U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARTHA P. BOHON and DEPARTMENT OF THE ARMY, T.S.A. COMMISSARY, Fort Polk, La.

Docket No. 97-2352; Submitted on the Record;
Issued June 15, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that the position of general clerk fairly and reasonably represented appellant's wage-earning capacity, effective February 2, 1997, the date it reduced her compensation benefits; and (2) whether the Office abused its discretion in denying appellant's request for a hearing.

On September 14, 1988 appellant, then a 48-year-old assistant sales superintendent, sustained employment-related contusions to the left elbow, shoulder and ankle, a lumbosacral strain and aggravation of post-laminectomy status when she fell at work.[1] She stopped work that day, did not return and was placed on the periodic rolls.[2] Following referral by the Office, appellant underwent an extensive rehabilitation effort that included enrollment in the field of information processing, beginning in March 1994, which she completed in November 1995. She had a heart attack and coronary bypass surgery in January 1996. By report dated May 20, 1996, her Board-certified cardiologist, Dr. Phillip A. Rozeman, advised that she could return to work with no lifting over 35 pounds. In August 1996 Suzanne Douglas, a rehabilitation counselor, completed a labor market survey and determined that the positions of general clerk and hotel clerk, based on the Department of Labor's *Dictionary of Occupational Title*, fit appellant's capabilities.[3] By letter dated November 15, 1996, the Office advised appellant that it proposed

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[1] The record indicates that appellant had a previous employment-related back injury that required surgery. This was adjudicated by the Office under file number A7-16654 and she was granted a schedule award for 15 percent loss of use of the left leg for this injury.

[2] On November 16, 1990 the Office terminated appellant's compensation, and by decision dated February 21, 1991, the Office vacated the prior decision on the grounds that she continued to suffer residuals of disability due to the September 14, 1988 employment injury. She was then returned to the periodic rolls.

[3] Appellant initially underwent rehabilitation in 1993 at which time counselor Pete Mills determined that the positions of receptionist and cashier fit her capabilities. These positions are considered sedentary with maximum lifting of 10 pounds. The clerk positions are considered light with maximum lifting of 20 pounds.

to reduce her compensation based on the opinion of Dr. Robert Po, a Board-certified orthopedic surgeon who had provided an impartial medical evaluation for the Office advising that appellant could do "light work" eight hours per day after she completed her training program with a lifting restriction of 20 pounds.[4] The Office determined that the position of general clerk and corresponding wages fairly and reasonably represented appellant's wage-earning capacity and found that the position was available in appellant's commuting area. The Office advised appellant that if she disagreed with its proposed action, she should submit contrary evidence or argument within 30 days.

In a letter dated December 12, 1996, appellant disputed the Office's proposed reduction, and submitted a December 4, 1996 report from her treating orthopedic surgeon, Dr. J.E. Smith, who noted appellant's complaints of severe pain in her lower back and neck with some radiation into the arms with buttock pain and no radiation into her legs. Findings on examination included a negative straight leg raising test with normal muscle strength in all muscle groups and decreased sensation over the S1 distribution. He advised that she could perform sedentary work for four hours per day, if she were allowed to alternately stand and sit.

By decision dated January 7, 1997, the Office finalized the reduction of appellant's compensation, based on her capacity to earn wages as a general clerk. By letter postmarked February 7, 1997, appellant requested a hearing, and, in an April 16, 1997 decision, an Office hearing representative denied the request on the grounds that it had not been timely filed. The instant appeal follows.

The Board finds that the Office properly reduced appellant's compensation benefits.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.[5] Under section 8115(a) of the Federal Employees' Compensation Act,[6] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, wage-earning capacity is determined with due regard to the nature of injury, degree of physical impairment, usual employment, age, qualifications for other

[4] Dr. Po provided a November 8, 1993 report in which he diagnosed lumbosacral strain which aggravated a post-laminectomy syndrome with chronic neuritis in the lower extremities. He found no evidence that she was impaired for employment due to this condition and indicated that she could perform the duties of a receptionist or cashier, starting at four hours per day and working up to an eight-hour day within four months. In a work capacity evaluation dated November 8, 1993, Dr.Po indicated that appellant was no longer totally disabled and provided limitations to her activity including a lifting restriction of 20 pounds. He stated that she could work four hours per day at that time with a gradual increase over a six-month period to an eight-hour day. In a December 30, 1993 report, Dr. Po advised that appellant could do "light work" and stated that her limitations would not interfere with the scheduled training program. He indicated that at the completion of the training program that appellant could work eight hours per day.

[5] *Garry Don Young*, 45 ECAB 621 (1994).

[6] 5 U.S.C. §§ 8101-8193.

employment, the availability of suitable employment, and other factors and circumstances which may affect the employee's wage-earning capacity in his or her disabled condition.[7]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.[8] Finally, by applying the principles set forth in *Albert C. Shadrick*, the employee's loss of wage-earning capacity can be ascertained.[9]

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[10] Here the Office determined that a conflict of medical opinion existed between appellant's treating physician and those who provided second opinions for the Office. The Office then referred appellant, along with the medical record, a statement of accepted facts with job description and a list of questions, to Dr. Po to resolve the conflict.

In this case, there is no indication that the selected position of general clerk is outside the restrictions set forth by Dr. Po. Furthermore, by letter dated May 20, 1996, Dr. Rozeman advised that appellant could return to work. While Dr. Smith provided a December 4, 1996 report in which he advised that appellant could work only four hours daily, he had submitted an August 4, 1993 report in which he enumerated similar findings and conclusions. This report was reviewed by Dr. Po. The Board, therefore, finds that the Office properly assessed appellant's physical impairment in determining that the position of general clerk fairly and reasonably represented her wage-earning capacity.

As noted above, the selected position must not only be medically suitable but must also be available in appellant's commuting area. The rehabilitation counselor in this case indicated that the recommended positions were reasonably available and that the position paid $5.50 per hour or $220.00 per week in the open market. Appellant's compensation was accordingly reduced to reflect such wage-earning capacity under the principles set forth in *Shadrick*.[11]

The Board further finds that the Office did not abuse its discretion in denying appellant's hearing request.

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[7] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); 5 U.S.C. § 8115(a).

[8] *See Dennis D. Owen*, 44 ECAB 475 (1993).

[9] 5 ECAB 376 (1953); *see* 20 C.F.R. § 10.303.

[10] *See Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

[11] *Albert C. Shadrick*, *supra* note 9.

Section 8124(b) of the Federal Employees' Compensation Act provides claimants under the Act a right to a hearing if they request a hearing within 30 days of an Office decision.[12] In its April 16, 1997 decision, the Office denied appellant's request for a hearing because it was untimely, stating that she was not, as a matter of right, entitled to a hearing since her request had not been made within 30 days of its January 7, 1997 decision. The Office noted that the matter had been considered in relation to the issue involved and indicated that appellant's request was denied on the basis that the issue could be addressed through a reconsideration application.

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[13] In the present case, appellant's request for a hearing postmarked February 7, 1997 was made 31 days after the date of issuance of the Office's prior decision dated January 7, 1997. Hence, the Office was correct in stating in its April 16, 1997 decision that appellant was not entitled to a hearing as a matter of right because her hearing request was not made within 30 days of the Office's January 7, 1997 decision. While the Office also has the discretionary power to grant a hearing request when a claimant is not entitled to a hearing as a matter of right, the Office properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, 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 deduction from established facts.[14] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

[12] 5 U.S.C. § 8124(b).

[13] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[14] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

The decisions of the Office of Workers' Compensation Programs dated April 16 and January 7, 1997 are hereby affirmed.

Dated, Washington, D.C.
June 15, 1999

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member