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G.B., Appellant	)	
	)	
and	)	Docket No. 08-401
	)	Issued: January 8, 2009
DEPARTMENT OF THE TREASURY,	)	
INTERNAL REVENUE SERVICE,	)	
Holtsville, NY, Employer	)	
	)	

Case Submitted on the Record

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

On November 20, 2007 appellant filed a timely appeal of an October 25, 2007 decision of the Office of Workers' Compensation Programs which denied his request for a review of the written record. He also timely appealed the Office's August 23, 2007 wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim.¹

The issues are: (1) whether appellant's actual earnings as a part-time, limited-duty tax examining technician fairly and reasonably represent his wage-earning capacity; and (2) whether the Branch of Hearings & Review properly denied his September 28, 2007 request for a review of the written record.

¹ The record on appeal contains evidence that was received after the Office issued its October 25, 2007 decision. The Board may not consider evidence that was not in the case record when it rendered its final decision. 20 C.F.R. § 501.2 (2008).

FACTUAL HISTORY

Appellant, a 54-year-old tax examining technician, sustained multiple injuries on August 18, 2005 when the chair he was attempting to sit on slid from beneath him causing appellant to stumble backwards and fall. As he fell, his head struck a counter and his right knee hit a computer desk. The computer began to fall and appellant caught it and fell to his knees. The Office accepted the claim for neck sprain, cervicgia, cervicobrachial syndrome, lumbago, lumbar sprain and right knee sprain. Appellant received appropriate wage-loss compensation.

On November 6, 2006 appellant returned to work in a part-time, limited-duty capacity. He worked four hours a day as a tax examiner and received wage-loss compensation for four hours per day.²

Dr. David T. Zitner, a Board-certified orthopedic surgeon and impartial medical examiner, saw appellant on November 14, 2006.³ He diagnosed cervical and lumbar strains and right knee osteoarthritis. Dr. Zitner indicated that appellant was capable of performing limited-duty work, six hours a day. Appellant's limitations were primarily due to his right knee osteoarthritis, which Dr. Zitner found to be preexisting and only minimally aggravated by the accepted August 18, 2005 employment injury.⁴ As to appellant's work status, Dr. Zitner explained that appellant was capable of sedentary work up to 6 hours per day, with breaks every 20 minutes to allow him to walk around. He further indicated that appellant was limited in bending and lifting, but not significantly limited in sitting, working at a desk or keyboard. A November 15, 2006 work capacity evaluation (Form OWCP-5c) provided a more detailed account of appellant's various limitations.⁵

On February 16, 2007 the employing establishment offered appellant a limited-duty position as a tax examining technician working six hours per day. The offer was based on Dr. Zitner's November 15, 2006 work restrictions. Appellant accepted the position on February 26, 2007 and began working a six-hour schedule.⁶ Thereafter, the Office paid appellant two hours of wage-loss compensation per day.

² The employing establishment extended an October 16, 2006 job offer was based on work restrictions imposed by Dr. P. Leo Varriale, a Board-certified orthopedic surgeon and Office referral physician.

³ The Office had declared a conflict in medical opinion between Dr. Varriale and appellant's then-treating physician, Dr. George L. Colvin. In August 2006, both physicians imposed certain physical restrictions, but Dr. Clovin found appellant capable of working full-time, limited-duty in contrast to Dr. Varriale's recommended four-hour workday.

⁴ The impartial medical examiner noted that appellant's significant obesity also contributed to his symptoms and disability.

⁵ Dr. Zitner reported that appellant had a "limited ability to sit for long periods." Consistent with his narrative report, he imposed a six-hour workday. Dr. Zitner also noted the following limitations: Sitting (six hours); walking (three hours); standing (four hours); reaching (six hours); reaching above shoulder (six hours); twisting (four hours); bending/stooping (two hours); operating a motor vehicle at work and to/from work (four hours); repetitive wrists/elbow movements (four hours); pushing/pulling (4 hours/30 pounds); lifting (3 hours/20 pounds); squatting and kneeling (one hour); climbing (two hours); and 20 minute breaks every 2 hours.

⁶ Although appellant was now working fewer hours, appellant retained his date-of-injury pay rate.

In a decision dated August 23, 2007, the Office found that appellant's actual earnings of \$601.87 as a tax examining technician fairly and reasonably represented his wage-earning capacity. It noted that the part-time position appellant held since February 2007 was consistent with Dr. Zitner's work restrictions. The Office further indicated that appellant had demonstrated the ability to perform the duties of this job for two months or more. Although, appellant had been working full-time prior to his employment injury, he currently was capable of working only part time. The February 16, 2007 job offer was, therefore, suitable to his partially disabled condition. The Office further advised that appellant's wage-loss compensation was adjusted to reflect his part-time weekly wages as a tax examining technician.

Appellant requested a review of the written record utilizing the appeal request form that accompanied the August 23, 2007 decision. He signed and dated the form on September 20, 2007. However, appellant's request was postmarked September 28, 2007, and it was not received until October 15, 2007.

By decision dated October 25, 2007, the Branch of Hearings & Review denied appellant's request for a review of the written record. Appellant's request was found untimely and therefore, he was not entitled to a hearing as a matter of right. In denying a discretionary hearing, the Branch of Hearings & Review advised appellant that he could pursue the issue by requesting reconsideration before the district Office.

LEGAL PRECEDENT -- ISSUE 1

An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁷ An employee's actual earned wages generally best reflect his or her wage-earning capacity.⁸ Absent evidence that actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.⁹

A determination of whether actual earnings fairly and reasonably represent wage-earning capacity should be made only after an employee has worked in a given position for more than 60 days.¹⁰ Factors to be considered in determining if a position fairly and reasonably represents the injured employee's wage-earning capacity include: (1) whether the kind of appointment and tour of duty are at least equivalent to those of the date-of-injury job; (2) whether the job is part time or sporadic in nature; (3) whether the job is seasonal in an area where year-round employment is

⁷ 20 C.F.R. §§ 10.402, 10.403; see *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

⁸ See 5 U.S.C. § 8115(a) (2000); *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

⁹ *Id.*

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (July 1997).

available; and (4) whether the job is temporary where the claimant's previous job was permanent.¹¹

ANALYSIS -- ISSUE 1

Appellant's part-time position as a limited-duty tax examining technician is in keeping with the work restrictions identified by Dr. Zitner on November 15, 2006.¹² Dr. Zitner's limitations were, in fact, more restrictive than the August 2, 2006 limitations imposed by appellant's then-treating physician, Dr. Colvin. The most compelling measure of the appropriateness of the current limited-duty assignment is the fact that appellant has performed these duties for more than 60 days. Furthermore, he has offered no contemporaneous medical evidence indicating an inability to perform some or all of his designated responsibilities. There is also no evidence that the position is temporary, sporadic or seasonal. While the position is not full time, that is merely a reflection of appellant's physical limitations. Other than the number of hours worked, there is no indication that his current appointment and tour of duty are inconsistent with his date-of-injury job. Accordingly, the Board finds that appellant's actual earnings as a part-time, limited-duty tax examining technician fairly and reasonably represent his wage-earning capacity.

LEGAL PRECEDENT -- ISSUE 2

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record.¹³ A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought.¹⁴ If the request is not made within 30 days, a claimant is not entitled to a hearing or a review of the written record as a matter of right. Office regulations further provide that the "claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision."¹⁵ Although a claimant may not be entitled to a hearing as a matter of right, the Office has discretionary authority with respect to granting a hearing and the Office must exercise such discretion.¹⁶

ANALYSIS -- ISSUE 2

Appellant's request for a review of the written record was postmarked September 28, 2007, which is more than 30 days after the Office issued its August 23, 2007 decision. The regulations clearly specify that "[t]he hearing request must be sent within 30 days

¹¹ *Id.* at Chapter 2.814.7(a).

¹² The February 16, 2007 job offer mimics verbatim the limitations outlined in Dr. Zitner's November 15, 2006 work capacity evaluation.

¹³ 20 C.F.R. § 10.615.

¹⁴ 20 C.F.R. § 10.616(a).

¹⁵ *Id.*

¹⁶ See *Herbert C. Holley*, 33 ECAB 140 (1981).

(as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."¹⁷ Appellant's request was, therefore, untimely and as such, he was not entitled to a review of the written record as a matter of right. In its October 25, 2007 decision, the Branch of Hearings & Review also denied appellant's request on the grounds that the pertinent issue could be addressed by requesting reconsideration and submitting additional evidence to the district Office. This is considered a proper exercise of the hearing representative's discretionary authority.¹⁸ Moreover, there is no evidence indicating that the Branch of Hearings & Review otherwise abused its discretion in denying appellant's request. Accordingly, the Board finds that the Branch of Hearings & Review properly exercised its discretion in denying appellant's request for a review of the written record.

CONCLUSION

Appellant's actual earnings as a part-time, limited-duty tax examining technician fairly and reasonably represent his wage-earning capacity. The Board further finds that the Branch of Hearings & Review properly denied appellant's September 28, 2007 request for a review of the written record.

ORDER

IT IS HEREBY ORDERED THAT the October 25 and August 23, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 8, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹⁷ 20 C.F.R. § 10.616(a).

¹⁸ *Mary B. Moss*, 40 ECAB 640, 647 (1989).