U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANNE R. SCHMIDT and DEPARTMENT OF THE NAVY, DEFENSE PRINTING OFFICE, Oakland, CA

Docket No. 98-1183; Submitted on the Record;
Issued November 2, 1999

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensations Programs properly determined the modified copier/duplicating equipment operator position, which appellant performed, fairly and reasonably represented her wage-earning capacity; and (2) whether the Office properly determined that appellant abandoned her request for a hearing.

The Board has duly reviewed the record in the present appeal and finds that the Office properly determined the modified copier/duplicating equipment operator position, which appellant performed, fairly and reasonably represented her wage-earning capacity.

Section 8115 of the Federal Employees' Compensation Act,[1] provides that the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity. The Board has stated that, generally, wages actually earned are the best measure of a 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 a measure.[2]

On April 2, 1991 appellant, then a 42-year-old offset photo helper, sustained neck and back injuries when she tripped in the performance of duty. On July 8, 1991 the Office accepted appellant's claim for cervical and lumbar strains and authorized appropriate compensation benefits. Appellant returned to light duty August 1, 1991 and on February 28, 1994 began her most recent limited-duty position, as a modified copier/duplicating equipment operator, at her

[1] 5 U.S.C. § 8115.

[2] *Elbert Hicks*, 49 ECAB ___ (Docket No. 95-1448, issued January 20, 1998).

retained rate of pay. Appellant's last day of employment was February 17, 1995, due to a reduction-in-force.[3]

In a decision dated October 8, 1996, the Office found that the modified copier/duplicating equipment operator position fairly and reasonably represented appellant's wage-earning capacity. Appellant requested a hearing, but on the date of the hearing failed to appear. In a decision dated July 7, 1997, the Office found that through her unexplained absence, appellant had abandoned her request for a hearing. By letter dated October 7, 1997, appellant requested reconsideration of the Office's October 8, 1996 decision and presented additional arguments in support of her request. Appellant did not submit additional medical evidence. In a decision dated November 26, 1997, the Office found the arguments raised by appellant insufficient to warrant modification of its October 8, 1996 decision.

In the present case, appellant returned to light-duty work on August 1, 1991, at the same pay rate. She began her most recent light-duty job as a modified copier/duplicating equipment operator on February 28, 1994 and her rate of pay was again saved. Appellant continued to perform the duties of this position through February 17, 1995, the date the reduction-in-force went into effect. The Office, under its procedures, can make a retroactive determination of wage-earning capacity.[4] The Office's procedure manual provides that if a claimant has worked in the position for at least 60 days, the claims examiner has determined that the employment fairly and reasonably represents the wage-earning capacity and the work stoppage did not occur because of any change in the claimant's injury-related condition affecting ability to work, then a retroactive wage-earning capacity determination may be made.[5] The record contains a copy of the position description for a copier/duplicating equipment operator, GS-0350-04 and further contains a memorandum from the employing establishment noting the slight modifications made to the position in order to accommodate appellant's permanent physical restrictions. There is no evidence that this position is seasonal, temporary, less than full time, or make-shift work designed for appellant's particular needs.[6] The record also reflects that there was no reduction in

[3] The record reflects that appellant sustained a new injury on February 17, 1995, her last day of employment, when she was involved in a motor-vehicle accident. It does not appear from the record that appellant stopped work due to this incident. On June 1, 1995 the Office accepted that appellant sustained cervical and thoracic strains as a result of this second injury and combined appellant's case files. In a medical report dated July 25, 1995, appellant's treating physician, Dr. Susan Lambert, who specializes in occupational medicine, provided an update on appellant's condition. She noted that at the time of her February 17, 1995 accident, appellant had been working permanent light duty as a result of her prior April 12, 1991 employment injury. The physician stated that she first treated appellant on February 24, 1995 and that by April 27, 1995, appellant had progressed to her preinjury status and was cleared to return to the light-duty position she was performing at the time of the February 17, 1995 accident. Dr. Lambert emphasized that there was no period of total disability related to appellant's February 17, 1995 injury and that appellant was expected to be on light duty until she was cleared to return to her preinjury position on April 27, 1995. She explained that while appellant continued to have residuals from her April 12, 1991 employment injury, which necessitated her permanent light-duty status, appellant had fully recovered from her February 17, 1995 injury.

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997).

[5] *Id.*

[6] *Monique L. Love*, 48 ECAB ___ (Docket No. 95-188, issued February 28, 1997).

appellant's pay as a result of her performing modified duty. Finally, there is no evidence that appellant stopped performing this position because of a change in her injury-related condition affecting her ability to work. While appellant did sustain an employment-related injury on February 17, 1995, which was to be her last day of work due to a reduction-in-force, appellant's treating physician, Dr. Susan Lambert, specifically stated that there was no period of total disability related to this most recent injury. The Board therefore finds that the Office properly determined appellant's wage-earning capacity was represented by her actual earnings as a modified copier/duplicating equipment operator and that she had no loss of wage-earning capacity and was not entitled to further compensation benefits.

The Board further finds that the Office properly determined that appellant abandoned her request for a hearing.

The Office's July 7, 1997 decision, which denied appellant's hearing request, was also issued within a year prior to appellant's filing of her claim with the Board and, therefore, is also within the Board's jurisdiction.[7]

Section 8124(b) of the Act[8] provides that a claimant not satisfied with a decision on his claim is entitled, upon timely request, to a hearing before a representative of the Office.[9] In the instant case, appellant made a timely *pro se* request for a hearing before an Office hearing representative.

The Office has the burden of proving that it mailed to a claimant notice of a scheduled hearing. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that claimant. This presumption arises after it appears from the record that the notice was duly mailed and the notice was properly addressed.[10] In this case, the Office mailed appellant a notice of hearing dated May 10, 1997 to her address of record and the record contains a copy of this letter. Therefore, as it appears from the record that the notice was duly mailed to appellant and that the notice was properly addressed, the presumption arises that appellant received notice of hearing.[11]

Section 10.137 of Title 20 of the Code of Federal Regulations provides in relevant part: "A claimant who fails to appear at a scheduled hearing may request in writing 10 days after the date set for the hearing that another hearing be scheduled. Where good cause is shown, another hearing will be scheduled. The failure of the claimant to request another hearing within 10 days

[7] The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed her appeal with the Board on March 3, 1998, the decision of the Office dated July 7, 1997 is within the Board's jurisdiction; *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[8] 5 U.S.C. §§ 8101-8193.

[9] 5 U.S.C. § 8124(b).

[10] *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

[11] *Id.*

or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for hearing."[12]

Appellant did not appear at the scheduled June 23, 1997 hearing, of which she had timely and proper notice, nor did she, within 10 days after the date of the hearing, give a reason for her failure to appear as required by the regulations. Therefore, the Office had sufficient reason to find that the request for a hearing had been abandoned.

The decisions of the Office of Workers' Compensation Programs dated November 26 and July 7, 1997 are hereby affirmed.

Dated, Washington, D.C.
November 2, 1999

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[12] 20 C.F.R. § 10.137(c); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(d) and (e) (October 1992). The Board notes that under the procedure manual, the date of a request for the rescheduling of a hearing is determined by the postmark date.