrictions; entry level wages for cashiers, retail salespersons and counter clerks in various Florida locations were noted. According to the rehabilitation specialist, appellant could earn $270.00 per week.

In a letter to appellant dated May 20, 2005, the Office claims examiner stated that he was "writing in reference to the plan developed by you and your rehabilitation counselor for your return to work as a cashier, earning wages of $270.00 per week." The claims examiner stated that the counselor had advised that appellant had begun, or would shortly begin, looking for employment and "you will receive 90 days of assistance from the Office to help you meet this goal. At the end of the 90-day period, whether you are actually employed or not, the Office will in all likelihood reduce your compensation based on your ability to earn wages of $14,040.00 per year."

Appellant responded in a letter dated May 23, 2005 that he intended to comply with vocational rehabilitation. He stated that he had damage to his sailboat and moved to Moore Haven, where the boat yard rates were more affordable.

By decision dated July 18, 2005, the Office stated that it was adjusting appellant's compensation in accordance with provisions of 5 U.S.C. § 8113(b) and 5 U.S.C. § 8104. The Office stated that had appellant cooperated with vocational rehabilitation efforts, he would have been able to perform the position of cashier II. The Office reduced appellant's compensation based on an adjusted earning capacity of $279.95 per week as of August 7, 2005. The net compensation was $757.88 every 28 days. A memorandum dated July 14, 2005 from Mr. Price stated that appellant "declined to cooperate in [vocational rehabilitation] efforts in the Key West area since he claimed that he did not know where he would be permanently residing." The memorandum stated that appellant had not contacted the rehabilitation counselor, Ms. Soto, to cooperate in job placement efforts and he had not provided any indication that he was engaged in job search activities.

Appellant continued to receive, through direct deposit, compensation payments of $1,529.88 on September 3, 2005 for the period August 7 to September 3, 2005, and on October 1, 2005 for the period September 4 to October 1, 2005. Appellant also received a compensation payment of $757.88 for the period September 4 to October 1, 2005 on October 7, 2005.

By letter dated October 24, 2005, the Office advised appellant of a preliminary determination that an overpayment of $2,301.88 was created. The Office also made a preliminary finding that appellant was at fault because he accepted payments he knew or should have known were incorrect.

In a decision dated January 20, 2006, the Office finalized its preliminary determination that an overpayment of $2,301.88 was created and appellant was not entitled to waiver since he

was at fault in creating the overpayment. The Office directed appellant to send a payment for the entire overpayment amount.

LEGAL PRECEDENT

Pursuant to 5 U.S.C. § 8104, the Secretary of Labor may direct a permanently disabled individual whose disability is compensable under the Federal Employees' Compensation Act to undergo vocational rehabilitation.[1] 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."

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[2]

ANALYSIS

The Office relied on 5 U.S.C. § 8113(b) in this case to reduce appellant's compensation as of August 8, 2005. The Board finds that the evidence does not establish that appellant failed, without good cause, to undergo vocational rehabilitation when so directed.

As the language of section 8113(b) indicates, a claimant must fail to undergo vocational rehabilitation "when so directed." It is not clear from the record specifically what appellant failed to perform with respect to vocational rehabilitation that he was directed to perform. The July 14, 2005 memorandum accompanying the July 18, 2005 decision stated that appellant had declined to cooperate with the rehabilitation counselor, Ms. Soto, when he stated that he did not know where he would be permanently residing. Appellant had stated to Ms. Soto on May 18, 2005 that he had to move his boat for repairs to Moore Haven and he provided a new address. The May 19, 2005 report from Ms. Soto did not state that appellant had declined to cooperate. It was concluded that the case would be placed on hold pending further development.[3]

The July 14, 2005 memorandum also asserted that appellant did not contact Ms. Soto to cooperate and failed to provide indication that he was engaged in job search activities. Appellant

[1] *See also* 20 C.F.R. § 10.519. This section provides that an injured employee who has a loss of wage-earning capacity is presumed to be permanently disabled under section 8104.

[2] *Demetrius Beverly*, 53 ECAB 305 (2002); *Jorge E. Sotomayor,* 52 ECAB 105, 106 (2000).

[3] The report appeared to state both that if the change in residence was not permanent then a rehabilitation plan in Key West could be developed, but then also stated appellant was planning to stay at his new location and appellant chose not to develop a job placement plan in Key West.

did meet with Ms. Soto on May 18, 2005 and it is not clear what additional contact was envisaged at that time. With respect to job search activities, the report from Ms. Soto did not indicate that appellant was directed to perform specific job search activities. Moreover, on May 20, 2005, the Office rehabilitation specialist apparently concluded that appellant could not perform work on a sea vessel based on his physical restrictions and appellant for the first time was advised of a rehabilitation plan for a cashier position. No further explanation was provided and it is not clear what job search activities would be relevant to this vocational rehabilitation plan.

The May 10, 2005 letter from the Office claims examiner directed appellant to contact him and the rehabilitation counselor. Appellant met with a vocational counselor on May 18, 2005 and sent a May 23, 2005 letter to the Office indicating that he was participating in vocational rehabilitation but had to move his boat to Moore Haven. There is no specific action that appellant failed to perform as directed based on the May 10, 2005 letter. With regard to the May 20, 2005 letter, it did not direct appellant to perform any specific vocational rehabilitation activities. In addition, the letter stated that appellant would receive 90 days of assistance to meet vocational rehabilitation goals. The July 18, 2005 decision was issued prior to the end of the 90-day period.

The Board finds that the evidence of record does not establish that appellant failed to undergo vocational rehabilitation when so directed. The record does not indicate that appellant failed to meet with a vocational counselor or failed to perform specific vocational rehabilitation activities as directed. Accordingly, the Board finds the Office improperly relied on 5 U.S.C. § 8113(b) in reducing appellant's compensation.

Since the overpayment determination was based on the reduction in compensation, the overpayment decision must be set aside. It appears from the evidence of record appellant may have received an additional compensation payment for the period September 4 to October 1, 2005. On remand the Office should make relevant findings and after such further development as it deems necessary, issue an appropriate decision.

CONCLUSION

The Office did not properly reduce appellant's compensation pursuant to 5 U.S.C. § 8113(b). The case will be remanded for further development on the issue of an overpayment of compensation.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office dated July 18, 2005 is reversed. The overpayment decision dated January 10, 2006 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Issued: February 23, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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