U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAYMOND R. AVILES and DEPARTMENT OF VETERANS AFFAIRS, LONG ISLAND NATIONAL CEMETERY, Farmingdale, N.Y.

Docket No. 97-167; Submitted on the Record;
Issued October 15, 1998

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in reducing appellant's compensation to zero, effective June 22, 1996, on the grounds that he had the capability of performing the selected position of security guard; and (2) whether the Office abused its discretion in denying appellant's request for an oral hearing as untimely filed.

On May 2, 1994 appellant, then a 62-year-old cemetery caretaker,[1] filed a notice of traumatic injury, claiming that he hurt his back while pushing a casket up a ramp on April 29, 1994. Appellant returned to work, but filed a notice of recurrence of disability on July 12, 1994, claiming that he had cramping in his left leg. Dr. Michael P. Carroll, a Board-certified orthopedic surgeon, diagnosed an acute lumbosacral strain and found appellant totally disabled. The Office accepted both claims and paid appropriate compensation.

Subsequently, the Office referred appellant for a second opinion evaluation to Dr. James B. Sarno, a Board-certified neurosurgeon. He initially reported that appellant was totally disabled due to a herniated disc at L4-5, but in April 3, 1996 and June 1, 1995 reports Dr. Sarno stated that a myelogram and computerized tomographic (CT) scan showed no herniation. Dr. Sarno stated that without the herniated disc the likelihood that appellant could return to work after intensive physical therapy was "better." Dr. Sarno then released appellant to work 8 hours a day with no heavy lifting, repetitive bending, stooping, pushing or shoving and a weight restriction of 10 pounds.

The Office referred appellant for vocational rehabilitation on September 6, 1995. Subsequently, appellant chose to receive retirement benefits and thus declined to participate in job placement. The rehabilitation counselor conducted a labor market survey on November 7,

[1] Appellant had been working at the employing establishment until he retired in 1990. He had returned to work for four hours a day five days a week when he was injured.

1995 and identified the positions of security guard and customer service clerk as vocationally suitable and reasonably available within appellant's commuting area. The Office determined that the security guard position was within the medical restrictions imposed by Dr. Sarno.

On April 19, 1996 the Office issued a notice of proposed termination on the grounds that appellant was capable of working within medical restrictions at a full-time sedentary job such as that of a security guard. Appellant objected to the notice on the grounds that objective testing indicated functional and structural damage to appellant's spine.

On June 7, 1996 the Office terminated appellant's compensation on the grounds that he was no longer totally disabled and could perform the duties of a security guard. The Office noted that the medical evidence appellant submitted supporting his objection to the proposed termination of benefits was unsigned and provided no rationalized opinion supporting continued total disability.

Appellant requested an oral hearing on July 26, 1996. On August 14, 1996 the Office denied appellant's request for an oral hearing as untimely filed. The Office noted that the issue in the case could be equally well addressed by a request for reconsideration and the submission of new evidence showing that the selected position was not suitable. The Office made the same determination in a letter dated October 25, 1996 after appellant again requested an oral hearing on September 16, 1996.

The Board finds that the Office met its burden of proof in terminating appellant's compensation on the grounds that he was capable of working as a security guard.

Under the Federal Employees' Compensation Act,[2] 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.[3] 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.[4]

Wage-earning capacity is the measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[5] Section 8106(a)[6] of the Act provides for compensation for the loss of wage-earning capacity during an employee's disability by paying

[2] 5 U.S.C. §§ 8101-8193 (1974).

[3] *James B. Christenson*, 47 ECAB ___ (Docket No. 95-1106, issued September 5, 1996).

[4] 20 C.F.R. § 10.303(a); *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

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

[6] 5 U.S.C. § 8106(a).

the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability.[7]

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.[8] 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.[9] A job in the position selected for determining wage-earning capacity must be reasonably available in the general labor market in the commuting area, in which the employee lives.[10]

In this case, Dr. Sarno concluded on June 1, 1995 after reviewing the results of the myelogram and CT scan that appellant remained "unchanged" in terms of his ability to work for 8 hours within the listed physical restrictions and weight limitation of 10 pounds.

By contrast, Dr. Carroll stated on April 8, 1996 that appellant had continued back pain, could not sit or stand for any length of time and was permanently disabled. Dr. Carroll repeated this cursory opinion in notes dated January 10 and February 21, 1996 as well as May 5, June 26 and November 16, 1995, but provided no medical findings or rationale for his conclusion. Dr. Daoud Karam, Board-certified in physical medicine and rehabilitation, who diagnosed lumbosacral sprain and bilateral radiculopathy at L-5, reported appellant's complaints of pain during office visits on January 5, February 27, May 20, August 3 and December 27, 1995, but failed to address the issue of whether appellant could work.

The selected position is regarded as sedentary with maximum lifting of 10 pounds and on- the-job-training for one to two days. It requires guarding property against fire, theft, vandalism and illegal entry by patrolling buildings and grounds, examining doors, windows and gates, reporting data, unusual occurrences or irregularities and routine checks, observing departing personnel and sounding an alarm or calling the police if necessary. The position paid $240.00 a week and there were more than 9,000 job openings in appellant's geographical area.

Appellant argued that the security guard position was far too strenuous and that he could not do the job because he had been hospitalized. The job description appellant submitted to the

[7] 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).

[8] 5 U.S.C. § 8115(a); *Lawrence D. Price*, 47 ECAB ___ (Docket No. 93-2007, issued October 4, 1995).

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

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

Office is more detailed than that used to determine appellant's loss of wage-earning capacity, but also includes duties that may be assigned rather than only those required. Obviously, appellant would be limited to performing those duties within his physical limitations. Appellant also contended that the position required a greater strength level than sedentary but submitted no evidence disputing the sedentary nature of a security guard position.

The Board also finds that the earnings of the selected position as security guard reasonably represent appellant's wage-earning capacity. When rehabilitation efforts by the Office proved futile because appellant had elected retirement benefits, the Office identified the positions of security guard and customer service clerk as consistent with appellant's education and available within his area and used the information provided by the rehabilitation counselor to determine the prevailing wage rate in the area.

The Office then found that the selected position of security guard was reasonably available in the labor market within appellant's commuting distance.[11] Thus, the Office properly followed its procedures[12] in determining appellant's wage-earning capacity.[13] Accordingly, the Board finds that the Office has met its burden of justifying a reduction in appellant's compensation for total disability.

The Board also finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing.

The Act 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.[14] The statutory right to a hearing pursuant to section 8124(b)(1) follows an initial decision of the Office.[15] 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.[16]

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[11] *See Dorothy Lams*, 47 ECAB ___ (Docket No. 94-1577, issued May 8, 1996) (finding that appellant failed to submit evidence specifically showing the unavailability of the selected position in his immediate labor market).

[12] The Office's procedures governing the determination of wage-earning capacity based upon a selected position are set forth in Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

[13] *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).

[14] 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).

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

[16] 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.[17] The Board has held that the only limitation on the Office's authority is reasonableness,[18] 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.[19]

In this case, appellant's attorney requested an oral hearing on July 26 and September 16, 1996. Both dates are well beyond the 30-day limit for requesting an oral hearing. By letters dated August 14 and September 16, 1996, the Office denied appellant's requests as untimely filed.

The record shows that, with its June 7, 1996 decision, the Office included a copy of appellant's appeal rights, which clearly states that if appellant has "not requested reconsideration as described below," he may request a hearing in writing within 30 days. The Office's instruction is unequivocal: the request for a hearing must be made in writing within 30 days of the date of the decision. Appellant's requests in July and September 1996 were, therefore, untimely filed and 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.[20] The Office stated in both its letters denying an oral hearing that it had considered the timeliness matter in relation to the issue of the suitability of the selected position and had determined that this issue could be equally well addressed by requesting reconsideration and submitting evidence not previously considered.

In this case, nothing in the record indicates that the Office committed any act in denying appellant's request for a waiver of the 30-day time limit, which could be found to be an abuse of discretion. Further, appellant has offered no credible explanation for his untimely requests or any argument to justify further discretionary review by the Office.[21] Thus, the Board finds that the Office properly denied appellant's request for a hearing.

[17] *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).

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

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

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

[21] *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).

The September 16, August 14 and June 7, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
October 15, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member