U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of IRA D. DEASON and U.S. POSTAL SERVICE,
POST OFFICE, Tunica, FL

Docket No. 02-2161; Submitted on the Record;
Issued December 24, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
DAVID S. GERSON

The issues are: (1) whether appellant was entitled to wage loss from October 21, 2000 to November 2, 2001; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant had abandoned his request for a hearing.

On October 5, 2000 appellant, then a 48-year-old postmaster, filed a claim for traumatic injury alleging that on July 17, 2000 he injured his left knee in the performance of duty. Appellant did not lose any work as a result of his injury.

On that same date, the employing establishment reduced appellant's grade from postmaster to part-time flexible carrier for misconduct. The effective date of his grade reduction was October 21, 2000.

On November 3, 2000 the Office accepted appellant's claim for lateral meniscus tear and authorized arthroscopic services. On November 3, 2000 appellant underwent arthroscopic surgery.

On November 13, 2000 appellant's treating physician noted that he could return to a light-duty eight-hour workday effective that day. The restrictions were noted as "sedentary work with intermittent standing."

On November 14, 2000 the employing establishment offered appellant a position of modified part-time flexible distribution clerk. On November 15, 2000 appellant conditionally accepted the job offer pending clarification of the duration of the job and grade, step and salary level. On December 6, 2000 appellant returned to work.

In a letter dated November 2, 2001, appellant stated that he was filing a claim for wage loss. Specifically, he requested "the difference between the amount of pay I was receiving at the time of the injury [July 17, 2000] and the amount of pay I have been paid since October 21, 2000." In a claim dated November 2, 2001 and received by the Office on

November 21, 2001, appellant filed a claim for wage loss. In an attachment, appellant noted that his wage loss was about $209.73 a week from October 21, 2000 to November 2, 2001.

In a report dated November 21, 2001, the employing establishment stated that it reduced appellant's grade from a postmaster to a clerk carrier, effective October 21, 2000, for cause and that appellant was capable of performing his date-of-injury job as a postmaster based on his current restrictions of "sedentary work with intermittent standing."

By decision dated November 28, 2001, the Office denied appellant's claim for wage loss on the grounds that his first day of disability was November 3, 2000, the date of his surgery and he was employed as a part-time flexible clerk at that time and thus his "pay rate should be considered as a part-time flexible employee." The Office noted that appellant's downgrade was not as a result of his work-related injury.

In a statement of accepted facts, the Office noted that appellant was reduced in grade on October 21, 2000 "due to cause."

By letter dated December 4, 2001, appellant requested an oral hearing.[1]

By letter dated April 15, 2002, the Office advised appellant that the oral hearing would be held on May 20, 2002 at 8:30 a.m. at the Federal Office Building in Memphis, Tennessee. On June 6, 2002 the Office found that appellant abandoned his request for an oral hearing before an Office hearing representative, for failure to appear at the hearing.

The Board finds that appellant has failed to establish that he sustained wage loss from October 21, 2000 to November 2, 2001.

Under the Federal Employees' Compensation Act, compensation is based on an employee's monthly pay, which is defined under 5 U.S.C. § 8101(4) as the rate of pay at the time of injury, or the rate of pay at the time disability begins, or the rate of pay at the time compensable disability recurs if it recurs more than six months after an employee resumes full-time employment with the United States, whichever is the greatest. The word "disability" is used in several sections of the Act. With the exception of certain sections where the statutory context or the legislative history clearly shows that a different meaning was intended, the word as used in the Act means "Incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury.[2] This meaning, for brevity, is expressed as "disability for work." Regarding section 8101(4), the section at issue in this case the Board finds that the context and legislative history clearly show that the term "disability" was intended to have the general meaning which it has in the Act, namely "disability for work."[3] Since appellant had been reduced in grade from postmaster to clerk for misconduct at the time his disability began, his rate of pay for wage-loss purposes would be his rate of pay at the time his

[1] Appellant's address of record which he used in this letter was 83 N. Parkway, Hernando, MS 38632-1612.

[2] *Franklin L. Armfield*, 28 ECAB 445 (1977); *Elden H. Tietze*, 2 ECAB 38 (1948).

[3] Prior to the 1960 amendments to the Act, "monthly pay" for compensation purposes was based in all cases on the rate of pay at the time of injury.

disability began. Appellant was not eligible to work as a postmaster at the time his disability began and thus his pay should be set at wage grade and salary of the job he was assigned at the time of his disability. To pay appellant at his former pay rate of postmaster, the job he held at the time of the injury, would effectively pay him for a job he was not entitled to hold regardless of his physical capacity to perform that job. The Office properly calculated his wage-loss claim on his wages as a part-time flexible clerk, thus appellant was not able to demonstrate a wage loss based on his prior postmaster's wages.

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

The Office's regulations are silent on the issue of abandonment of a hearing request. According to the Office's procedure manual, a hearing can be considered abandoned only if: "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."[4] Under these circumstances, the Branch of Hearings and Review will issue a formal decision finding that the claimant has abandoned his or her request for a hearing.[5]

The record indicates that the Office sent a notice dated April 15, 2002 to appellant's address of record that advised him of an oral hearing scheduled for May 20, 2000, in Memphis, Tennessee. Appellant did not request a postponement, failed to appear for the hearing and there is no indication that appellant provided notification for his failure to appear within 10 days of the scheduled hearing. As this meets the conditions for abandonment, the Branch of Hearings and Review properly issued a decision finding that appellant has abandoned his request for a hearing.[6]

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

[5] *Id.*

[6] *See Chris Wells*, 52 ECAB __ (Docket No. 00-38, issued July 12, 2001).

The June 6, 2002 and November 28, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
December 24, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

David S. Gerson
Alternate Member