

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BILLIE J. BERTUCCI and U.S. POSTAL SERVICE,
POST OFFICE, Jackson, MS

*Docket No. 00-1072; Submitted on the Record;
Issued February 1, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity; and (2) whether the Office properly denied appellant's request for a hearing.

On December 5, 1994 appellant, then a 28-year-old part-time postal clerk, filed a claim alleging that she sustained an injury to her right shoulder on November 17, 1995 while pulling mail flats.¹ The Office accepted the claim for a tear of the right rotator cuff for which appellant underwent corrective surgery on February 26, 1996 and outpatient surgical manipulation of the right shoulder on July 10, 1996. She received appropriate compensation for intermittent periods of total disability.²

Appellant returned to modified-duty work on January 6, 1997 for 35 hours a week. On May 14, 1997 appellant underwent surgery for ulnar nerve entrapment release, following which she was placed in vocational rehabilitation. She returned to work on January 31, 1998 at limited duty for four hours a day, six days a week under restrictions set by her attending physician, Dr. Joe Jackson, a neurologist.³ He recommended light, sedentary employment, restricting the right shoulder to no lifting and no weight above right shoulder level. Dr. Jackson estimated that appellant had a 30 percent impairment of the right upper extremity.

The Office developed the medical evidence by referring appellant to Dr. Paul A. Stanton, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a June 19, 1998 report, he found that appellant had reached maximum medical improvement with regard to her right

¹ The employing establishment noted as of the date of injury appellant worked a flexible schedule at an average of 35 hours a week and salary of \$10.47 per hour.

² The record indicates that appellant sustained an injury in a motor vehicle accident in 1996.

³ Appellant received compensation for the period May 14, 1997 to January 30, 1998.

shoulder and ulnar nerve conditions and estimated a two percent permanent impairment of the right upper extremity. Dr. Stanton also concluded that appellant was capable of performing medium duty, with lifting with the right upper extremity limited to no greater than 10 pounds. He noted she should not perform prolonged overhead lifting.

The Office found that a conflict of medical opinion was created between Drs. Jackson and Stanton as to the nature and extent of appellant's permanent impairment and capacity for work. On September 21, 1998 she was referred to Dr. Dudley S. Burwell, Jr., a Board-certified orthopedic surgeon, for an impartial medical evaluation.⁴ In an October 7, 1998 report, Dr. Burwell reviewed appellant's history of medical treatment and reported his findings on physical examination. He estimated that appellant had a 20 percent permanent impairment of the right shoulder secondary to weakness and pain related to the surgical procedures. Dr. Burwell indicated that she could work at a level deemed by her functional capacity evaluation.

The Office requested clarification of Dr. Burwell's medical opinion and authorized the physician to arrange for a new functional capacity evaluation. Appellant underwent a functional capacity evaluation on May 17, 1999, which noted she could perform sedentary to light duty with lifting 15 pounds maximum and carrying objects of up to 5 pounds.

On June 30, 1999 appellant was offered a limited-duty position as a modified casual clerk, seven hours a day, for a total of 35 hours a week at a rate of pay of \$11.73 an hour. The job offer noted that her restrictions were based on the functional capacity evaluation performed for Dr. Burwell, with lifting restricted to 15 pounds maximum, no prolonged use of the right upper extremity or use of the right extremity above shoulder level. Her duties consisted of answering the telephone, processing second notice forms, filing change of address notices, verifying mail to be forwarded and other incidental duties as assigned within her physical restrictions. Appellant accepted the job offer on July 2, 1999 and commenced working on July 19, 1999. By letter dated September 27, 1999, the employing establishment confirmed that appellant had been working limited duty for 35 hours a week and that her current pay rate was \$11.73 an hour.

By decision dated October 13, 1999, the Office found that appellant's actual earnings as a modified mail clerk fairly and reasonably represented her wage-earning capacity. The Office noted that appellant was working in a modified position within the restrictions specified by Dr. Burwell for 35 hours a week, earning \$469.20 or what her date-of-injury position paid.⁵

By letter dated December 27, 1999, appellant, through her attorney, requested a hearing before an Office hearing representative. By decision dated February 18, 2000, the Office Branch of Hearings and Review denied the request, finding that it was not timely made within 30 days of issuance of the October 13, 1999 decision. The Office considered the matter and determined that

⁴ On September 11, 1998 appellant accepted a limited-duty modified clerk position at a new post office under physical restrictions set by Dr. Jackson.

⁵ On October 14, 1999 the Office issued appellant a schedule award for a 20 percent impairment of her right upper extremity. The period of the award was from July 18, 1999 to September 26, 2000. In the current appeal, appellant has not requested review of the schedule award determination.

the issue could equally well be addressed by requesting reconsideration from the district office and submitting evidence not previously considered.

The Board finds that the Office properly determined appellant's wage-earning capacity based on her actual wages.

Section 8115(a) of the Federal Employees' Compensation Act provides that the "wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity."⁶ The Board has stated, "Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure."⁷

In reaching its determination of appellant's wage-earning capacity, the Office properly noted that appellant had received actual earnings as a modified casual clerk for more than 60 days. Appellant began working in the modified position on July 19, 1999 for 35 hours a week at a pay rate of \$11.73 an hour.⁸ The Board notes that, at the time of injury in 1994, appellant worked as a part-time postal clerk working for 35 hours a week at a pay rate of \$10.47 an hour. Disability, as defined in the Office's federal regulations, means "the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total."⁹ The evidence of record establishes that appellant is no longer disabled as defined under the Act, as the wages she is receiving from employment are equivalent to the current pay rate for the position she held when injured. For this reason, appellant's actual wages as a modified clerk fairly and reasonably represent her wage-earning capacity and the Office properly found no further wage-loss compensation was payable.¹⁰

The Board finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Act provides: "Before review under section 8128 of this title, a claimant for compensation not satisfied with the decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹¹ Thus, a claimant must request a hearing within the provided time period and before he or she requests reconsideration or the employee is not

⁶ 5 U.S.C. § 8115(a).

⁷ *Laura E. Vasquez*, 49 ECAB 362 (1998); *Monique L. Love*, 48 ECAB 378 (1997); *James D. Champlain*, 44 ECAB 438 (1993); *Floyd A. Gervais*, 40 ECAB 1045 (1989).

⁸ Prior to this time, appellant worked as a modified casual clerk for 24 hours a week at the pay rate of \$11.73 an hour effective September 19, 1999.

⁹ 20 C.F.R. § 10.5(f) (2000).

¹⁰ Appellant was advised that the Office's wage-earning capacity determination did not affect her entitlement to continuing medical benefits for treatment of her accepted conditions.

¹¹ 5 U.S.C. § 8124(b)(1).

entitled to a hearing as a matter of right.¹² In this case, appellant's request for a hearing before the Branch of Hearings and Review was not made until December 27, 1999, more than 30 days following the October 13, 1999 wage-earning capacity determination. Therefore, appellant was not entitled to a hearing as a matter of right.

Even when a hearing is not timely, the Office has discretion to grant a hearing request and must exercise that discretion. In the February 18, 2000 decision, the Office exercised its discretion by advising appellant that it considered her request in relation to the issue involved and the hearing was denied on the basis that she could address the issue by submitting new evidence with a request for reconsideration to the district office which showed that the modified clerk position did not represent her wage-earning capacity. The Board has held that such exercise of the Director's discretion does not constitute an abuse of discretion.¹³

The February 18, 2000 and October 13, 1999 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
February 1, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹² See *Martha A. McConnell*, 50 ECAB 129 (1998); *Mary G. Allen*, 40 ECAB 190 (1988).

¹³ *William E. Seare*, 47 ECAB 663 (1996); *Jeff Micono*, 39 ECAB 617 (1988).