U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM T. McKENZIE and GENERAL SERVICES ADMINISTRATION, Washington, D.C.

Docket No. 96-847; Submitted on the Record;
Issued June 8, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that the position of order clerk fairly and reasonably represented appellant's wage-earning capacity, effective October 15, 1995, the date it reduced his compensation benefits; and (2) whether the Office abused its discretion in denying appellant's request for a hearing.

The Board has duly reviewed the case record and finds that the Office properly reduced appellant's compensation.

On August 21, 1985 appellant, then a 39-year-old painter, sustained employment-related neck, thoracic and lumbosacral strains. He stopped work that day and has not returned. Following referral by the Office, appellant underwent an extensive rehabilitation effort at the conclusion of which John E. Mills, a rehabilitation counselor, completed a labor market survey and determined that the positions of routing clerk and order clerk, based on the Department of Labor, *Dictionary of Occupational Titles*, fit appellant's capabilities. By letter dated August 14, 1995, the Office advised appellant that it proposed to reduce his compensation based on the opinion of Dr. Jeffrey I. Goltz, appellant's treating Board-certified orthopedic surgeon who provided a work capacity evaluation dated August 4, 1994 in which he indicated that appellant was no longer totally disabled and had the capacity to work eight hours per day. He recommended a sedentary job with no lifting over ten pounds, no standing or walking more than one hour at a time, and further restrictions on sitting, bending, squatting and climbing. Dr. Goltz indicated that maximum medical improvement had been reached on March 7, 1990.

The Office determined that the position of order clerk and corresponding wages fairly and reasonably represented appellant's wage-earning capacity and found that the position was available in appellant's commuting area. The Office advised appellant that if he disagreed with its proposed action, he should submit contrary evidence or argument within 30 days.

In a letter dated September 26, 1995, appellant, through counsel, disputed the Office's proposed reduction, and submitted a September 6, 1995 report from Dr. Goltz who noted that appellant had a job offer that would require a 75 to 80-mile commute each way. Dr. Goltz stated:

> "I think he can do the job but the drive will hurt his back. The job he certainly can do. There is no doubt about that in my mind if it is kept under ten pounds of lifting. The problem will be the long drive to that job. Sitting for a prolonged period of time will aggravate his condition."

By decision dated October 10, 1995, the Office finalized the reduction of appellant's compensation, based on his capacity to earn wages as an order clerk. By letter dated November 10, 1995, appellant's counsel requested a hearing and in a December 13, 1995 decision, an Office hearing representative denied the request on the grounds that it had not been timely filed. The instant appeal follows.

The Board finds that the Office properly reduced appellant's compensation benefits.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.[1] Under section 8115(a) of the Federal Employees' Compensation Act,[2] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, wage-earning capacity is determined with due regard to the nature of injury, degree of physical impairment, usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect the employee's wage-earning capacity in his or her disabled condition.[3]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office specialist for selection of a position, listed in the Department of Labor, *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.[4] Finally, by applying the principles set forth in *Albert C. Shadrick*, the employee's loss of wage-earning capacity can be ascertained.[5]

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[1] *Garry Don Young*, 45 ECAB 621 (1994).

[2] 5 U.S.C. §§ 8101-8193.

[3] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); 5 U.S.C. § 8115(a).

[4] *See Dennis D. Owen*, 44 ECAB 475 (1993).

[5] 5 ECAB 376 (1953); *see* 20 C.F.R. § 10.303.

With regard to appellant's physical restrictions, the record contains an August 4, 1994 work capacity evaluation in which Dr. Goltz, his treating Board-certified orthopedic surgeon, who provided restrictions to appellant's physical activity. Dr. Goltz also provided a September 6, 1995 report in which he indicated that appellant could perform the job of clerk. The job description for the selected position of order clerk indicates that it is a sedentary position with a maximum of 10 pounds lifting. There is no indication that the selected position is outside the restrictions set forth by Dr. Goltz. The Board therefore finds that the Office properly assessed appellant's physical impairment in determining that the position of order clerk fairly and reasonably represented his wage-earning capacity.

As noted above, the selected position must not only be medically suitable but must also be reasonably available in appellant's commuting area. While Dr. Goltz indicated that a job offer that required a lengthy commute was unsuitable, the rehabilitation counselor in this case indicated that appellant lived in a metropolitan area and, therefore, the recommended positions were reasonably available.[6] The rehabilitation counselor indicated that the position paid $5.50 per hour or $220.00 per week in the open market, and appellant's compensation was accordingly reduced to reflect such wage-earning capacity under the principles set forth in *Shadrick*.[7]

The Board further finds that the Office did not abuse its discretion in denying appellant's hearing request.

Section 8124(b) of the Act provides claimants a right to a hearing if they request a hearing within 30 days of an Office decision.[8] In its December 13, 1995 decision, the Office denied appellant's request for a hearing because it was untimely, stating that he was not, as a matter of right, entitled to a hearing since his request had not been made within 30 days of its October 10, 1995 decision. The Office noted that the matter had been considered in relation to the issue involved and indicated that appellant's request was denied on the basis that the issue could be addressed through a reconsideration application.

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.[9] In the present case, appellant's request for a hearing dated November 10, 1995 was made 31 days after the date of issuance of the Office's prior decision dated October 10, 1995. Hence, the Office was correct in stating in its December 13, 1995 decision that appellant was not entitled to a hearing as a matter of right because his hearing request was not made within 30 days of the Office's October 10, 1995 decision. While the Office also has the discretionary power to grant a hearing request when a claimant is not entitled to a hearing as a matter of right, the Office properly exercised its

[6] Appellant's address of record is Waldorf, Maryland.

[7] *Supra* note 5.

[8] 5 U.S.C. § 8124(b).

[9] *Henry Moreno*, 39 ECAB 475, 482 (1988).

discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is 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.[10] 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.

The decisions of the Office of Workers' Compensation Programs dated December 13 and October 10, 1995 are hereby affirmed.

Dated, Washington, D.C.
June 8, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[10] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).