U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAULETTE LIPFORD and U.S. POSTAL SERVICE,
POST OFFICE, Memphis, TN

Docket No. 03-378; Submitted on the Record;
Issued April 25, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity based on her actual earnings as a casual carrier; and (2) whether the Branch of Hearings and Review properly denied appellant's request for an oral hearing.

On March 12, 2001 appellant, then a 51-year-old mail clerk, filed a traumatic injury claim asserting that, as she was pushing a cart down an incline, the cart stopped suddenly and her right arm and hand got jammed.[1] The Office accepted her claim for a right carpal fracture and authorized the requested surgery. Appellant received compensation for temporary total disability. She returned to work in a limited-duty capacity on June 4, 2001.

In decisions dated May 23 and June 5, 2002, the Office issued a schedule award totaling a 17 percent permanent impairment to appellant's right arm.[2]

In a decision dated August 6, 2002, the Office determined that appellant's reemployment as a casual carrier with the employing establishment effective September 4, 2001 fairly and reasonably represented her wage-earning capacity. The Office terminated her compensation as appellant's actual wages met or exceeded the wages of the job held when injured and no loss of wages has occurred. In an attached statement of appeal rights, the Office notified appellant that

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[1] The injury compensation specialist at the employing establishment advised that, on the date of injury, appellant was a temporary (casual worker) with a 90-day appointment. Appellant had worked pay period 26 in year 2000 and pay period 01 in year 2001. In pay period 6, 2001, she began two 90-day appointments. Appellant's gross pay, exclusive of overtime, was $1,515.02. Three dollars and twenty-two cents of night differential was noted for the whole year. The record further reflects that appellant worked from September 9, 1987 until September 5, 2001 for 40 hours per week/12 months a year as a custodian for the Memphis City Schools.

[2] As neither appellant nor her attorney has contested the amount of her schedule award, the Board will not address these decisions.

any request for a hearing must be made in writing within 30 days after the date of this decision, as determined by the postmark of the request. The Office advised that, to protect her right to a hearing, appellant must send her request to the Branch of Hearings and Review in Washington, DC, at the address provided.

In a letter dated September 10, 2002, but postmarked September 8, 2002, appellant requested "an oral hearing and a review of the written record."

In a decision dated October 28, 2002, the Branch of Hearings and Review found that appellant's request was untimely because it was not postmarked within 30 days of the Office's August 6, 2002 decision. She, therefore, was not entitled to an oral hearing as a matter of right. The Branch of Hearings and Review considered appellant's request, nonetheless and denied a discretionary hearing on the grounds that she could address the issue in her case equally well by requesting reconsideration from the district Office and submitting evidence not previously considered establishing that the casual carrier position does not fairly and reasonably represent her wage-earning capacity.

The Board finds that the Office properly determined appellant's wage-earning capacity based on her actual earnings as a casual carrier.

The Board notes that, on the date of injury, appellant was concurrently employed full time as a "custodial" worker with the Memphis City Schools. Her employment ceased September 5, 2001, approximately six months after she was injured. Under the principles of *Irwin E. Goldman*,[3] if a part-time federal employee was concurrently employed full time in private business when injured or when disability began, she had the capacity to earn wages as a full-time federal employee. Appellant's pay rate for compensation purposes should be that of the federal position and any similar employment she was holding at the time of injury.[4]

In calculating appellant's compensation, the Office properly excluded appellant's concurrent private sector earnings in calculating appellant's compensation on the basis that the custodial duties appellant performed while working for the Memphis City Schools was totally different and thus dissimilar to the duties appellant performed as a causal worker for the employing establishment.[5] Accordingly, in this case, the Office need not calculate appellant's loss of wage-earning capacity to include her private sector employment as a full-time custodial worker as the duties are dissimilar to her date-of-injury position.

Section 8115(a) of the Federal Employees' Compensation Act provides that the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and

[3] 23 ECAB 6 (1971).

[4] *Steven J. Rose*, 44 ECAB 211 (1992); *James Jones, Jr.*, 39 ECAB 678 (1988).

[5] In a May 14, 2001 physical therapy report, it is noted that appellant's "job duties with the [employing establishment] involve getting the mail to the carriers." She reports "I really do n[o]t have a lot of heavy lifting. I do a lot of lifting bundles." Job duties with the Memphis City Schools involve tasks with the janitorial services. Appellant states, "My job with the schools involve heavy lifting of buckets of water, mopping, buffing [and] climbing ladders to change light bulbs."

reasonably represent the wage-earning capacity.[6] 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.[7]

The Office's procedure manual provides in relevant part as follows:

> "*Factors Considered*. To determine whether the claimant'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 (see FECA PM 2-0900.3) are at least equivalent to those of the job held on date of injury. Unless they are, the [claims examiner] may not consider the work suitable.
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> "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 [the employing establishment] worker in another term or transitional position is likewise acceptable. However, the reemployment may not be considered suitable when:
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> > "(1) *The job is part-time* (unless the claimant was a part-time worker at the time of injury) or sporadic in nature;
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> > "(2) *The job is seasonal* in an area where year-round employment is available. If an employee obtains seasonal work voluntarily in an area where year-round work is generally performed, the [claims examiner] should carefully determine whether such work is truly representative of the claimant's [wage-earning capacity]; or
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> > "(3) *The job is temporary* where the claimant's previous job was permanent."[8]

The Office of Personnel Management (OPM) recognizes four kinds of appointments: (1) career; (2) career conditional (essentially a probationary period); (3) term (not to exceed four years and with no career status); and (4) temporary (not to exceed one year, with a one-year extension possible and with no career status). OPM also recognizes five kinds of tours of duty: (1) full time (40 hours per week); (2) part time (16 to 32 hours per week); (3) intermittent (no regularly scheduled hours); (4) seasonal (less than 12 months a year, with either a full-time, part-

[6] 5 U.S.C. § 8115(a).

[7] *Don J. Mazurek*, 46 ECAB 447 (1995).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7.a (July 1997) (original emphasis).

time or intermittent schedule); and (5) on call (usually at least six months a year on an as needed basis, with either a full-time or part-time schedule).[9]

The evidence in this case is sufficient to support that appellant's appointment and tour of duty as a casual carrier were equivalent to those in her date-of-injury position as a temporary (casual worker) clerk.[10] Both appointments were temporary, with terms of less than a year.[11] Both tours of duty were at greater than 20 hours a week.[12] Appellant was reappointed to the casual carrier position on September 4, 2001 and continued working as a casual employee well into the following year. When the Office issued its decision on wage-earning capacity on August 6, 2002 she had worked as a casual carrier at least 90 days.

As there was no evidence to show that appellant's actual earnings, as a casual carrier did not fairly and reasonably represent her wage-earning capacity, the Office properly accepted these earnings as the best measure of her wage-earning capacity.

The formula for determining loss of wage-earning capacity based on actual earnings was set forth in the case of *Albert C. Shadrick*, 5 ECAB 376 (1953), and is codified by regulation at 20 C.F.R. § 10.403 (1999). Section (d) of this regulation provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings by the current pay rate for the job held at the time of injury. Because the position of casual carrier paid a greater hourly rate as the position of transitional clerk currently paid, appellant's wage-earning capacity was greater than 100 percent and showed no loss as a result of her accepted employment injury. The Board finds that the Office properly applied the principles of *Shadrick* in calculating appellant's wage-earning capacity and will affirm the Office's August 6, 2002 decision.

The Board also finds that the Branch of Hearings and Review properly denied appellant's request for an oral hearing.

[9] *Id*. at *Determining Pay Rates*, Chapter 2.900.3.a (December 1995).

[10] Casual employees may be used as a limited-term supplemental work force but may not be employed in lieu of full- or part-time employees. They are limited to two 90-day terms in a calendar year, in addition to reemployment during a Christmas period for not more than 21 days. Casual employees do not earn leave, cannot file grievances and can be separated for any reason. Transitional employees may be used to cover vacant-duty assignments due to be eliminated by automation and residual vacancies, as well as to replace part-time attrition. They are hired for a term not to exceed 359-calendar days for each appointment. Transitional employees earn annual leave but not sick leave, can file certain grievances and can be separated at any time upon completion of their assignment or for lack of work. Both employees' classifications lie outside the regular work force of the employing establishment. Both carry temporary appointments with no career status. *See generally* 1998-2001 NALC-U.S. Postal Service National Agreement, Article 7 (Employee Classifications), Appendix B (Transitional Employee Arbitration Award).

[11] Appellant stopped work on June 27, 2002 as her term appointment expired.

[12] Appellant's date-of-injury position was 5 hours per day, 5 days a week and earned $10.00 per hour. The casual carrier position was 6 hours per day, 5 days a week and earned $10.00 per hour.

Section 8124(b)(1) of the Act provides:

> "Before review under section 8128(a) of this title [relating to requests for reconsideration], a claimant for compensation not satisfied with a decision of the Secretary [*i.e.*, the district Office] under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary [*i.e.*, the Branch of Hearings and Review]."[13]

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.[14] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[15] In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[16]

The evidence of record fails to show that appellant made a request for an oral hearing within 30 days of the Office's August 6, 2002 decision, she is not entitled to a hearing as a matter of right. The Branch of Hearings and Review considered granting a discretionary hearing anyway and correctly advised appellant that she could address the issue in her case equally well by requesting reconsideration from the district Office and submitting evidence not previously considered establishing that the casual carrier position does not fairly and reasonably represent her wage-earning capacity. As appellant may indeed address the issue at hand by submitting to the district Office new and relevant medical evidence with a request for reconsideration, the Board finds that the Branch of Hearings and Review acted within its discretion in denying a discretionary hearing.[17] The Board will, therefore, affirm the October 28, 2002 decision of the Branch of Hearings and Review denying appellant's untimely request for a hearing.

[13] 5 U.S.C. § 8124(b)(1).

[14] 20 C.F.R. § 10.616(a).

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

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

[17] The Board has held that the denial of a hearing on these grounds is a proper exercise of the Branch of Hearings and Review's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).

The decisions of the Office of Workers' Compensation Programs dated October 28 and June 5, 2002 are affirmed.[18]

Dated, Washington, DC
April 25, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[18] The Board further notes that with her appeal appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c). This decision does not preclude appellant from submitting new evidence to the Office and request reconsideration pursuant to 5 U.S.C. § 8128(a).