

**United States Department of Labor
Employees' Compensation Appeals Board**

M.O., Appellant)	
)	
and)	Docket No. 07-1699
)	Issued: December 11, 2007
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS HEALTH ADMINISTRATION,)	
San Antonio, TX, Employer)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 11, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 20, 2006 merit decision concerning her wage-earning capacity and the Office's March 16, 2007 nonmerit decision denying her request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant's actual wages in her licensed vocational nurse position fairly and reasonably reflected her wage-earning capacity effective September 11, 2006, the date that it adjusted her compensation to zero; and (2) the Office properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act.

FACTUAL HISTORY

In January 2004, the Office accepted that appellant, then a 60-year-old licensed vocational nurse, sustained subacromial impingement syndrome, subacromial bursitis and degenerative joint disease of the acromioclavicular (ACV) joint of her right shoulder due to the repetitive lifting, pushing and pulling of patients and equipment required by her job.¹ The Office paid appellant appropriate compensation for periods of disability.² On February 24, 2004 Dr. David M. Gonzalez, an attending Board-certified orthopedic surgeon, performed right shoulder surgery, including a rotator cuff repair, subacromial decompression and distal clavicle resection. The surgery was authorized by the Office. On February 15, 2005 appellant received a schedule award for a 14 percent permanent impairment of her right arm.

On February 21, 2006 Dr. Gonzalez performed left shoulder surgery, including a rotator cuff repair, subacromial decompression and distal clavicle resection. The surgery was authorized by the Office. Appellant stopped work at the time of her February 21, 2006 surgery and received compensation for total disability. She began to work towards a return to work with a field nurse assigned by the Office and participated in regular physical rehabilitation sessions.

On August 28, 2006 Dr. Gonzalez determined that appellant could return to work for eight hours per day without restrictions except for no lifting, pushing and pulling more than five pounds, avoidance of reaching above her shoulders and no driving beyond driving back and forth from work.³ Appellant returned to work on September 11, 2006 as a licensed vocational nurse for the employing establishment. The position involved handling triage telephone calls and watching the vital signs of patients.⁴ Appellant continued to work in this position.

In a December 20, 2006 decision, the Office determined that the position of licensed vocational nurse fairly and reasonably reflected appellant's wage-earning capacity effective September 11, 2006 and adjusted her compensation to zero effective that date. The Office noted that this determination was justified by the fact that appellant had received actual earnings as a licensed vocational nurse for more than 60 days in that she had been working in the position since September 11, 2006. It determined that it was appropriate to reduce appellant's compensation to zero because her actual earnings in the current licensed vocational nurse position were greater than the current pay rate of the job she held on September 29, 2003, *i.e.*, the date of injury.⁵

¹ Appellant indicated that she first became aware of her employment-related condition on September 29, 2003.

² The Office also accepted that on December 22, 2003 appellant sustained a sprain/strain of her left knee and leg and a sprain/strain of her left elbow and forearm. It does not appear that appellant lost time from work due to this injury.

³ On October 9, 2006 Dr. Gonzalez indicated that appellant could lift, push and pull up to 10 pounds.

⁴ The position contained the same restrictions as those recommended by Dr. Gonzales.

⁵ The record contains documents which show that, at the time of the Office's December 20, 2006 decision, the current pay rate of the job appellant held on September 29, 2003 was \$774.10 per week and that she earned \$792.10 per week in the licensed vocational nurse position she returned to on September 11, 2006.

In a January 31, 2007 letter, appellant indicated that she performed her work duties with a great deal of pain.⁶ In a February 2, 2007 form, she requested a hearing before an Office hearing representative. The form was sent in an envelope postmarked on February 2, 2007.

In a March 16, 2007 decision, the Office denied appellant's request for a hearing. The Office found that her February 2, 2007 hearing request was made more than 30 days after the date of issuance of its prior decision dated December 20, 2006 and, thus, she was not entitled to a hearing as a matter of right. The Office indicated that it was exercising its discretion and denying appellant's hearing request on the basis that the issue in the case could equally well be addressed by requesting reconsideration and submitting additional evidence showing that the Office's wage-earning capacity determination was improper.⁷

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁸ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁹

Section 8115(a) of the 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."¹⁰ 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."¹¹ Office procedures direct that a wage-earning capacity determination based on actual wages be made following 60 days of employment.¹² The procedures provide for a retroactive determination where an employee has worked for at least 60 days, the employment fairly and reasonably represents the claimant's wage-earning capacity, and work stoppage did not occur due to any change in the claimant's injury-related condition.¹³

For actual wages to fairly and reasonably represent wage-earning capacity, the position in which the wages are earned should not involve part-time, sporadic, seasonal or temporary

⁶ Appellant also submitted additional medical evidence.

⁷ Appellant submitted additional evidence after the Office's decision, but the Board cannot consider such evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

⁸ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁹ See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

¹⁰ 5 U.S.C. § 8115(a).

¹¹ *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981).

¹² See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7c (December 1993).

¹³ *Id.* at Chapter 2.814.7e (December 1993).

work,¹⁴ nor may the position be a make-shift position designed for a claimant's particular needs.¹⁵

ANALYSIS -- ISSUE 1

In January 2004, the Office accepted that appellant sustained subacromial impingement syndrome, subacromial bursitis and degenerative joint disease of the ACV joint of her right shoulder due to the repetitive lifting, pushing and pulling of patients and equipment required by her job.¹⁶ Appellant returned to work on September 11, 2006 as a licensed vocational nurse for the employing establishment.

The Board finds that the Office properly determined that appellant's actual wages in her licensed vocational nurse position fairly and reasonably reflected her wage-earning capacity effective September 11, 2006, the date that it adjusted her compensation to zero. In reaching its determination of appellant's wage-earning capacity, the Office properly noted that appellant received actual earnings as a licensed vocational nurse for more than 60 days in that she had been working in the position since September 11, 2006 when the Office issued its December 20, 2006 decision.¹⁷ The Office properly found that such wages fairly and reasonably represented appellant's wage-earning capacity. The record does not contain any evidence showing that the licensed vocational nurse position constitutes part-time, sporadic, seasonal or temporary work. Moreover, the record does not reveal that the position is a make-shift position designed for a claimant's particular needs.¹⁸ The Office also properly determined that it was appropriate to reduce appellant's compensation to zero because her actual earnings in the current licensed vocational nurse position were greater than the current pay rate of the job she held on September 29, 2003, *i.e.*, the date of injury.¹⁹

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a 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

¹⁴ *Id.* at Chapter 2.814.7a (December 1993). Wage-earning capacity may be based on actual wages in a part-time position if the employee was a part-time worker at the time of the injury. *Id.*

¹⁵ See *William D. Emory*, 47 ECAB 365, 372 (1996).

¹⁶ Appellant indicated that she first became aware of her employment-related condition on September 29, 2003.

¹⁷ See *supra* note 12 and accompanying text.

¹⁸ See *supra* notes 14 and 15 and accompanying text. The Board further notes that the duties of the licensed vocational nurse position were within the August 2006 work restrictions recommended by Dr. Gonzalez, an attending Board-certified orthopedic surgeon. It was appropriate for the wage-earning determination to be retroactive because appellant worked for at least 60 days, the employment fairly and reasonably represented her wage-earning capacity and she did not stop work due to any change in her injury-related condition. See *supra* note 13 and accompanying text.

¹⁹ The record contains pay rate documents which support this determination.

a representative of the Secretary.”²⁰ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.²¹ The date of filing of a hearing request is fixed by postmark or other carrier’s date marking.²²

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.²³ Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,²⁴ when the request is made after the 30-day period for requesting a hearing,²⁵ and when the request is for a second hearing on the same issue.²⁶

ANALYSIS -- ISSUE 2

Appellant requested a hearing before an Office representative in a form dated February 2, 2007 and sent in an envelope postmarked February 2, 2007. The date of filing for appellant’s hearing request was fixed by the date of the postmark, *i.e.*, February 2, 2007.²⁷ Appellant’s February 2, 2007 hearing request was made more than 30 days after the date of issuance of the Office’s prior decision dated December 20, 2006 and, thus, appellant was not entitled to a hearing as a matter of right. Hence, the Office was correct in stating in its March 16, 2007 decision that appellant was not entitled to a hearing as a matter of right because her February 2, 2007 hearing request was not made within 30 days of the Office’s December 20, 2006 decision.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its March 16, 2007 decision, properly exercised its discretion by stating that it had denied appellant’s hearing request on the basis that the issue in the case could equally well be addressed by requesting reconsideration and submitting additional evidence showing that the Office’s wage-earning capacity determination was improper. The Board has held that as the only limitation on the Office’s authority is

²⁰ 5 U.S.C. § 8124(b)(1).

²¹ *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

²² *See* 20 C.F.R. § 10.616(a).

²³ *Henry Moreno*, 39 ECAB 475, 482 (1988).

²⁴ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

²⁵ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

²⁶ *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

²⁷ *See supra* note 22 and accompanying text.

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.²⁸ 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.

CONCLUSION

The Board finds that the Office properly determined that appellant's actual wages in her licensed vocational nurse position fairly and reasonably reflected her wage-earning capacity effective September 11, 2006, the date that it adjusted her compensation to zero. The Board further finds that the Office properly denied appellant's request for a hearing under section 8124 of the Act.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' Office's March 16, 2007 and December 20, 2006 decisions are affirmed.

Issued: December 11, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

²⁸ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).