U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DONALD E. HOBSON and DEPARTMENT OF THE NAVY, NAVAL SEA SYSTEMS COMMAND, Bremerton, WA

*Docket No. 99-176; Submitted on the Record;*
*Issued September 25, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that the position of psychiatric child care counselor fairly and reasonably reflected appellant's wage-earning capacity effective June 21, 1998 and properly adjusted his compensation effective that date; and (2) whether the Office properly denied appellant's request for a review of the written record as untimely.

The Board finds that the Office properly determined that the position of psychiatric child care counselor fairly and reasonably reflected appellant's wage-earning capacity effective June 21, 1998 and properly adjusted his compensation effective that date.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[1] Section 8115(a) of the Federal Employees' Compensation Act provides that the "wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity."[2] The Board has stated, "generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure."[3]

On March 10, 1987 appellant, then 33-year-old pipefitter, WG-10, Step 4, sustained an employment-related low back strain. The Office later accepted that appellant sustained a

[1] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[2] 5 U.S.C. § 8115(a).

[3] *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981).

consequential right lateral meniscus tear and authorized back and knee surgery.[4] Appellant underwent vocational rehabilitation and on August 14, 1995 he began to work as a psychiatric child care counselor for the State of Washington. Appellant's compensation was adjusted for the period August 20, 1995 to June 20, 1998 but it was later determined that the calculations for the adjustment had been improper. In early 1998, the Office discovered that a formal wage-earning capacity determination had not been made based on appellant's actual earnings

By decision dated June 17, 1998, the Office determined that the position of psychiatric child care counselor fairly and reasonably reflected appellant's wage-earning capacity effective June 21, 1998 and adjusted his compensation effective that date. The Office determined that appellant had been employed as a psychiatric child care counselor for more than 60 days and adjusted his compensation based on his earnings in this position. At the time of the decision, appellant earned $529.85 per week as a psychiatric child care counselor; the current wage level for his date-of-injury position, pipefitter, was $760.55 per week.

In reaching its determination of appellant's wage-earning capacity, the Office properly noted that appellant had received actual earnings as a psychiatric child care counselor for more than 60 days in that he had been working in the position since August 14, 1995 when the Office issued its June 17, 1998 decision.[5] The record does not contain any evidence showing that the psychiatric child care counselor position constitutes part-time, sporadic, seasonal or temporary work.[6] Moreover, the record does not reveal that the position is a make-shift position designed for a claimant's particular needs.[7] The Board has carefully reviewed the Office's wage-earning capacity decision in the context of the relevant evidence of record and notes that, in addition to making a correct finding that appellant had actual wages as a psychiatric child care counselor, the Office also properly found that such wages fairly and reasonably represented his wage-earning capacity.[8]

[4] The Office accepted that appellant sustained a recurrence of disability on August 18, 1989 at which time he was working as a pipefitter, WG-10, Step 5.

[5] Office procedure provides that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7c (December 1993).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a (December 1993).

[7] *See, e.g., Michael A. Wittman*, 43 ECAB 800 (1992) (where the Board found that the evidence did not support a finding that a position with the National Guard fairly and reasonably represented the claimant's wage-earning capacity based on the fact that the claimant only performed limited duties and did not appear every month as normally required); *Elizabeth E. Campbell*, 37 ECAB 224 (1985) (where the Board found that the evidence did not support a finding that the position of "baseball cover sorter" fairly and reasonably represented the claimant's wage-earning capacity based on the fact that the position tended to be seasonal and appeared to have been make-shift work designed for the claimant's particular needs).

[8] The Office also properly calculated appellant's wage loss in accordance with *Albert C. Shadrick*, 5 ECAB 376 (1953).

For these reasons, the Office properly determined that the position of psychiatric child care counselor fairly and reasonably reflected appellant's wage-earning capacity effective June 21, 1998 and properly adjusted his compensation effective that date.

The Board further finds that the Office properly denied appellant's request for a review of the written record as untimely.

The Board notes that effective June 1, 1987 the Office's regulations implementing the Act were revised. Several revisions were made which affect appellate's rights of employees who seek review of the 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.[9]

In the present case, the Office denied appellant's request for a review of the written record on the grounds that the request was untimely. In its September 4, 1998 decision, the Office stated that appellant was not as a matter of right entitled to a review of the written record since his request was not made within 30 days of the Office's June 17, 1998 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 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.[10] 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.[11]

In the present case, appellant's July 25, 1998 request for a review of the written record was made more than 30 days after the date of issuance of the Office's prior decision, dated June 17, 1998 and, thus, appellant was not entitled to a review of the written record as a matter of right. Appellant requested a review of the written record in a letter dated July 24, 1998 and postmarked July 25, 1998. Hence, the Office was correct in stating in its September 4, 1998 decision, that appellant was not entitled to a review of the written record as a matter of right

[9] 20 C.F.R. § 10.131(b); *see Michael J. Welsh*, 40 ECAB 994, 996 (1989).

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

[11] *See Welsh, supra* note 9 at 996-97.

because his request for a review of the written record was not made within 30 days of the Office's June 17, 1998 decision.

While the Office also has the discretionary power to grant a review of the written record when a claimant is not entitled to a review of the written record as a matter of right, the Office, in its September 4, 1998 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 for a review of the written record on the basis that the issue of performance of duty 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.[12] 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 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 September 4 and June 17, 1998 are affirmed.

Dated, Washington, DC
September 25, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

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