

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RAYMOND JASKOWIAK and DEPARTMENT OF THE NAVY,  
PENNSYLVANIA NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 97-2576; Submitted on the Record;  
Issued August 12, 1999*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly adjusted appellant's compensation to reflect his wage-earning capacity in the position of assembler, small parts; and (2) whether the Branch of Hearings and Review properly denied appellant's request for an oral hearing as untimely.

The Board has duly reviewed the case on appeal and finds that the Office properly adjusted appellant's compensation to reflect his wage-earning capacity in the position of assembler, small parts.

Appellant, a boilermaker inspector, filed a claim on July 30, 1994 alleging that he injured his back in the performance of duty. The Office accepted appellant's claim for lumbosacral strain and left L5-S1 radiculopathy. The Office entered appellant on the periodic rolls on January 31, 1996. The Office referred appellant for vocational rehabilitation services on June 28, 1996. By decision dated February 24, 1997, the Office reduced appellant's compensation based on his capacity to earn wages as an assembler, small parts. Appellant requested an oral hearing on March 29, 1997 and by decision dated May 14, 1997, the Branch of Hearings and Review denied appellant's request for a hearing as untimely.

Once the Office has determined that an employee is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation. If the employee's disability is no longer total but is partial, appellant is only entitled to the loss of his wage-earning capacity.<sup>1</sup>

In its February 24, 1997 decision, the Office informed appellant that it was adjusting his wage-loss compensation as he was no longer totally disabled under 5 U.S.C. § 8106 and was

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<sup>1</sup> *Anthony W. Warden*, 40 ECAB 168, 181-82 (1988).

capable of performing the position of assembler, small parts, in accordance with 5 U.S.C. § 8115.

Section 8106 of the Federal Employees' Compensation Act provides that a claimant may be paid 66 percent of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of partial disability.<sup>2</sup> With regard to section 8115(a), this section of the Act provides that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.<sup>3</sup>

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*<sup>4</sup> will result in the percentage of the employee's loss of wage-earning capacity. The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay. Where the employee has one or more dependents as defined in the Act, the employee is entitled to have his or her basic compensation augmented for a total of 75 percent of monthly pay.<sup>5</sup>

In the instant case, the Office determined that appellant was no longer totally disabled based on the reports of Dr. Murray D. Robinson, a Board-certified neurosurgeon, who reported on April 23, 1996 that appellant could perform light to medium work eight hours a day with no lifting over 60 pounds. Appellant's attending physician, Dr. Avrom S. Brown, an osteopath, referred appellant for a functional capacity evaluation on July 10, 1996 which indicated that appellant could perform "medium" work. The Board finds the Office's determination that appellant was no longer totally disabled for work and capable for some type of employment was proper.

The Office then relied on appellant's vocational rehabilitation counselor's determination that the position of assembler, small parts, was within appellant's work restrictions and that it

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<sup>2</sup> 5 U.S.C. § 8106.

<sup>3</sup> *Pope D. Cox*, 39 ECAB 143, 148 (1988).

<sup>4</sup> 5 ECAB 3766 (1953).

<sup>5</sup> *Thomas Taylor*, 49 ECAB \_\_\_\_ (Docket No. 95-1483, issued October 16, 1997).

was reasonably available within appellant's commuting area. This position is classified as light with maximum lifting up to 20 pounds and lifting and carrying up to 10 pounds. Therefore, the position is well within the restrictions established by appellant's attending physician. Appellant's rehabilitation counselor found that the job of assembler was available in numbers sufficient to make it appropriate for appellant by contacting the state employment agency. The rehabilitation counselor and the Office considered appellant's prior occupation and vocational training in concluding that an assembler, small parts was appropriate. The evidence establishes that the Office properly selected the job of assembler, small parts, in determining appellant's wage-earning capacity.

Further, the Office properly determined appellant's wage-earning capacity based on the weekly wages of \$384.85 of an assembler, small parts and properly reduced his compensation to reflect his wage-earning capacity.

The Board further finds that the Branch of Hearings and Review did not abuse its discretion by denying appellant's request for an oral hearing as untimely.

Appellant requested an oral hearing of the Office's February 24, 1997 decision on March 29, 1997. By decision dated May 14, 1997, the Branch of Hearings and Review denied this request as untimely and stated that the issue of appellant's loss of wage-earning capacity could be addressed by submitting relevant new evidence in the reconsideration process.

Section 8124(b) of the Act,<sup>6</sup> concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant ... not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>7</sup>

The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.<sup>8</sup> Even where the hearing request is not timely filed, the Office may within its discretion, grant a hearing and must exercise this discretion.<sup>9</sup>

In the instant case, the Office properly determined appellant's March 29, 1997 request, for a hearing was not timely filed as it was made more than 30 days after the issuance of the Office's February 24, 1997 decision. The Office, therefore, properly denied appellant's hearing as a matter of right.

The Office then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a hearing in this case. The Office determined that a hearing was

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<sup>6</sup> 5 U.S.C. §§ 8101-8193.

<sup>7</sup> 5 U.S.C. § 8124(b)(1).

<sup>8</sup> *Tammy J. Kenow*, 44 ECAB 619 (1993).

<sup>9</sup> *Id.*

not necessary as the issue in the case could be resolved through the submission of evidence in the reconsideration process establishing that the Office erred in determining appellant's wage-earning capacity. Therefore, the Office properly denied appellant's request for a hearing as untimely and properly exercised its discretion in determining to deny appellant's request for a hearing as he had other review options available.

The decisions of the Office of Workers' Compensation Programs dated May 14 and February 24, 1997 are hereby affirmed.

Dated, Washington, D.C.  
August 12, 1999

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member