U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAURA E. VASQUEZ and U.S. POSTAL SERVICE,
POST OFFICE, Kalamazoo, Mich.

Docket No. 96-1403; Submitted on the Record;
Issued February 24, 1998

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 found that appellant had abandoned her request for a hearing before an Office hearing representative; and (2) whether the Office properly found that appellant did not sustain a loss of wage-earning capacity from August 16, 1993 through February 19, 1994 due to residuals from her accepted left elbow injury of June 11, 1989.

On July 11, 1989 appellant, a 37-year-old mail clerk, sustained an injury, when her left arm was caught and pinched while reaching onto a conveyer belt to grab a packet of mail. Appellant filed a Form CA-1 claim for benefits based on traumatic injury to her left elbow, which was ultimately accepted by the Office.

The employing establishment located a light-duty job for appellant in which she was not required to use her left arm, which appellant accepted on June 11, 1989. Appellant's treating physician, Dr. James D. Gilbert, a Board-certified orthopedic surgeon, recommended in a September 12, 1991 office note that appellant undergo surgery on her left ulnar nerve to reduce the pain in her arm and elbow. In a November 7, 1991 letter, the Office authorized the surgery based on Dr. Gilbert's September 12, 1991 office note.

Appellant, however, ultimately declined to have surgery, based on her stated desire to keep working,[1] and on October 19, 1992 she accepted a light-duty job as a distribution clerk on the 2:00p.m. through 10:50p.m. shift.

On August 16, 1993 appellant accepted a office position as a distribution clerk with the safety compensation specialist unit. This position was within the guidelines of her physical restrictions but required her to change her shift from her regular work hours of 2:00p.m. to 10:30p.m. to 8:00a.m. to 5:00p.m.

[1] See October 14, 1992 report of Dr. David L. Gerstner, a Board-certified orthopedic surgeon.

On June 21, 1994 appellant filed a Form CA-7 claim, for benefits based on loss of wages from August 16, 1993 through February 19, 1994, alleging that she was temporarily shifted into the morning shift from 8:00a.m. through 5:00p.m. because of residuals from her June 11, 1989 employment injury. Appellant claimed she was entitled to the wage loss caused by her transfer to a job in which she wasn't able to obtain night differential pay.

In a August 11, 1994 letter, the Office informed the employee that she had to submit factual and medical information in support of her claim. The Office noted that as of the date of injury on July 11, 1989, she was working the 2:00p.m. to 10:30p.m. shift and that subsequently she was placed on work restrictions and accepted a job offer on October 19, 1992, for the same hours. The Office requested that appellant submit a detailed factual statement, providing the date she changed job assignments, a copy of the specific job offer effective August 16, 1993 and an explanation as to whether the change of job was due to her injury-related work restrictions, or to a job bid. The Office also required an explanation as to why she was reassigned as of February 19, 1994 and a statement from her employing establishment pertaining to work factors which would include the employing establishment's review and comments on her employment situation.

The Office also stated that it had no medical evidence, establishing that appellant was placed on limited duty for the period of August 16, 1993 through February 19, 1994 and it therefore, requested that she submit a doctor's opinion, supported by medical reasons, regarding whether her continued left elbow condition was still causally related to the June 11, 1989 employment injury, whether this condition required work limitations during the period in question, and whether the doctor believed that factors or incidents in her federal employment contributed to her conditions.

On September 27, 1994 appellant stated, she was approached with a job offer from the safety compensation specialist, which was within the guidelines of her restrictions, but did not afford her a night shift at her regular work hours of 2:00p.m. to 10:30p.m. Appellant stated that the hours for this position were to be 8:00a.m. to 5:00p.m. beginning August 16, 1993. Appellant related that the person offering the job didn't know exactly when the job would end, but that she believed this was due to a staffing/bidding deficiency created by the stream-lining the employing establishment was undergoing. Appellant stated that the reason she did not continue in this position after February 19, 1994 was because they needed to assign another clerk who was losing her express mail bid [and who had already served in that position] to that job. Appellant further stated that she felt the employing establishment knew this would occur and that, rather than put the position up for bid by using her until notification of job terminations, they could then offer this position to those displaced employees. Appellant said that when this became apparent, they returned her to her regular shift with the same restrictions and time as the original light-duty offer had entailed. Appellant also submitted a September 8, 1993 medical report from Dr. David L. Gerstner, a Board-certified orthopedic surgeon, which was the most recent report regarding appellant's medical condition. Dr. Gerstner stated it had been almost a year since he had seen appellant, and at that time she had been referred back by the employing establishment for a follow-up evaluation of her current restrictions. Appellant indicated to Dr. Gerstner that overall, she had adapted to her level of symptoms and was able to perform her present work requirements. Dr. Gerstner reiterated that he had recommended surgery to remedy

appellant's condition, but that basically, if she was minimizing and controlling symptoms to a satisfactory level by limiting activities, that was probably her best treatment option. Dr. Gerstner advised her to continue with light duty.

The employing establishment submitted a letter dated September 21, 1994, which stated that appellant's pay rate on June 11, 1989, the date she was injured, was $475.75 per week plus $23.79 per week in night pay, for a total of $499.54 per week. The letter stated that her pay rate on August 16, 1993 was $604.85 per week plus $30.40 per week night pay, for a total of $635.25 per week, and that her current pay rate, as of the date of the letter, was $646.33 per week plus $32.20 night pay, for a total of $678.53 per week.

Accompanying the letter were copies of appellant's job offers dated October 19, 1992 and August 16, 1993. The letter stated that the reason appellant was offered the job with the safety compensation specialist unit on August 16, 1993 was because she had always been asking management if they had any office openings, and that she had asked to be considered for such a job were one to become available. The letter stated that when this temporary position became available on August 16, 1993, it was offered to her. The letter further stated that at the time of the offer she never asked for night pay, due to the fact that she was very happy working days in an office position, and that it was not until she was transferred back to her original light-duty job on February 19, 1994 that she began inquiring about receiving her lost night pay.

In a letter dated October 7, 1993, the Office requested additional information from the employing establishment.

On November 1, 1994 the employing establishment corrected some of the pay rate information contained in its previous letter. The letter stated that the starting salary stated on the August 1993 job offer was not correct, that appellant's salary on August 24 ,1993 as a Grade 5 Step I was actually $604.85 per week, without night differential, and that the pay rate for a Grade 5 Step C employee on August 16, 1993 was actually $547.06 without night differential. The letter further stated that, with regard to the discrepancy between the date appellant claimed she started the day shift job and the date she signed the job offer, the employing establishment and appellant had already agreed that she would be placed in the job before she signed the letter; *i.e.*, appellant began working on the day shift on August 16, 1993, but didn't sign the formal job offer until August 27, 1993.

By decision dated November 8, 1994, the Office denied appellant's claim that she sustained a loss of wage-earning capacity from August 16, 1993 through February 19, 1994, due to residuals from her accepted June 11, 1989 left elbow injury. The Office found that appellant had submitted no medical evidence supporting her claim that she required a change of jobs or new work restrictions due to the employment-related left elbow condition from August 16, 1993 through February 19, 1994. The Office noted that the work limitations provided by Dr. Gerstner for the October 16, 1992 job were reiterated in the September 8, 1993 medical report, which did not indicate that a job change was necessary to accommodate appellant's injury-related residuals.

The Office further stated that appellant had sustained a zero percent wage loss for compensation purposes based on the formula outlined in *Albert C. Shadrick*,[2] as indicated in a Form CA-816 completed on November 9, 1994. The Office indicated that appellant's weekly pay rate as of June 11, 1989, the date she was injured and shifted into the limited-duty position of Grade 5, Step C clerk, was $499.54, and that as of August 16, 1993 and November 9, 1994, the pay rate for this position was $574.85. The day shift job with the safety compensation specialist which the employing establishment offered and appellant accepted on August 16, 1993, and in which she was employed until February 19, 1994, entailed a weekly pay rate of $604.85, without the night differential. Based on this computation, the Office determined that appellant's wage-earning capacity should be based on actual wages, as her actual earnings fairly and reasonably represented her wage-earning capacity.

In a letter dated November 28, 1994, received by the Office on November 29, 1994, appellant requested a hearing regarding her claim.

In a April 12, 1995 letter, the Office informed appellant that a hearing would be held on May 17, 1995.

In a May 30, 1995 decision, the Office found appellant abandoned her request for a hearing, as she failed to appear at the time and place set for the hearing and did not show good cause for her failure to appear within 10 calendar days after the time set for the hearing.

The Board finds that the Office properly found that appellant had abandoned the request for a hearing.

Section 8124(b) of the Act[3] provides claimants under the Act a right to a hearing if they request a hearing within 30 days of the Office's decision. Pursuant to section 10.137 of the applicable regulations[4] a scheduled hearing may be postponed upon written request of a claimant or her representative if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown. If a claimant fails to appear for a scheduled hearing, she has 10 days after the date of the scheduled hearing to request that another hearing be scheduled. Where good cause for the failure is shown, a second hearing will be scheduled.

In the instant case, appellant failed to appear at the scheduled hearing on May 17, 1995, did not attempt to provide appropriate notice that she would not attend, and made no attempt to postpone the hearing date. Further, appellant failed to show good cause within 10 days of the scheduled hearing date as to why she failed to appear. Based on these facts, therefore, the Office properly concluded under section 10.137 that appellant's claim should be abandoned.

[2] 5 ECAB 376 (1953).

[3] 5 U.S.C. § 8124

[4] 20 C.F.R. § 10.137.

Appellant has explained to the Board on appeal that she "inadvertently" missed the hearing because she was preoccupied with training sessions, but the Board's jurisdiction to decide appeals from final decisions of the Office is limited to reviewing the evidence that was before the Office at the time of its final decision.[5] The Office's finding of abandonment was proper under the circumstances of this case.[6]

The Board finds that appellant has not established that she sustained a loss in wage-earning capacity from August 16, 1993 through February 19, 1994, due to residuals from her accepted left elbow injury of June 11, 1989.

Section 8115(a) of the Act,[7] which 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." 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."[8]

In the present case, the Office, in its November 9, 1994 decision, based appellant's loss of wage-earning capacity on a determination that her actual earnings as a distribution clerk with the safety compensation specialist unit from August 16, 1993 through February 19, 1994 fairly and reasonably represented her wage-earning capacity. This determination was consistent with section 8115(a), as the evidence does not establish that appellant's actual earnings as a distribution clerk on the day shift, without the night differential, did not fairly and reasonably represent her wage-earning capacity. The Office's wage-earning capacity determination, as described in the November 9, 1994 decision and the Form CA-816 dated November 9, 1994, indicated that appellant's pay rate at the safety compensation specialist unit actually constituted an increase in her salary and a promotion from Grade 5, Step C to Grade 5, Step I, notwithstanding any night differential pay.[9]

In addition, appellant acknowledged in her factual statement of August 29, 1994 that the August 16, 1993 job offer was within her physical restrictions, although it would entail changing her work hours from the 2:00p.m. to 10:30p.m. shift to the 8:00a.m. to 5:00p.m. shift. Appellant also acknowledged in this letter that the job was offered because of a staffing/bidding deficiency created by downsizing in the employing establishment. Appellant demonstrated that she was able to perform the duties of this position for seven months[10] and the that job was discontinued

[5] 20 C.F.R. § 501.2(c). Appellant may submit such argument and any supporting evidence in a request for review to the Office pursuant to 5 U.S.C. § 8128.

[6] *Mike C. Geffre*, 44 ECAB 942 (1993).

[7] 5 U.S.C. § 8115(a).

[8] *James D. Champlain*, 44 ECAB 438, 440 (1993); *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989).

[9] *See Shadrick, supra* note 2.

[10] *See Benjamin Magante*, 34 ECAB 356 (1982).

by the employing establishment only because another clerk was reassigned back into that unit, not because of a worsening of her accepted elbow condition. The evidence does not establish that this was a make-shift position designed for appellant's particular needs. Appellant was then reassigned back into the 2:00p.m. to 10:30p.m. shift at her previous job, which entailed the same duties, within her restrictions, as it had previously. Appellant has therefore submitted no evidence, factual or medical, supporting her claim that the position she accepted and performed for seven months did not fairly and reasonably represent her wage-earning capacity.

Further, the medical evidence from appellant's attending physician, Dr. Gerstner suggested that her work tolerance limitations were not exceeded by the requirements of the position with the safety compensation specialist unit. The medical evidence indicates that appellant's left elbow condition remained the same, as noted in Dr. Gerstner's September 8, 1993 report. Thus, the evidence does not show that the original determination of appellant's wage-earning capacity was erroneous, that there was a material change in the nature and extent of her injury-related condition, or that she had been retrained or otherwise vocationally rehabilitated. Accordingly, the Office properly determined in its November 9, 1994 decision, that appellant's actual wage fairly and reasonably represented her wage-earning capacity.

The decisions of the Office of Workers' Compensation Programs dated May 30, 1995 and November 8, 1994 are affirmed.

Dated, Washington, D.C.
February 24, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member