

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARLIN LEROY JACKSON and U.S. POSTAL SERVICE,
POST OFFICE, Harrisburg, Pa.

*Docket No. 97-2361; Submitted on the Record;
Issued July 16, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits on March 13, 1997 based on his capacity to perform the duties of a clerk-typist; and (2) whether the Office properly denied appellant's request for an oral hearing before an Office representative.

The Board has duly reviewed the case on appeal and finds that the Office properly reduced appellant's compensation benefits subsequent to March 13, 1997.

Appellant filed a claim on March 12, 1995 alleging that on March 1, 1995 he injured his left shoulder in the performance of duty.¹ On May 2, 1995 the Office accepted that appellant sustained a left shoulder sprain and on September 25, 1995, the Office expanded its acceptance to include herniated nucleus pulposus at C6-7. Appellant was placed on the short-term rolls and rehabilitation efforts were begun. By decision dated March 13, 1997, the Office found that appellant was no longer totally disabled as a result of his injury of March 1, 1995. The Office found that appellant could perform the duties of a clerk typist and reduced appellant's compensation to reflect his wage-earning capacity.

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.²

¹ At the time of his injury, appellant was a casual bag handler or mailhandler. On March 28, 1995 the employing establishment terminated appellant's employment for cause.

² *Dorothy Lams*, 47 ECAB 584 (1996); *Anthony W. Warden*, 40 ECAB 168, 181-82 (1988).

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.³ 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.⁴

In the instant case, based on the results of a September 17, 1996 work capacity evaluation performed by appellant's treating physician, Dr. Barry B. Moore, a Board-certified neurological surgeon, which established that appellant could perform sedentary work and based on appellant's prior employment from 1978 to 1990 as a clerk, during which time he performed typing, filing, computer and office work, appellant's rehabilitation counselor completed a labor market survey for the position of clerk typist on October 16, 1996. He determined that the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area. The rehabilitation counselor found that appellant met the requirements for the position and provided the wages.⁵ The Office referred the physical requirements of the position to an Office medical adviser who responded that appellant was capable of performing the duties entailed.

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of clerk typist represented appellant's wage-earning capacity. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position and that such a position was reasonably available within the general labor market of appellant's commuting area. Therefore the Office properly determined that the position of clerk typist reflected appellant's wage-earning capacity effective March 13, 1997 and properly reduced appellant's wage-loss compensation in accordance with his earning capacity.⁶

³ 5 U.S.C. § 8106.

⁴ *James R. Verhine*, 47 ECAB 460 (1996); *Pope D. Cox*, 39 ECAB 143, 148 (1988).

⁵ The rehabilitation counselor determined that the position of clerk typist has an earning capacity of \$273.20 a week.

⁶ The Office determined that appellant's rate of pay in his date-of-injury job as a mail handler or bag handler was \$444.36 a week. The Office further determined that as the selected position of clerk typist has an adjusted earning capacity of \$266.61 a week, appellant is entitled to compensation based on the difference between his date of injury pay and his new earning capacity. Appellant disagreed with the Office's calculations, asserting that his date-of-injury pay was actually \$336.00 a week and requested that the Office consult the employing establishment in order to confirm this figure. The Board notes, however, that compensation benefits based on a prior weekly wage of \$366.00 would result in lower compensation for appellant.

The Board further finds that the Office properly denied appellant's request for an oral hearing or review of the written record before an Office representative.

The Board notes that effective June 1, 1987 the Office's regulations implementing the Act were revised. Several revisions were made which affect the appellate rights of employees who seek review of Office final decisions. Section 8124 provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office final decision. The Office's new regulations have expanded section 8124 to provide the opportunity for a "review of the written record" before an Office hearing representative in lieu of an "oral hearing." The Office has provided that such review of the written record is also subject to the same requirement that the request be made within 30 days of the Office's final decision.⁷

In the present case, the Office denied appellant's request for an oral hearing or review of the written record on the grounds that the request was untimely. In its June 26, 1997 decision, the Office stated that appellant was not as a matter of right entitled to an oral hearing or review of the written record because his request was not made within 30 days of the Office's March 13, 1997 decision. The Office noted that it had considered the matter in relation to the issue involved and indicated that appellant's request was denied on the basis that the issue of appellant's wage-earning capacity 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.⁸ The principles underlying the Office's authority to grant or deny a written review of the record are analogous to the principles underlying its authority to grant or deny a hearing. The Office's procedures, which require the Office to exercise its discretion to grant or deny a request for a review of the written record when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.⁹

In the present case, appellant's request for an oral hearing or a review of the written record was made more than 30 days after the date of issuance of the Office's prior decision dated March 13, 1997 and, thus, appellant was not entitled to an oral hearing or a review of the written record as a matter of right. Appellant requested further review in a letter dated May 19, 1997. Hence, the Office was correct in stating in its June 26, 1997 decision that appellant was not entitled to an oral hearing or a review of the written record as a matter of right because his request was not made within 30 days of the Office's March 13, 1997 decision.

While the Office also has the discretionary power to grant a review of the written record when a claimant is not entitled to an oral hearing or a review of the written record as a matter of

⁷ 20 C.F.R. § 10.131(b); see *Michael J. Welsh*, 40 ECAB 994, 996 (1989).

⁸ *Henry Moreno*, 39 ECAB 475, 482 (1988).

⁹ See *Welsh*, *supra* note 7 at 996-97.

right, the Office, in its June 26, 1997 decision, properly exercised its 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 of appellant's wage-earning capacity 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 request for an oral hearing or a review of the written record which could be found to be an abuse of discretion.

The decisions of the Office of Workers' Compensation Programs dated June 26 and March 13, 1997 are hereby affirmed.¹¹

Dated, Washington, D.C.
July 16, 1999

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

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

¹¹ The record contains a May 28, 1996 decision in which the Office suspended appellant's compensation benefits for failure to attend a scheduled medical examination. This decision is not currently before the Board in that it was issued more than one year before July 17, 1997, the date appellant filed the current appeal with the Board; *see* 20 C.F.R. § 501.3(d)(2).