U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KIMBERLY A. SUTHERLAND and U.S. POSTAL SERVICE, POST OFFICE, Arnold, MD

Docket No. 01-1189; Submitted on the Record;
Issued July 5, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective March 13, 2000 on the basis that her position as a modified letter carrier represented her wage-earning capacity; and (2) whether the Office properly denied appellant's request for a hearing.

On November 30, 1993 appellant, then a 33-year-old rural carrier, sustained an injury to her low back when she fell off a curb. The Office accepted that she sustained a herniated nucleus pulposus at L4-5, for which it authorized surgery, which was performed on May 26, 1994.

The Office also accepted that appellant sustained recurrences of disability related to her November 30, 1993 injury, the last beginning when she stopped work on June 16, 1998. On August 3, 1999 the Office referred appellant, prior medical reports and a statement of accepted facts to Dr. James E. Tozzi for an opinion as to whether she had residuals of her employment injury and for work tolerance limitations. In a report dated August 30, 1999, he concluded that appellant could not perform the duties of a carrier, but that she could perform sedentary work. Dr. Tozzi noted that her leg pain was relieved by sitting or lying down.

On February 29, 2000 the employing establishment offered appellant a limited-duty position, performing clerical and carrier duties including working nixie and CFS mail, handling telephone inquiries and delivering express mail. The position involved working 27½ hours a week while sitting. With modifications agreed to by appellant and the employing establishment, she accepted the position on March 3, 2000.

Appellant returned to work on March 13, 2000.

By decision dated September 14, 2000, the Office terminated appellant's compensation effective March 13, 2000 on the basis that the position of modified carrier, in which she had

worked successfully for at least 60 days, fairly and reasonably represented her wage-earning capacity.

By letter dated December 3, 2000, appellant requested a hearing, stating that she had worked fewer than the 27½ hours a week of the employing establishment's offer and that her attending physician reduced her number of hours a week to 20 on April 20, 2000. By letter dated December 15, 2000, appellant stated that she returned to work on March 13, 2000 but worked only five weeks before stopping work completely.

By decision dated February 14, 2001, the Office found that appellant was not entitled to a hearing because her request was untimely. The Office exercised its discretion to deny appellant a hearing "for the reason that the issue in this case can equally well be addressed by requesting reconsideration from the district Office and submitting evidence not previously considered which establishes that the position of modified carrier with the employing establishment does not fairly and reasonably represent her wage-earning capacity."

The Board finds that the Office improperly terminated appellant's compensation effective March 13, 2000.

Once the Office determines that an employee is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction in compensation benefits.[1] Section 8115 of the Federal Employees' Compensation Act, titled "Determination of Wage-Earning Capacity" states in pertinent part: "In determining compensation for partial disability, the wage-earning capacity of an employee is determined by [her] actual earnings if [her] actual earnings fairly and reasonably represent [her] wage-earning capacity."[2] In situations where an employee has earned actual wages for a substantial period, there is "an affirmative requirement for the Office to determine whether the position in which the employee earns actual wages fairly and reasonably represents his or her wage-earning capacity prior to making any determination regarding the suitability of any other position as a measure of wage-earning capacity. [A]ctual wages are the preferred measure of wage-earning capacity if they fairly and reasonably represent such capacity."[3]

The Office's procedure manual provides: "After the claimant has been working for 60 days, the claims examiner will determine whether the claimant's actual earnings fairly and reasonably represent his or her wage-earning capacity. If so, a formal decision should be issued no later than 90 days after the date of return to work."[4] An Office determination that

[1] *Harold S. McGough*, 36 ECAB 332 (1984).

[2] 5 U.S.C. § 8115.

[3] *Roberta R. Moncrief*, 52 ECAB ___ (Docket No. 00-116, issued July 3, 2001).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7c(1) (December 1993).

reemployment fairly and reasonably represents a claimant's wage-earning capacity is improper if the claimant has not worked for the minimum 60-day period.[5]

In the present case, the record contains no evidence that appellant worked more than 60 days in the limited-duty position she returned to on March 13, 2000. For the Office to rely on the presumption contained in its procedure manual, it must obtain evidence from the employing establishment, appellant, or other knowledgeable source that appellant worked more than 60 days. The Office cannot assume that one of the elements of its burden of proof is present, but must obtain evidence. The case record contains no evidence that the Office inquired as to whether appellant was still working in the limited-duty position or had done so for 60 days before the issuance of the Office's September 14, 2000 decision. Because there is no evidence that appellant had actual earnings for more than 60 days, the Office did not meet its burden of proof to terminate her compensation.

The September 14, 2000 decision of the Office of Workers' Compensation Programs is reversed.[6]

Dated, Washington, DC
July 5, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

[5] *Corlisia L. Sims*, 46 ECAB 172 (1994).

[6] Given the Board's disposition of the first issue, it is not necessary to decide whether appellant's request for a hearing was properly denied.