U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEPHEN V. CARKNARD, JR. and DEPARTMENT OF THE ARMY, WATERVLIET ARSENAL, Watervliet, N.Y.

Docket No. 95-2190; Submitted on the Record;
Issued January 13, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity; and (2) whether the Office properly denied appellant's request for a hearing pursuant to section 8124(b) of the Federal Employees' Compensation Act.

On June 26, 1979 appellant, then a 36-year-old machinist, injured his left leg when his left foot was caught on a pallet while he was lifting work by using a crane. He stopped work on July 26, 1979 and returned to work on April 14, 1980. The Office accepted appellant's claim for chrondromalacia of the patella and rupture of fibers in the anterior cruciate ligament. Appellant stopped work again on June 16, 1980 when his left knee buckled and a physician in the employing establishment dispensary sent him home. On August 25, 1980 appellant filed a claim for recurrence of disability. Appellant's claim for recurrence of disability was accepted. Appellant received appropriate compensation for temporary total disability.

On October 18, 1993 appellant was reemployed as an identification clerk and began working four hours a day. By letter dated June 23, 1994, the employing establishment advised the Office that it would begin a compressed work schedule effective June 12, 1994. The employing establishment explained that employees would work nine-hour days Monday through Thursday of the first week of a pay period, an eight-hour day the first Friday of a pay period, eight-hour days Monday through Thursday of the second week in a pay period and that the second Friday would be a regularly scheduled day off for the employing establishment. The employing establishment requested that the Office make appropriate adjustments to appellant's compensation in light of the compressed work schedule.[1]

On August 11, 1994 appellant began filing Form CA-8 claims for continuing compensation. On October 20, 1994 appellant filed a claim for recurrence of disability, alleging

[1] In a memorandum dated June 29, 1994, a supervisory claims examiner noted that a formal rating of appellant's loss of wage-earning capacity had not been done and requested that appropriate action be taken.

that the recurrence occurred on approximately June 20, 1994 and that he stopped work on August 11, 1994.

In a memorandum for the file, the Office indicated that it had verified that appellant had been working in the same loss of wage-earning capacity job for 20 hours a week from October 18, 1993 to August 11, 1994.

In a decision dated January 13, 1995, the Office found that appellant had been reemployed as an identification clerk with wages of $210.40 per week. The Office enclosed a computation of compensation indicating that appellant had a weekly pay rate of $360.80, an adjusted earning capacity in the new position of $115.46 with a loss in earning capacity per week of $245.34. The Office found that appellant was entitled to compensation in the amount of $184.01 per week which when increased by applicable cost-of-living adjustment totaled $308.50 per week.

By letter dated February 21, 1995, appellant requested review of his claim and inquired whether the Office had considered his compressed work schedule when making the formal loss of wage-earning capacity determination.

In a letter decision dated April 29, 1995, the Office denied appellant's request for review, construing it as an untimely request for a hearing. The Office advised appellant that it had considered the matter in relation to the issue involved and he could submit additional evidence on the issue of loss of wage-earning capacity through a reconsideration process.

By letter dated May 9, 1995, appellant requested reconsideration of the Office's decision that his request for a hearing was untimely and submitted evidence he believed was supportive of his position.

In a letter dated May 18, 1995, the Office informally responded to appellant's concerns in his May 9, 1995 letter and advised appellant that it did not consider his letter to be a formal request for reconsideration.[2]

The Board finds that the case is not in posture for decision with respect to the issue of whether the Office properly determined appellant's loss of wage-earning capacity.

Where an employee sustains an injury-related impairment that prohibits the employee from returning to the employment held at the time of the injury, or from earning equivalent wages, but that does not render the employee totally disabled from all gainful employment, the employee is considered partially disabled and is entitled to compensation for his or her loss of wage-earning capacity as provided for under section 8115 of the Act.[3] The formula for determining loss of wage-earning capacity based on actual earnings, developed in the case of *Albert C. Shadrick*,[4] has been codified by regulation at 20 C.F.R. § 10.303. The wage-earning capacity of an employee is determined by his or her actual earnings if the actual earnings fairly

[2] Appellant filed his appeal with the Employees' Compensation Appeals Board on May 16, 1995.

[3] 5 U.S.C. § 8115.

[4] 5 ECAB 376 (1953).

and reasonably represent his or her wage-earning capacity.[5] Generally, wages actually earned are the best measure of wage-earning capacity and, in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[6]

In the present case, appellant's current rate of pay for the date-of-injury position is undisputed and is supported by evidence of record. The determination of appellant's weekly pay in his position as an identification clerk appears to be based on a letter he submitted to the Office dated February 3, 1994 in which he reported an hourly wage of $10.52 multiplied by 20 hours per week for a weekly wage of $210.40. However, subsequent to the Office's receipt of that letter from appellant and prior to its formal determination of appellant's loss of wage-earning capacity, the employing establishment advised the Office that it would begin a compressed work schedule effective June 12, 1994. Consequently, although the Office indicated that it verified a 20-hour work week for appellant from October 18, 1993 through August 11, 1994, the notice from the employing establishment indicates that appellant worked 20 hours the first week of every pay period and 16 hours the second week of every pay period beginning June 12, 1994. The Office determination which is based on actual earnings for 20 hours per week for appellant does not fairly and reasonably represent his actual earnings since appellant actually worked 16-hour weeks approximately 50 percent of the time beginning June 12, 1994. This case will therefore be remanded to the Office for a proper determination of appellant's loss of wage-earning capacity during the period that compensation is claimed. After such further development as the Office deems necessary, it should issue an appropriate decision.

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

Section 8124(b)(1) of the Act provides that 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."[7] As section 8124(b)(1) is unequivocal in setting forth the time limitations 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.[8]

In this case, the Office issued its formal loss of wage-earning capacity decision on January 13, 1995. Appellant requested a hearing in his case by letter dated February 21, 1995. Appellant contends that his request was timely based on his assertion that the January 13, 1995 decision was enclosed in an envelope postmarked January 21, 1995 and was received January 25, 1995. In support of his contention, appellant submitted a copy of an envelope from the Office which is postmarked January 21, 1995. It is a well-established principle that absent evidence to the contrary, a decision mailed to an individual in the ordinary course of business is presumed received by that individual when it appears from the record that the notice was

[5] 5 U.S.C. § 8115(a); *Clarence D. Ross*, 42 ECAB 556 (1991).

[6] *Hubert F. Myatt*, 32 ECAB 1994 (1981).

[7] 5 U.S.C. § 8124(b)(1).

[8] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

properly addressed and duly mailed.[9] Although appellant has presented evidence which he believes provides an inference that that the decision was not duly mailed, this evidence is not sufficiently persuasive to overcome the presumption of receipt. There is no indication that the envelope copied and submitted by appellant contained the January 13, 1995 decision. In addition, the decision in question is properly addressed to appellant and he has not made any allegation to the contrary in this regard. Therefore, the presumption of receipt under the "mailbox rule" is triggered. The Board further notes that even if appellant did not receive the January 13, 1995 decision until January 25, 1995, he nonetheless would have had approximately three weeks to timely request a hearing. The Board finds that as appellant's request for a hearing was not within 30 days of the Office's decision, he is not entitled to a hearing under section 8124 as a matter of right.

Even when the hearing request is not timely, the Office has discretion to grant the hearing request and must exercise that discretion. In this case, the Office advised appellant that it considered his request in relation to the issue involved and the hearing was denied on the basis that he could address this issue by submitting evidence on the issue of loss of wage-earning capacity. Appellant was advised that he may request reconsideration with additional evidence. The Board has held that an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[10] There is no evidence of an abuse of discretion in the denial of a hearing in this case.

The decision of the Office of Workers' Compensation Programs dated April 29, 1995 is affirmed, the decision of the Office dated January 13, 1995 is set aside and this case is remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.
January 13, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member

[9] *Newton D. Lashmett*, 45 ECAB 181 (1993).

[10] *Daniel J. Perea*, 42 ECAB 214 (1990).