U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES SMITH and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Seattle, WA

Docket No. 00-1103; Submitted on the Record;
Issued October 25, 2001

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 security guard represented appellant's wage-earning capacity; and (2) whether the Office properly denied appellant's request for an oral hearing as untimely.

On April 19, 1988 appellant, then a 57-year-old plumber/pipefitter, filed a notice of traumatic injury claiming that on March 25, 1988 he injured his right elbow while working under a sink when a wrench slipped and struck his elbow against a cabinet. His claim was accepted for epicondylitis of the right elbow. Appellant received appropriate compensation benefits and was placed on light duty in October 1989.

Appellant underwent surgery on February 26, 1990 for an arterial transfer of the right ulnar nerve. He also sustained a left knee medial meniscus tear while in the performance of duty on July 10, 1990. Appellant underwent rehabilitation from 1990 through September 1994.

In a March 31, 1993 work restriction evaluation, Dr. Donald D. Hubbard, a Board-certified orthopedic surgeon, stated that appellant had reached maximum medical improvement and could work for eight hours a day. Dr. Hubbard also indicated that appellant could lift up to 10 pounds with no repetitive grasping.

In a June 10, 1993 report, Dr. Hubbard stated that appellant could return to work in a sedentary- to light-duty position with limited use of the right upper extremity.

In a final report dated August 5, 1999, an Office rehabilitation specialist indicated that appellant's rehabilitation file was closed on September 13, 1994 and found that appellant could perform the duties of a security guard.

On August 16, 1999 the Office issued a notice of proposed reduction of compensation, finding that appellant was no longer totally disabled. The Office noted that appellant was

partially disabled and had the capacity to earn wages as a security guard at the rate of $270.00 a week.

By letter dated August 21, 1999, appellant responded to the Office's notice, contending that his arm was in "no shape to be working in any capacity."

By decision dated September 29, 1999, the Office adjusted appellant's compensation benefits to reflect his wage-earning capacity as a security guard. The wage-earning capacity determination took into consideration such factors as appellant's disability, training, experience, age and the availability of such work in the commuting area in which he lived. Attached to the decision was a notice of appeal rights, specifying the procedures necessary for reconsideration, a hearing before the Office, or an appeal to the Board.

On October 21, 1999 the Board received a letter from appellant dated October 17, 1999 requesting an oral hearing.

By letter dated December 22, 1999, the Board responded to appellant, acknowledging the October 17, 1999 letter and noting it was unclear whether he was seeking reconsideration or an oral hearing before the Office or an appeal to the Board. Appellant was advised to direct any reconsideration request or request for an oral hearing to the Office or complete an application for review to proceed with an appeal.

By letter dated December 19, 1999 and postmarked December 20, 1999, appellant requested an oral hearing before an Office hearing representative.

In a January 28, 2000 decision, the Office denied appellant's request for an oral hearing as untimely. The Office found that appellant's hearing request was not postmarked until January 20, 1999, more than 30 days following the September 29, 1999 decision. The Office noted that appellant could submit additional evidence not previously considered with a request for reconsideration.

The Board finds that the Office properly determined that the position of security guard reflects appellant's wage-earning capacity effective September 29, 1999, the date it reduced his compensation benefits.

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]

Under section 8115(a) of the Federal Employees' Compensation Act, 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 if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his

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

wage-earning capacity in his disabled condition.[2] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[3] The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.[4]

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 limitation, 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.

In this case, the Office received a work capacity evaluation from appellant's attending physician, Dr. Hubbard, who found that appellant could work 8 hours a day and lift up to 10 pounds with minimal grasping. He did not make any finding that appellant remained totally disabled or unable to do any work due to residuals to his right upper extremity. Dr. Hubbard reviewed several position descriptions, including that of security guard, and approved the work tolerance limitations.

In an August 5, 1999 report, the Office rehabilitation counselor determined that appellant was able to perform the position of security guard. He determined that the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area and that the wage of the position was $270.00 per week. The rehabilitation counselor noted that there were security guard jobs that were entry level and for which appellant met the requirements and which were within appellant's medical restrictions. He provided a job description for the position of security guard which indicated that the position would require exerting force up to 20 pounds occasionally or 10 pounds frequently and involve significant standing, walking, pushing and pulling. The Board notes that the position of security guard did not require any fingering or hand dexterity as restricted by appellant's physician.

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, and age and employment qualifications, in determining that the position of security guard represented appellant's wage-earning capacity.[5] The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of security guard and that such a position was reasonably available within the general labor market of appellant's commuting area. The Office properly determined that the position of security guard reflected appellant's wage-earning capacity effective September 29, 1999.

[2] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

[3] *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

[4] *Id*.

[5] *See Clayton Varner*, 37 ECAB 248, 256 (1985).

The Board also finds that the Office properly denied appellant's request for an oral hearing as untimely.

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing, or, in lieu, thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision for which a hearing is sought.[6] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[7] In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.[8]

The Office's wage-earning capacity decision was issued on September 29, 1999. Attached to the decision was a notice of appeal rights, informing appellant to read his rights carefully and to clearly specify the procedure he wished to request. The attachment notified appellant to send his request to the correct address. Appellant had 30 days from the date of the Office's decision to request an oral hearing before the Branch of Hearings and Review.

Appellant's request for an oral hearing was dated December 19, 1999 and postmarked on December 20, 1999, more than 30 days following the Office's September 29, 1999 decision. For this reason, the Office properly found that appellant did not timely request an oral hearing before the Branch of Hearings and Review.

Appellant contends that his October 17, 1999 letter, received by the Board on October 21, 1999, constitutes a timely request for an oral hearing.[9] The Board notes that this letter was addressed "To whom it may concern," and indicated that he was seeking an appeal of the Office's decision. By letter dated December 22, 1999, the Board informed appellant of his appeal rights and noted that if he was requesting an oral hearing before an Office representative, his request should be directed to the Branch of Hearings and Review. The Board finds that appellant's letter requesting an oral hearing was not postmarked to the Office until December 20, 1999. There is no other evidence in the record establishing that the October 17, 1999 letter was mailed to the Office's Branch of Hearings and Review within 30 days of the Office's wage-earning capacity determination.[10] Accordingly, the Board finds that the Office properly found appellant's request for a hearing to be untimely.

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[6] 20 C.F.R. § 10.616(a) (1999).

[7] *Herbert C. Holley*, 33 ECAB 140 (1981).

[8] *Rudolph Bermann*, 26 ECAB 354 (1975).

[9] A copy of appellant's letter is date stamped as received by the Board and not the Office.

[10] In determining the timeliness of a hearing request received by a district Office, the Office's procedure manual provides that the request will be found timely by the Branch of Hearings and Review if the letter is date-stamped as received by the district Office within 30 days of issuance of the decision. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.4(a) (June 1997). However, there is no provision that receipt of any hearing request by the Board within 30 days of an Office decision will satisfy the statutory time requirement.

The Office proceeded to exercise its discretionary authority in considering appellant's hearing request. The Office noted that it considered the matter and determined that the issue could be equally well addressed through the reconsideration process by the submission of additional evidence to establish that appellant was unable to perform the duties of a security guard. There is no evidence to establish that the Office abused its discretion in refusing to grant appellant's request for a hearing.[11]

The January 28, 2000 and September 29, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
October 25, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[11] *See Marilyn D. Polk*, 44 ECAB 673 (1993).