U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CYNTHIA ATENCIO and U.S. POSTAL SERVICE,
POST OFFICE, Denver, CO

Docket No. 00-1726; Submitted on the Record;
Issued May 9, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's reemployment as a modified letter carrier fairly and reasonably represents her wage-earning capacity; and (2) whether the Office properly found that appellant abandoned her request for an oral hearing before an Office hearing representative.

The Board has duly reviewed the entire case record on appeal and finds that the Office properly determined that appellant's actual wages as a modified letter carrier fairly and reasonably represent her wage-earning capacity.

On February 16, 1994 appellant, then a 38-year-old letter carrier, filed a traumatic injury claim alleging that on February 14, 1994 she suffered an emotional reaction when she witnessed a shooting while in the performance of duty. Appellant stopped work on February 14, 1994. The Office accepted appellant's claim for a situational depression with features of anxiety. Appellant returned to light-duty clerical work in May 1994 and worked until August 18, 1995, when she stopped work and filed a claim for occupational disease, asserting that her return to work had aggravated her emotional condition. Appellant's occupational disease claim was accepted on September 29, 1999. Appellant received appropriate compensation for all periods of temporary total disability.

On June 21, 1999 appellant returned to work in a position as a modified letter carrier for the employing establishment. Appellant suffered an adverse reaction to medication she had taken that morning, however, and was found not fit for duty. After obtaining the proper medical releases and documentation, appellant successfully returned to work on June 28, 1999. By decision dated August 27, 1999, the Office determined that appellant was reemployed as a modified letter carrier effective June 28, 1999 and that her actual wages in this position fairly and reasonably represent her wage-earning capacity.

It is well established that once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[1] After it has determined that an employee has a disability causally related to his or her federal employment, the Office may not reduce compensation without establishing that the disability ceased or that it is no longer related to the employment. Section 8115(a) of the Federal Employees' Compensation Act provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.[2] 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] After the Office determines that appellant's actual earnings fairly and reasonably represent his or her wage-earning capacity, application of the principles set forth in the *Alfred C. Shadrick*[4] decision will result in the percentage of the employee's loss of wage-earning capacity.[5] Office procedures indicate that a determination regarding whether actual wages fairly and reasonably represent wage-earning capacity should be made after a claimant has been working in a given position for 60 days.[6]

In this case, appellant effectively returned to work on June 28, 1999 as a modified letter carrier in the mailroom at the general mail facility. The modified letter carrier position is permanent and full time and does not constitute part-time, sporadic, seasonal or temporary work.[7] Moreover, appellant worked in the position for 60 days prior to the Office's initial wage-earning capacity determination and the record does not reveal that the position was a makeshift position designed for appellant's particular needs.[8] The Board, therefore, finds that the Office properly determined that appellant's position as a modified letter carrier fairly and reasonably represents her wage-earning capacity. In addition, the evidence of record reveals that appellant's date-of-injury position was level 5 step 0. When appellant accepted the position as a modified letter carrier, appellant returned to work at the same level, step and rate of pay as her date-of-injury salary. Based on the evidence of record, appellant's actual earnings as a modified letter carrier fairly and reasonably represent her wage-earning capacity and the Office properly determined that there was no loss of wage-earning capacity.

[1] *See Lawrence D. Price*, 47 ECAB 120 (1995); *Charles E. Minniss*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

[2] 5 U.S.C. § 8115(a); *Clarence D. Ross*, 42 ECAB 556 (1991).

[3] *Hubert F. Myatt*, 32 ECAB 1994 (1981).

[4] 5 ECAB 376 (1953).

[5] *See Hattie Drummond*, 39 ECAB 904 (1988); *Shadrick, supra* note 4.

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (December 1993); *see William D. Emory*, 47 ECAB 365 (1996).

[7] *See William D. Emory*, *supra* note 6.

[8] *Id.* Appellant was medically restricted from delivering mail in a residential area.

The Board also finds that appellant abandoned her request for an oral hearing before an Office hearing representative.

In a decision dated January 21, 2000, the Office found that appellant abandoned her September 23, 1999 request for an oral hearing before an Office hearing representative. The Office noted that the hearing was scheduled for January 4, 2000, that appellant received written notification of the hearing 30 days in advance, that appellant failed to appear and that the record contained no evidence that appellant contacted the Office to explain her failure to appear.

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."
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> "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."[9]

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.[10] 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.
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> "(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

[9] 20 C.F.R. §§ 10.137(a), 10.137(c) (revised as of April 1, 1997).

[10] 20 C.F.R. § 10.622(b) (1999).

scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

"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.

"(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.

"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."[11]

In this case, the Office scheduled an oral hearing before an Office hearing representative at a specific time and place on January 4, 2000. The record shows that the Office mailed appropriate notice to the claimant and her attorney at their last known addresses on December 3, 1999. While appellant's counsel asserts that neither he nor appellant received the Office's December 3, 1999 letter notifying them of the date of the hearing, 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.[12] The record also supports that appellant did not request postponement, that she failed to appear at the scheduled hearing and that she failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment specified in the Office's procedure manual, the Office properly found that appellant abandoned her request for an oral hearing before an Office hearing representative.

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

[12] *A.C. Clyburn*, 47 ECAB 153 (1995).

The January 21, 2000 and August 27, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
May 9, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member