U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CATHIE M. CRAWFORD and DEPARTMENT OF THE NAVY, CHARLESTON NAVAL SHIPYARD, Charleston, SC

Docket No. 98-1352; Submitted on the Record;
Issued January 21, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity; (2) whether the Office abused its discretion in denying appellant's request for a hearing; and (3) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On December 11, 1992 appellant, then a 46-year-old typing secretary, filed an occupational disease claim, alleging that factors of employment caused pain and soreness in both wrists. She did not stop work and was placed on limited duty until January 29, 1993. By letters dated March 30 and July 20, 1993, the Office accepted that appellant sustained employment-related tendinitis of both hands. In a December 9, 1993 decision, the Office found that appellant's neck condition was not causally related to the employment injury. By decision dated January 4, 1994, the Office denied modification of the prior decision, finding that the medical evidence did not support causal relationship. On August 2, 1995 appellant filed a recurrence claim, stating that she continued to have wrist problems. She did not stop work and on September 26, 1995 the Office accepted that she sustained a recurrence of tendinitis and requested that she submit medical bills. On March 29, 1996 she filed a schedule award claim. Appellant was terminated from federal employment, effective April 1, 1996, due to a reduction in force caused by closure of the employing establishment.

On May 23, 1996 appellant was granted a schedule award for a 10 percent loss of use of each arm. The award covered the period of March 21, 1996 to May 31, 1997, for a total of 62.40 weeks. By decision dated March 19, 1997, the Office found that appellant's light-duty typist position fairly and reasonably represented her wage-earning capacity. The decision indicated that she had no loss of earnings. On June 18, 1997 appellant requested a hearing. In a November 17, 1997 decision, an Office hearing representative denied appellant's request on the grounds that it was not timely filed. On December 10, 1997 appellant requested reconsideration and submitted additional evidence. By decision dated December 29, 1997, the Office denied

appellant's request, finding the evidence submitted immaterial and repetitious. The instant appeal follows.

The Board finds that the Office properly determined appellant's wage-earning capacity.

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.[1] Wage-earning capacity is the measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[2] Section 8106(a) of the Federal Employees' Compensation Act[3] 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.[4] 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.[5] The Board has held that wages actually earned are the best measure of wage-earning capacity; absent contrary evidence, actual earnings must thus be accepted as the proper figure.[6]

The record, in this case, indicates that appellant was terminated effective April 1, 1996 due to a reduction-in-force. The relevant medical evidence includes numerous reports from her treating Board-certified orthopedic surgeon, Dr. Edward R. Hay, who, on February 21, 1995, advised that she could return to full duty without restriction. There is no evidence in this record that appellant's work until the reduction-in-force was part time, sporadic, seasonal or temporary, and there is no evidence to indicate that she lost wages due to the employment-related tendinitis. The Office based its wage-earning capacity on her employment as of March 14, 1992, with an annual pay rate of $18,970.00 or weekly rate of $364.81. When she was terminated due to the reduction-in-force, she earned $21,907.00 per year. The Board, therefore, finds that appellant's actual earnings as of March 14, 1992 fairly and reasonably represented her wage-earning capacity.

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

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[1] 20 C.F.R. § 10.303(a); *Alfred R. Hafer*, 46 ECAB 553 (1995).

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

[3] 5 U.S.C. § 8106(a).

[4] 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).

[5] 5 U.S.C. § 8115(a); *Lawrence D. Price*, 47 ECAB 120 (1995).

[6] *Clarence D. Ross*, 42 ECAB 556 (1991).

In the present case, the Office denied appellant's request for a hearing on the grounds that it was untimely. In its November 17, 1997 decision, the Office stated that appellant was not, as a matter of right, entitled to a hearing since her request had not been made within 30 days of its March 19, 1997 decision. The Office noted that it had considered the matter in relation to the issue involved and indicated that appellant's request was denied on the basis that the issue of whether she sustained a loss of wage-earning capacity could be addressed through reconsideration.

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.[7] In the present case, appellant's request for a hearing on June 18, 1997 was made more than 30 days after the date of issuance of the Office's prior decision dated March 19, 1997 and, thus, appellant was not entitled to a hearing as a matter of right. Hence, the Office was correct in stating in its November 17, 1997 decision that appellant was not entitled to a hearing as a matter of right because her request was not made within 30 days of the Office's March 19, 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, in its November 17, 1997 decision, 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 of whether she sustained an injury causally related to factors of employment 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.[8] 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.

Lastly, the Board finds that the Office did not abuse its discretion in denying appellant's request for review.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[9] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[10] When a claimant fails to meet one of the above standards, it is a

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

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

[9] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[10] 20 C.F.R. § 10.138(b)(1) and (2).

matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[11] To be entitled to merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[12]

In this case, appellant did not advance a point of law not previously considered or articulate any legal argument with a reasonable color of validity in support of her request. While she submitted additional evidence including reports from Dr. Hay, these had been previously considered by the Office. She also submitted two notices of personnel action and a December 1, 1997 letter from the South Carolina Vocational Rehabilitation Department stating that she was its client. These, however, are irrelevant to the issue of whether the Office properly determined appellant's wage-earning capacity. The Office, thus, properly denied appellant's application for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated December 29, November 17 and March 19, 1997 are hereby affirmed.

Dated, Washington, D.C.
January 21, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[11] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[12] 20 C.F.R. § 10.138(b)(2).