U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KIM C. MAR and U.S. POSTAL SERVICE,
POST OFFICE, Coppell, TX

Docket No. 00-1275; Submitted on the Record;
Issued March 27, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective October 10, 1999 on the grounds that she could perform the position of manager trainee; and (2) whether the Office abused its discretion in denying appellant's request for an oral hearing under 5 U.S.C. § 8124(b)(1) on the grounds that it was untimely requested.

The Board has given careful consideration to the issues involved, the contentions of the parties on appeal and the entire case record.[1] The Board finds that the June 16, 1999 decision of the Office hearing representative is in accordance with the facts and the law in this case and hereby adopts the findings and conclusions of the hearing representative.[2]

After the June 16, 1999 decision, appellant's compensations were reinstated and the Office authorized the rehabilitation counselor (RC) to perform a labor market survey on the reasonable availability of suitable jobs in the area of Moscow and Lewiston, Idaho and Pullman, Washington, appellant's commuting area. The RC contacted 12 employers in appellant's commuting area and by report dated September 7, 1999 he identified the availability of 12 jobs, including 8 managerial or assistant managerial jobs, which were within her physical restrictions

[1] Appellant's claim had been accepted for a right medial meniscal tear with subsequent arthroscopic surgery.

[2] The facts and holdings in the case are fully laid out in the hearing representative's decision and are hereby adopted by reference. The hearing representative reversed the Office's compensation reduction, which was based on appellant's ability to perform the position of management trainee finding that it had based its calculations on the incorrect area, Oklahoma City, which was neither her place of current residence nor the place of original injury. Appellant objected to the reduction of compensation claiming that she had not completed vocational rehabilitation and that she had a right to accommodation position with her former employer and the hearing representative also found that the issue of whether or not appellant was vocationally qualified for a management trainee position had not been resolved.

in her partially disabled state.[3] However, the RC's survey was based on appellant's completion of a two-year Associate Degree in business administration, which would qualify her for SVP-7 and lower positions.[4]

In 1997 the RC had selected the position of management trainee as being suitable to appellant's partially disabled condition.[5] It was considered to be physically a light-duty position and within appellant's work activity restrictions and its specific vocational preparation, which was noted to be one to two years, was met in appellant's case by her one year of completed college work specializing in business administration and by her past work history, which was noted to include 16 months as a small office manager and 12 months' employment as an assistant manager in a restaurant. However, in his June 16, 1999 decision, the Office hearing representative had found that reduction of compensation was not proper with appellant claiming that she had not completed vocational rehabilitation and that she had a right to accommodation position with her former employer and the hearing representative also found that the issue of whether or not appellant was vocationally qualified for a management trainee position had not been resolved.

On September 8, 1999 the Office issued appellant a notice of proposed reduction of compensation, which stated that the medical and factual evidence of record established that she was no longer totally disabled[6] and that she had the capacity to earn wages as a management trainee. The Office noted that appellant's physician, Dr. Charles Williams, had released appellant from his care in January 1995 and that in September 1995 Dr. Yates, the Office second opinion specialist, opined that she was capable of working eight hours per day with no continuous standing, walking, or sitting for long periods of time. The Office indicated that the RC's August 31, 1999 report indicated that appellant was qualified to perform the duties of a management trainee, which was a position available on a full-time basis in the Moscow, Idaho labor market and commuting area with a weekly wage of $300.00 per week. The Office indicated that appellant's year and one half of college courses specializing in business administration and past managerial experience made her vocationally capable of performing the duties of a management trainee. The Office noted that the RC had reported that appellant had earned a general equivalency diploma and that her past work history included 16 months as a small office manager and 12 months as an assistant manager of a restaurant. He also noted that appellant had completed 24 college hours in business administration successfully with a excellent overall grade point average in Oklahoma City, but noted that she moved to Moscow, Idaho before completing her Associate Degree program or before placement implementation could occur. The RC had opined that with appellant's work experience and academic training, she was vocationally capable of performing the light-duty position as management trainee, which

[3] Dr. Carlan K. Yates, a Board-certified orthopedic surgeon specializing in sports medicine, indicated that appellant could work eight hours per day with intermittent standing, walking and sitting. Repetitive squatting was also restricted.

[4] Appellant had not completed her Associate Degree in business administration due to her pregnancies and due to her move away from Oklahoma City to Moscow, Idaho.

[5] Appellant had previously worked as a letter carrier with the employing establishment.

[6] Appellant did not dispute this finding.

was reasonably available in the Moscow, Idaho commuting area and at which she could earn $300.00 per week as an management trainee. The Office found that the RC's opinion was entitled to great weight.

By letter dated October 1, 1999, appellant disagreed with the proposed reduction of compensation to reflect her wage-earning capacity, claiming that she was entitled to reasonable accommodation by her former employer. Appellant admitted that she had worked in an office for 16 months but noted that she worked as a waitress/server in the restaurant making minimum wage and was promoted to assistant manager only when the business was failing, such that she had no work experience as an assistant manager. Appellant denied that she supervised personnel, scheduled things, or performed other manager duties. Appellant argued that she had not completed vocational training[7] and that, therefore, her compensation should not have been reduced.[8]

By decision dated October 13, 1999, the Office finalized the proposed reduction of compensation effective October 10, 1999, based upon appellant's ability to perform the position of management trainee. The Office found that her arguments about not completing vocational training and failure of the employing establishment to accommodate her in her partially disabled condition were without merit,[9] as she had substantial relevant work experience and had successfully completed 24 hours of schooling in a relevant area.

By letter dated November 11, 1999, but not postmarked until November 15, 1999, appellant requested an oral hearing before an Office hearing representative.

By decision dated January 11, 2000, the Branch of Hearings and Review noted that appellant's request for an oral hearing was untimely requested and it denied the request on the grounds that she could equally well address the subject by submitting further evidence bearing on her ability to perform the job of managerial trainee and including a request for reconsideration by the Office.

The Board finds that the Office properly reduced appellant's compensation on the grounds that she could perform the position of manager trainee.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.[10] In this case, the Office evaluated appellant's nature of injury, degree of physical impairment, her usual employment, her age and qualifications for other employment, the availability of suitable employment and other factors and circumstances, which

[7] She was pursuing an Associate Degree at a college in Oklahoma City but got married and moved to Idaho.

[8] Since rehabilitation was begun, appellant had gotten married, had two children and was currently functioning as a housewife in Moscow, Idaho.

[9] Had appellant completed her vocational rehabilitation, her wage-earning capacity would be that of a managerial trainee.

[10] *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

affected her wage-earning capacity in her partially disabled condition. The Office determined that the position of management trainee was suitable to appellant's partially disabled condition and to her vocational preparation and, noting the availability of such business administration-type jobs in her commuting area, it reduced appellant's compensation to reflect her ability to earn $300.00 per week. This determination is proper under the facts and circumstances of this case.

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[11] Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area, in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[12] In this case, the position of management trainee was found to be suitable to appellant's partially disabled condition, as it was considered to be light duty, as it conformed with the activity restrictions specified by Dr. Yates[13] and as it was reasonably available on the open labor market within appellant's Moscow, Idaho commuting area. Moreover, such a position was found to be within appellant's vocational preparation.

The Board has held that actual earnings do not fairly and reasonably represent a claimant's wage-earning capacity where the actual earnings are derived from a makeshift position designed for appellant's particular needs.[14] Office procedures specifically direct a claims examiner to consider factors such as part-time, sporadic, seasonal or temporary work.[15] The burden of proof is on the party attempting to show that the award should be modified.[16]

The applicable regulation which details the formula to be used by the Office in determining a claimant's loss of wage-earning capacity provides as follows:

> "An employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's earnings by the current pay rate. The comparison of earnings and 'current' pay rate for the job held at the time of injury need not be made as of the beginning of partial disability. *Any convenient date* may be chosen

[11] *See generally*, 5 U.S.C. § 8115(a); A. Larson *The Law of Workers' Compensation* § 57.22 (1989); *see also Betty F. Wade*, 37 ECAB 556 (1986).

[12] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

[13] Dr. Yates opined that appellant could work eight hours per day with intermittent standing, walking and sitting and he restricted repetitive squatting.

[14] *See William D. Emory*, 47 ECAB 365 (1996).

[15] *Id.* at 371.

[16] *See Clarence D. Ross*, 42 ECAB 556 (1991).

by the Office for making the comparison as long as the two wage rates are in effect on the date used for comparison."[17] (Emphasis added.)

The Office properly found in its proposed reduction of compensation, which was finalized on October 13, 1999, that appellant was only partially disabled for work due to the effects of her July 22, 1992 right knee employment injury. Appellant does not dispute the fact that she was partially disabled or that the light-duty manager trainee position was suitable to her condition. She argues instead that her vocational rehabilitation was wrongfully terminated and should be restarted so that she can finish her Associate's Degree, that the employing establishment owed her job accommodation due to her partially disabled condition and that the salary used for the position of management trainee was not accurate. The RC further noted that appellant had completed 24 college credit hours in her rehabilitation program before moving to Idaho and that with her substantial working experience she could vocationally perform the position of management trainee. The RC contacted 12 employers in and around the Moscow, Idaho commuting area and determined that there were multiple positions for management trainees.

As appellant was offered a variety of employment suitable to her partially disabled condition and as the Office determined that the offered positions were also within appellant's vocational preparation, the Office was correct in reducing appellant's compensation benefits to reflect a $300.00 per week earning capacity.

Appellant further contended that under 5 U.S.C. § 8151(b) the employing establishment was required to make "all reasonable efforts" to place her in her former or an equivalent position.[18] However, the Board notes that it lacks jurisdiction to consider this contention as section 8151(b) provides that this issue is to be considered pursuant to federal regulations issued by the Civil Service Commission. In turn, Office of Personnel Management (OPM) has promulgated regulations at 5 C.F.R. Part 353 that set forth the placement assistance that OPM will provide to employees returning from a compensable injury sustained under 5 U.S.C. Chapter 81. An employee seeking to appeal an "agency's failure to restore or improper restoration" is to make such appeal to the Merit Systems Protection Board.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing under 5 U.S.C. § 8124(b)(1).

[17] *See Kathleen Weiseman*, 50 ECAB 416 (1999); *Domenick Pezzetti*, 45 ECAB 787 (1994).

[18] *See Nathan Stelly*, 46 ECAB 396 (1995).

Section 8124(b)(1) of the Federal Employees' Compensation Act provides in pertinent part as follows:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[19]

The Office's procedures implementing this section of the Act are found in the Code of Federal Regulations at 20 C.F.R. § 10.616(a). This paragraph, which concerns the preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and whether the case is in posture for a hearing states in pertinent part as follows:

> "A claimant, injured on or after July 4, 1966, who has received a final adverse decision by the district office may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought. The claimant must have not previously submitted a reconsideration request (whether or not it was granted) on the same decision."

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 of such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[20] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right for a hearing,[21] when the request is made after the 30-day period for requesting a hearing[22] and when the request is for a second hearing on the same issue.[23] In these instances the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[24] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[25]

---

[19] 5 U.S.C. § 8124(b)(1).

[20] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[21] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[22] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[23] *Johnny S. Henderson*, *supra* note 20.

[24] *Id.*; *Rudolph Bermann, supra* note 21.

[25] *See Herbert C. Holley, supra* note 22.

In this case, the Office issued its most recent merit decision denying appellant's claim on the issue in question on October 13, 1999. Appellant requested a hearing in a letter postmarked November 15, 1999. A hearing request must be made within 30 days of the issuance of the decision as determined by the postmark of the request.[26] Since appellant did not request a hearing within 30 days of the Office's October 13, 1999 decision, she was not entitled to a hearing under section 8124 as a matter of right.

The Office, however, in its discretion, considered appellant's hearing request in its October 13, 1999 decision and denied the request on the basis that appellant could pursue her claim by requesting reconsideration and submitting additional evidence which establishes that the position of management trainee does not fairly and reasonably represent your wage-earning capacity.

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 deductions from known facts.[27] There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's hearing request.

Consequently, the October 13 and June 16, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
March 27, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[26] 20 C.F.R. § 10.131(a).

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