U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BECKY L. WINNER and U.S. POSTAL SERVICE,
POST OFFICE, Tacoma, WA

Docket No. 01-2157; Submitted on the Record;
Issued August 20, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity effective January 18, 2001; and (2) whether the Office properly determined that appellant abandoned her request for a hearing.

On March 25, 1994 appellant, then a 46-year-old rural letter carrier, filed a claim for a torn right rotator cuff and impingement syndrome. The Office accepted that appellant sustained a torn right rotator cuff and impingement syndrome and authorized surgeries to repair the injuries on July 15, 1994 and April 13, 1995. Appellant stopped work on March 23, 1994 and returned in November 1995 and worked intermittently performing limited-duty work. On January 30, 1997 appellant returned to her regular duties and worked intermittently until November 3, 1997. Appellant stopped work at this time and returned to a part-time flexible clerk position on July 15, 1998. Appellant was paid appropriate compensation for all periods of disability.

On December 4, 1997 appellant filed a, Form CA-2, notice of recurrence of disability. She indicated a recurrence of shoulder pain on November 1, 1997, which occurred since the employment-related injury of March 4, 1994. Appellant stopped work on November 3, 1997 and returned to work on July 15, 1998. The Office accepted appellant's claim for recurrence of disability and paid appropriate compensation.

Appellant submitted various medical records from Dr. Nicholas Rajacich, a Board-certified orthopedic surgeon, from December 1997 to May 1998. Dr. Rajacich diagnosed appellant with a rotator cuff tear and frozen shoulder and recommended surgery to repair the tear. On May 14, 1998 appellant underwent an exploration of the right shoulder and complete avulsion of the right shoulder rotator cuff.

On July 8, 1998 the Office offered appellant a position as a part-time flexible general clerk position effective July 15, 1998. The position was eight hours a day, from 9:00 a.m. to 5:30 p.m. with a one half-hour lunch. The duties included: answering the telephone, assisting customer inquiries, maintaining post office box records, verifying bank deposits, processing

1510's and claims, time keeping, delivery of express mail within restrictions and other administrative duties. The job offer was within the limitations provided by Dr. Rajacich, which included intermittent sitting for eight hours a day; intermittent standing and walking eight hours a day; no lifting or carrying with the right arm; and no overhead reaching. On July 15, 1998 appellant accepted the position.

By decision dated January 18, 2001, the Office reduced appellant's compensation effective that same date based on her ability to earn wages as a part-time flexible general clerk. The Office indicated that appellant had been employed in the position for over 60 days. The Office concluded the position of part-time flexible general clerk represented appellant's wage-earning capacity.

By letter dated January 24, 2001, appellant requested an oral hearing before an Office hearing representative. Appellant submitted a statement indicating that when she accepted the position on July 15, 1998 appellant was guaranteed a 40-hour work week, however, she was not paid for holidays. Appellant further indicated that she does not have consecutive days off rather she has to split her days off which were Sunday and Tuesday. Appellant indicated that this was punitive because of her work-related disability.

In a letter dated April 12, 2001, the Office notified appellant that a hearing was scheduled for July 24, 2001.

By letter decision dated August 13, 2001, the Branch of Hearings and Review found that appellant abandoned her request for a hearing as she failed to appear for the scheduled oral hearing and did not request cancellation at least 3 days prior to the scheduled date of the hearing or 10 days after the hearing and did not show good cause.

The Board finds that the Office properly determined that appellant's actual earnings represented her wage-earning capacity.

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 her wage-earning capacity.[1] 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.[2]

The Office's procedure manual provides guidelines for determining wage-earning capacity based on actual earnings. To determine whether appellant's work fairly and reasonably represents his or her wage-earning capacity, the claims examiner should consider whether the kind of appointment and tour of duty[3] are at least equivalent to those of the job held on the date

[1] 5 U.S.C. § 8115(a).

[2] *Dennis E. Maddy*, 47 ECAB 259 (1995).

[3] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.900.3 (July 1997).

of injury. Unless they are, the claims examiner may not consider the work suitable. "For instance, reemployment of a temporary or casual worker in another temporary or casual employing establishment position is proper, as long as it will last at least 90 days and reemployment of a term or transitional employing establishment worker in another term or transitional position is likewise acceptable."[4]

In this case, the record indicates that appellant worked as a full-time rural letter carrier prior to her work-related injury of March 4, 1994. The medical evidence from appellant's treating physician indicates a reduction in appellant's ability to perform over the shoulder work due to a right shoulder condition, therefore, appellant was offered a part-time flexible general clerk position effective July 15, 1998. This position was 40 hours per week, 5 days a week, with a tour of duty from 9:00 a.m. to 5:30 p.m. The job offer was consistent with the limitations provided by appellant's treating physician, Dr. Rajacich.

The record establishes that appellant worked at the part-time flexible general clerk position for more than 60 days.[5] The regulations[6] provide an explanation of the tour of duty of a part-time flexible general clerk, indicating that this position may in certain circumstances be full time. The regulations[7] provide in pertinent part:

> "3. *Kinds of Appointments and Tours of Duty*. This paragraph describes the most common kinds of appointments in both regular Federal employment and in the Postal Service and the most usual tours of duty."
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> * * *
>
> b. *Postal Service*.
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> (2) *Tours of Duty*. The Postal Service recognizes several kinds of tours of duty, depending on the kind of work performed. An employee may work many more hours than indicated by the tour of duty. In such cases the pattern established by the actual number of hours worked or actual amounts of money earned takes precedence over the stated schedule or

[4] *Id*.

[5] The Office procedures state that a determination of whether actual earnings fairly and reasonably represented wage-earning capacity should be made after the employee had been working for more than 60 days. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.8147(c) (December 1993); *see* also *Beverly Dukes*, 46 ECAB 1014 (1995); *Corlisia L. Sims (Smith)*, 46 ECAB 172 (1995) (both finding that appellant had not worked the "minimum" 60-day period).

[6] *Supra* note 3.

[7] *Supra* note 3.

> tour of duty in deciding which part of 5 U.S.C. 8114 to use in determining the pay rate. The tours are as follows:
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> > (a) Craft employees, such as Letter Carriers and Mail Clerks, are paid under the Postal Service (PS) salary structure. They include: full-time regular employees, who work 40 hours per week;
> >
> > Part-time regular employees, who have a fixed schedule of less than 40 hours per week; and *part-time flexible employees, who are usually scheduled for 25 or more hours per week and who may in fact work a full time schedule.* (Emphasis added.)
> >
> > Part-time flexible employees are not paid extra for holidays, as their basic pay rate includes an increment for holidays."[8]

The record indicates that appellant accepted the part-time flexible general clerk position as reflected in the job offer of July 15, 1998. This position was a full-time schedule where appellant worked 40 hours per week, 5 days a week from 9:00 a.m. to 5:30 p.m. The Board finds that this position was consistent with her original full-time rural letter carrier position. As noted above, actual wages earned are generally the best measure of wage-earning capacity and the Board finds that the Office properly found that the actual earnings fairly and reasonably represented appellant's wage-earning capacity. Appellant's current part-time flexible general clerk position, in terms of the kind of appointment and tour of duty, is equivalent to those of the job held on the date of injury. Thus, appellant's current work is suitable reemployment, which represents her wage-earning capacity. The employing establishment indicated that the actual wages represent her wage-earning capacity and thus the Office properly determined that appellant had no loss of wage-earning capacity.[9]

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

Section 10.137 of Title 20 of the Code of Federal Regulations, revised as of April 1, 1997, previously set forth the criteria for abandonment:

> "A scheduled hearing may be postponed or cancelled at the option of the Office, or upon written request of the claimant if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown. The unexcused failure of a claimant to appear at a hearing or late notice may result in assessment of costs against such claimant."

* * *

[8] *Supra* note 3.

[9] *See Rex S. Hultz,* Docket No. 00-2270 (issued February 25, 2002); *Blanca E. Anderson,* Docket No. 00-738 (issued September 27, 2001).

> "A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing."[10]

These regulations, however, were again revised as of April 1, 1999. Effective January 4, 1999, the regulations now make no provision for abandonment. Section 10.622(b) addresses requests for postponement and provides for a review of the written record when the request to postpone does not meet certain conditions.[11] Alternatively, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative. The section is silent on the issue of abandonment.

The legal authority governing abandonment of hearings now rests with the Office's procedure manual. Chapter 2.1601.6.e of the procedure manual, dated January 1999, provides as follows:

> "e. Abandonment of Hearing Requests.
>
> "(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.
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> "Under these circumstances, H&R [Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the DO [District Office]. In cases involving prerecoupment hearings, H&R will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.
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> "(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, H&R should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.
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> "This course of action is correct even if H&R can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend."[12]

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[10] 20 C.F.R. §§ 10.137(a), 10.137(c) (revised as of April 1, 1997).

[11] 20 C.F.R. § 10.622(b) (1999).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e (January 1999).

In this case, appellant requested an oral hearing following the Office's January 18, 2001 decision. The Office informed appellant by notice dated April 12, 2001, that a hearing before an Office hearing representative had been scheduled for July 24, 2001. The case record reflects that appellant did not request a postponement/rescheduling of the hearing, that she failed to appear at the scheduled hearing and that she failed to provide any notification for such failure within 10 days after the date set for the hearing.

The Board finds that the Office properly determined, in a decision dated August 13, 2001, that appellant had abandoned her request for a hearing.[13]

The August 13 and January 18, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
August 20, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

[13] On appeal, appellant stated that she never received the Office's April 12, 2001 notice of oral hearing. The record supports that the Office's April 12, 2001 notice of hearing letter was sent to appellant at the address of record and does not indicated that it was returned as undeliverable. Under the "mailbox rule," it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. *A.C. Clyburn*, 47 ECAB 153 (1995).