United States Department of Labor
Employees' Compensation Appeals Board

J.E., Appellant	)	
and	)	**Docket No. 07-1577**
	)	**Issued: July 3, 2008**
DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, CA, Employer	)	

Appearances:
Laura A. Lowe, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 22, 2007 appellant filed a timely appeal from the March 14, 2007 merit decision of the Office of Workers' Compensation Programs, which reduced his compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.[1]

ISSUE

The issue is whether the Office properly reduced appellant's compensation for failing to cooperate with vocational rehabilitation.

[1] Appellant is not appealing the Office's December 28, 2006 decision to deny authorization for therapeutic exercises for his bilateral carpal tunnel syndrome.

FACTUAL HISTORY

On March 1, 1982 appellant, then a 32-year-old machinist, injured his back while lifting a piece of material in the performance of duty. The Office accepted his claim for thoracic sprain.[2] On July 9, 1984 he sustained injury in the performance of duty when he pulled on a wrench. It accepted his claim for cervical and thoracic sprain.[3] On January 21, 1985 appellant again sustained an injury pulling on a wrench. The Office accepted that claim for subluxation of T3, T8 and L5.[4] On December 1, 1987 appellant injured his back when he reached for a work package that was down and behind him. The Office accepted his claim for subluxation of T5, aggravation of cervical and thoracic degenerative joint disease and osteoarthritis of the right shoulder.[5] On August 18, 1989 appellant injured his back moving cans of metal, desks and workbenches. The Office accepted his claim for thoracic strain.[6]

In 1996 an impartial medical evaluation determined that appellant was not capable of returning to work in the position of machinist but could work with restrictions. The Office referred appellant to vocational rehabilitation. The vocational rehabilitation counselor developed a training plan for appellant to obtain an Associates degree in computer technology. Appellant enrolled at the Metropolitan Community College but at one point reduced his coursework to one class per term. He eventually stopped attending class altogether.

On November 9, 2001 the rehabilitation counselor conducted a labor market survey and determined, based on the medically determinable residuals of the injury in the case and taking into consideration all significant preexisting impairments and pertinent nonmedical factors, that appellant was able to perform the job of computer programmer. Such work was being performed in sufficient numbers so as to be considered reasonably available within his commuting area. The rehabilitation counselor noted that appellant did not meet the specific vocational preparation requirements for this position, but that he would have acquired the basic skills necessary to work in this capacity had he completed the training.

On November 28, 2001 the Office directed appellant to undergo the training program in computer technology and to respond within 30 days if he believed he had a good reason for not participating in this effort. The Office informed appellant of the provisions of 5 U.S.C. § 8113(b). Appellant responded that the job required lifting and carrying computers and components and pulling wire overhead and through floors, which exceeded his medical limitations.

In a decision dated January 25, 2002, the Office reduced appellant's compensation based on what he would have had the capacity to earn as an entry-level computer programmer had he

[2] OWCP File No. A13-0678334.

[3] OWCP File No. A13-0744560.

[4] OWCP File No. A13-0760534.

[5] OWCP File No. A13-0852771 (master).

[6] OWCP File No. A13-0899324.

cooperated with vocational rehabilitation efforts. The Office set forth the job description and noted that the position was sedentary in nature.

Appellant requested an oral hearing before an Office hearing representative. On November 22, 2005 he testified that, after he began his training, he learned that the position of computer networker required programming, setting up the network, pulling cables and moving computers, that it was a job requiring medium physical demands exceeding his medical limitations. He testified that he failed his computer programming class three times, even with the help of a tutor, so he dropped the class. Appellant's attorney indicated that medically appellant could perform the job of computer programmer, as it was sedentary and within his physical limitations, but that vocationally he could not.

Following the hearing, appellant's attorney submitted evidence to show that appellant enrolled in Principles of Data Processing but withdrew three times. This was a required class in the computer technology program and the rehabilitation counselor was aware of the difficulty appellant was having. Without the class, appellant could not complete the degree program and would not qualify for a position as a computer programmer.

Appellant submitted a November 9, 2005 report from Dr. Alan D. Jensen, a specialist in internal medicine, who stated: "At this point with the severe cervical canal stenosis, I do not believe that he should not [sic] return to work in any capacity and probably should not have returned in any capacity with this condition only to be made worse by exertion."

In a decision dated January 27, 2006, the Office hearing representative affirmed the reduction of appellant's compensation. She noted that appellant contacted the Office several times from the winter of 1998 through 2000 but never raised the issue of being unable to pass his data processing class. Further, when the Office asked appellant why he was no longer attending classes, he twice explained that he felt he was not physically capable of performing the job of computer networker because it required lifting computers. As he stated on December 20, 2001: "My question is not the mental capacities but the physical limitations." The hearing representative concluded that appellant's argument that he did not complete the training program because he was unable to complete the data processing course was not supported by the factual evidence. As appellant failed to establish that he would not have been successful in completing this program had he attended and completed all of the necessary classes, the hearing representative found that appellant failed to cooperate with vocational rehabilitation.

Appellant requested reconsideration. He submitted, among other things, a January 26, 2007 report from Paulette Kaye Freeman, a vocational rehabilitation specialist. Ms. Freeman reviewed appellant's file and reported that, while his vocational rehabilitation plan might have been appropriate at the outset, his physical condition deteriorated, which then forced him to discontinue the program. This was not noncooperation, she stated, but an incapacity as a result of the injury. Ms. Freeman did not understand how the Office rehabilitation counselor could project a wage that appellant "would have made" had he completed the program. She added that the program appellant was taking did not necessarily qualify him to become a computer programmer but rather qualified him to be an aide. Ms. Freeman stated that he had no experience and no connections that would qualify him for only a very entry-level wage and

possibly an aide position. "The potential jobs identified were n[o]t necessarily the result of the degree he would have obtained," she stated.

Appellant also submitted a December 14, 2006 letter from Diana Simons, one of his college tutors:

> "The first things I want to discuss are my qualifications. I have been working for Metropolitan [Community] College as a tutor since 1989, and I have been involved in arranging tutors for students since 1992. I have worked with several thousand students over the years, so I would consider myself an expert in this area. Also, I have kept records for 10 years concerning tutoring assignments. After reviewing these records, I remember working with [appellant in] 1998, once as a tutor and once to assign him a tutor.
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> "Now, concerning [appellant's] situation with his classes at Metro. I first met [him] the Spring quarter of 1997-1998. He had requested a tutor for his Intermediate Algebra class. I was the one who tutored him, and I got to know him very well. I could tell when he was getting frustrated with certain concepts. We would have to stop tutoring for the day and come back to the same problems the next day. This strategy work[ed] very well and [appellant] successfully passed his math class.
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> "The next time [appellant] requested a tutor was in the winter quarter of 1998. He was requesting a tutor for his Computer programming class (CPT 105). Unfortunately for [him], I assigned him a new tutor. Well to make a long story short, [appellant came] in a few weeks later totally frustrated. He was still having trouble with his class and the tutor was having a hard time explaining things to him so he could understand what was going on with his programs. In the past when I had similar situations occur, I assigned the students to a different tutor, but we didn't have any other programming tutors at that time to help him. Naturally this made matters worse. So out of desperation, [appellant] finally dropped his class. By looking at [his] records I know this was not [appellant's] normal way of doing things, but after trying everything else, he didn't know what else to do.
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> "I want to remind you that when I was working with [appellant], I realized that he was a very hard working, dedicated student. He tried very hard in all his subjects. But like everyone else, there are certain subjects that you just don't understand no matter how hard you try. Computer programming was that class for [appellant]. I feel that [he] did everything he could to try to pass his class, but things just didn't work out that way. In my opinion, I think it is better to drop a class, than to get an 'F.' Evidently, [appellant] felt the same way because that's exactly what he did. I hope you don't punish him for not completing his class, but I strongly feel that he did the only thing that he could do at the time."

In a decision dated March 14, 2007, the Office reviewed the merits of appellant's case and denied modification of its prior decision. The Office found that the position of computer programmer was medically and vocationally suitable.

LEGAL PRECEDENT

The Office may direct a permanently disabled individual whose disability is compensable to undergo vocational rehabilitation.[7] If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed, the Office, on review under 5 U.S.C. § 8128 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 have probably been his wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of the Office.[8]

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 meeting 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.[9]

ANALYSIS

The weight of the medical evidence established that appellant was not disabled for all work and the Office directed him to undergo vocational rehabilitation. The Office vocational rehabilitation counselor developed a training plan for appellant to obtain an Associates degree in computer technology. Appellant enrolled in the program but eventually stopped attending class. The question before the Board is whether he has shown good cause for his failure to participate in vocational rehabilitation when so directed.

Appellant's initial explanation did not show good cause. He believed that he was not physically capable of performing the job of a computer networker, which required lifting and carrying computers and components and pulling wire overhead and through floors. But the argument is immaterial because the Office did not reduce compensation based on the position of computer networker. The Office reduced appellant's compensation based on what would have been his capacity to earn wages as a computer programmer, a purely sedentary position. Appellant's attorney acknowledged this point at the November 22, 2005 oral hearing when she stated that medically appellant could perform the job of computer programmer, as it was sedentary and within his physical limitations. The November 9, 2005 report from Dr. Jensen, the internist, who stated that appellant should not return to work in any capacity due to his severe cervical canal stenosis, comes well after the fact and does not address whether appellant was physically unable to continue his schoolwork. The issue is a medical one, and the medical evidence does not establish that appellant's physical condition deteriorated to the point that he

[7] 5 U.S.C. § 8104(a).

[8] *Id*. at § 8113(b).

[9] 20 C.F.R. § 10.519 (1999).

was forced to stop the training program, as Ms. Freeman, the vocational rehabilitation specialist, reported.

Appellant's later explanation also fails to show good cause. He argued that he was not vocationally qualified to be a computer programmer because, even with the help of a tutor, he withdrew three times from a core class on the principles of data processing. Without the class, his attorney argued, appellant could not complete the degree program and would not qualify for a position as a computer programmer. But the question is not whether appellant currently qualifies for a position as a computer programmer without a passing grade in a core class and without a degree. The question is whether he established good cause for discontinuing the training program that would have given him the basic skills necessary to work in that capacity. First, appellant's difficulty understanding the principles of data processing did not justify his decision to discontinue his training altogether. Second, appellant is self-certifying his incapacity to continue the training and asking the Office to accept his judgment. Because appellant never saw the data processing class through to the end, it remains a matter of speculation whether he would have received a failing grade. His final grade was to be determined by five programming assignments, a programming project and three tests. Had appellant completed the assignments, turned in his project and taken the tests, and had the instructor given him a failing grade, appellant would have a stronger argument that he did not have the capacity to earn a degree in computer technology or the capacity to earn wages as a computer programmer. His fear that he might receive such a grade is not good cause for discontinuing the training program.

The Board finds that the Office properly reduced appellant's compensation. Appellant has not shown good cause for his failure to participate in vocational rehabilitation when so directed. The Office properly found that vocational training would probably have substantially increased his wage-earning capacity, and properly reduced appellant's compensation in accordance with what would have probably been his wage-earning capacity had he completed the program. The Board will affirm the Office's March 14, 2007 decision denying modification of the reduction of appellant's compensation. This reduction remains in effect until appellant in good faith complies with the direction of the Office.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation for failing to cooperate with vocational rehabilitation.

ORDER

IT IS HEREBY ORDERED THAT the March 14, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 3, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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