U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PETE P. FACHKO and U.S. POSTAL SERVICE,
NORTHWEST POST OFFICE, Austin, Tex.

Docket No. 96-2100; Submitted on the Record;
Issued July 10, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing as untimely filed and whether the Office met its burden of proof in reducing appellant's compensation, effective September 17, 1995, based on his capacity to perform the duties of an accounting clerk.

On September 9, 1993 appellant, then a 50-year-old mail carrier, filed a notice of traumatic injury, claiming that his back "gave out' while he was loading a tray of mail into a truck. The Office accepted the claim for a lumbar strain and temporary aggravation of appellant's preexisting degenerative disc disease, and paid appropriate compensation.

Subsequently, appellant was referred to a pain management program and placed on the periodic rolls.[1] Appellant's treating physician, Dr. Lori B. Wasserburger, Board-certified in physical medicine and rehabilitation, completed a work evaluation form, indicating that appellant was capable of full-time work with restrictions on sitting, standing, and walking up to 1 hour at a time for as many as 6 hours a day, lifting up to 10 pounds frequently and up to 25 pounds occasionally, and no running, no prolonged stair-climbing, and frequent changes of position. She stated that the date of maximum medical improvement was July 7, 1994.

On July 28, 1994 the employing establishment informed the Office that appellant's temporary position had expired on November 9, 1993 and that his physical limitations precluded reemployment.

On January 25, 1995 the Office warned appellant that his rehabilitation counselor was having difficulty assisting him in returning to gainful employment. The Office pointed out the

[1] Appellant also receives 20 percent disability benefits for his back condition from the Department of Veterans Affairs.

consequences of refusing to undergo vocational rehabilitation and directed appellant to contact his rehabilitation counselor three to four times a week during the rehabilitation process.

On February 8, 1995 the Office informed appellant that the rehabilitation counselor's plan for appellant's return to work as a file or accounting clerk had been approved. Dr. Wasserburger reviewed the physical requirements of the job description and found the position "medically feasible" for appellant. Based on the rehabilitation counselor's evaluation and a survey of the local labor market, the Office determined that appellant's annual wage-earning capacity was $13,520.00. The Office added that appellant was entitled to 90 days of job placement services after completing his training and that at the end of the rehabilitation program, his disability compensation would likely be reduced.

Appellant completed an eight-week computer skills training program on April 11, 1995 and began looking for work. In a report dated June 8, 1995, the rehabilitation counselor noted appellant's minimal efforts in seeking work and stated that appellant had made only 10 percent or less of the expected contacts required by the job search agreement he signed. On July 6, 1995 the rehabilitation counselor recommended that appellant's case be closed because of his "extremely low volume and quality job search activities. The rehabilitation counselor added that appellant's potential for reemployment was poor.

On July 24, 1995 the Office issued a notice of proposed reduction of compensation on the grounds that the evidence established that appellant was partially disabled and had a wage-earning capacity of $325.00 per week as an accounting clerk. The Office offered appellant 30 days to submit evidence relevant to his wage-earning capacity.

On August 24, 1995 the Office reduced appellant's compensation, effective September 17, 1995, on the grounds that the selected position of accounting clerk was medically and vocationally suitable and represented appellant's wage-earning capacity. The Office noted that appellant had failed to respond to its July 24, 1995 letter

The Board finds that appellant's request for a hearing was untimely filed.

The Federal Employees' Compensation Act[2] is unequivocal that a claimant not satisfied with a decision of the Office has a right, upon timely request, to a hearing before a representative of the Office.[3] The statutory right to a hearing pursuant to section 8124(b)(1) follows an initial decision of the Office.[4] Because subsection (b)(1) is unequivocal on the time limitation for requesting a hearing, a claimant is not entitled to such hearing as a matter of right unless his or her request is made within the requisite 30 days.[5]

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8124(b); *Joe Brewer*, 48 ECAB ___ (Docket No. 95-603, issued March 21, 1997); *Coral Falcon*, 43 ECAB 915, 917 (1992)

[4] *Eileen A. Nelson*, 46 ECAB 377, 379 (1994); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.10(b) (July 1993).

[5] W*illiam F. Osborne*, 46 ECAB 198, 202 (1994).

The Office's procedures implementing this section of the Act are found in Chapter 2.1601 of the Federal (FECA) Procedure Manual. The manual provides for a preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and, if not, whether a discretionary hearing should be granted; if the Office declines to grant a discretionary hearing, the claimant will be advised of the reasons.[6] The Board has held that the only limitation on the Office's authority is reasonableness,[7] and that abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.[8]

In this case, appellant requested a hearing almost eight months after the August 24, 1995 decision of the Office reducing his compensation. Attached to the decision was a statement outlining appellant's options regarding appeal and explaining clearly that the request for a hearing must be made in writing within 30 days of the date of the decision. While appellant believed that filing the required CA-1032 form on August 22, 1995 represented a "good-faith and timely request for a hearing," his written request was postmarked April 17, 1996, well beyond the 30-day limit. Therefore, appellant was not entitled to a hearing as a matter of right.

Nonetheless, even when the hearing request is not timely, the Office has the discretion to grant a hearing, and must exercise that discretion.[9] Here, the Office informed appellant in its May 24, 1996 decision that it had considered the timeliness matter in relation to the issue involved and denied appellant's hearing request on the basis that additional evidence on whether appellant was totally disabled from performing the duties of the selected position could be fully considered through a request for reconsideration.

In this case, nothing in the record indicates that the Office abused its discretion in denying appellant's hearing request. The Office explained in its response to a congressional inquiry that appellant submitted his CA-1032 form in August 1995 and that this was the "response" or "appeal" to which he referred in his letter to the senator.[10] The Office added that appellant's note stating that he was replying to the July 24, 1995 notice of proposed reduction did not elaborate further. Thus, appellant's December 18, 1995 note did not constitute evidence that he wished to contest the proposed reduction. Accordingly, the Office issued its final decision Office on August 24, 1995.

Appellant was fully advised that he could request reconsideration and submit evidence on the issue of the proposed reduction. He was also advised of his options regarding an oral hearing, reconsideration, or appeal to the Board. Finally, appellant has offered no other

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[6] *Belinda J. Lewis*, 43 ECAB 552, 558 (1992); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

[7] *Wanda L. Campbell*, 44 ECAB 633, 640 (1993).

[8] *Wilson L. Clow*, 44 ECAB 157, 175 (1992).

[9] *Frederick D. Richardson*, 45 ECAB 454, 465 (1994).

[10] The Board notes that appellant previously completed a Form CA-1032 on April 21, 1994, reporting no earnings since his work injury.

explanation for his untimely request or any argument to justify further discretionary review by the Office.[11] Thus, the Board finds that the Office properly denied appellant's request for a hearing.

The Board also finds that the Office met its burden of proof in reducing appellant's compensation based on its determination that the selected position of accounting clerk reasonably represented appellant's wage-earning capacity.

Under the Act, once the Office has accepted a claim and paid compensation benefits, it has the burden of proof to establish that an employee's disability has ceased or lessened, thus justifying termination or modification of those benefits.[12] An injured employee who is unable to return to the position held at the time of injury or to earn equivalent wages but who is not totally disabled for all gainful employment is entitled to compensation computed on the loss of wage-earning capacity.[13]

Wage-earning capacity is the measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[14] Section 8106(a)[15] of the Act provides for compensation for the loss of wage-earning capacity during an employee's disability by paying the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability.[16]

Section 8115 provides that the wage-earning capacity of an employee is determined by his actual earnings if these fairly and reasonably represent his or her wage-earning capacity.[17] If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, or if the employee has no actual wages, wage-earning capacity is determined by considering the nature of the injury, the degree of physical impairment, the employee's usual employment, age, and qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[18] A job in the position selected for determining wage-earning capacity must be

[11] *Cf. Brian R. Leonard*, 43 ECAB 255, 258 (1992) (finding that the Office abused its discretion by failing to consider appellant's explanation regarding the untimely filing of his hearing request).

[12] *James B. Christenson*, 47 ECAB ___ (Docket No. 95-1106, issued September 5, 1996); *Wilson L. Clow, Jr.*, 44 ECAB 157, 170 (1992).

[13] 20 C.F.R. § 10.303(a); *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

[14] *Dennis D. Owen*, 44 ECAB 475, 479 (1993); *Hattie Drummond*, 39 ECAB 904, 907 (1988).

[15] 5 U.S.C. § 8106(a).

[16] An employee's wage-earning capacity in terms of percentage is obtained by dividing the pay rate of the selected position by the current pay rate for the date-of-injury job; the wage-earning capacity in terms of dollars is computed by multiplying the pay rate for compensation purposes, as defined at 20 C.F.R. § 10.5(a)(20), by the percentage of wage-earning capacity and subtracting the result from the pay rate for compensation purposes to obtain the employee's loss of wage-earning capacity. 20 C.F.R. § 10.303(b).

[17] 5 U.S.C. § 8115(a); *Lawrence D. Price*, 47 ECAB ___ (Docket No. 93-2007, issued October 4, 1995).

[18] *Mary Jo Colvert*, 45 ECAB 575, 579 (1994); *Samuel J. Chavez*, 44 ECAB 431, 436 (1993).

reasonably available in the general labor market in the commuting area in which the employee lives.[19]

In this case, the Board finds that the medical evidence establishes that appellant is no longer totally disabled for work because of the effects of the September 1, 1993 back injury. Dr. Wasserburger stated in her July 7, 1994 report that appellant had reached maximum medical improvement. She reported in detail appellant's various modes of treatment and the physical limitations under which he could work an eight-hour day and approved the selected accounting clerk's position as medically feasible.

The Board also finds that the earnings of the selected position fairly and reasonably represent appellant's wage-earning capacity. When the employing establishment was unable to offer appellant a light-duty position, the rehabilitation counselor identified the position of file or accounting clerk, as listed in the Department of Labor's *Dictionary of Occupational Titles*, and assisted appellant in attempting to secure employment in this field within his commuting area.[20] The record reflects that many job opportunities were made available to appellant but that he did not engage in a maximum effort to pursue the various avenues of employment.

Upon the expiration of the 90 days afforded appellant to find employment, the rehabilitation counselor closed his case, noting that appellant's employment prospects were poor due to his less-than-committed diligence in following through on job leads. The Office then properly followed its established procedures for determining appellant's wage-earning capacity.[21]

Accordingly, the Board finds that the Office has met its burden of justifying a reduction in appellant's compensation for total disability.

The May 24, 1996 and August 24, 12995 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
July 10, 1998

[19] *Barbara J. Hines*, 37 ECAB 445, 450 (1986).

[20] The Office's procedures regarding vocational rehabilitation emphasize returning partially disabled employees to suitable work. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813 (December 1993). If vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report listing two or three jobs which are medically and vocationally suitable.

[21] *See Phillip S. Deering*, 47 ECAB ___ (Docket No. 94-2050, issued August 20, 1996) (finding that the Office properly applied the principles set forth in *Albert C. Shadrick*, 5 ECAB 376 (1953), for determining appellant's loss of wage-earning capacity).

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member