United States Department of Labor
Employees' Compensation Appeals Board

VICTOR L. CHANDLER, Appellant	)	
	)	**Docket No. 03-2258**
and	)	**Issued: January 22, 2004**
U.S. POSTAL SERVICE, Renton, WA, Employer	)	

Appearances:
Victor L. Chandler, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On September 23, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated May 1, 2003, in which the Office found that appellant's actual earnings represented his wage-earning capacity. He also appealed a September 2, 2003 decision, in which the Office denied appellant's request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case as well as the denial of the hearing.

ISSUES

The issues on appeal are: (1) whether the Office properly determined appellant's wage-earning capacity based on his actual earnings; and (2) whether the Office properly denied appellant's request for a hearing.

FACTUAL HISTORY

On September 5, 2001 appellant, then a 38-year-old letter carrier, filed a claim alleging that on August 29, 2001 he twisted his right knee when he grasped an unsecured hand rail at a residence while delivering mail. The Office accepted that appellant sustained a tear of the right

medial meniscus. Appellant did not stop work and on November 14, 2001 accepted a full-time limited-duty position. His salary on the date of injury was $43,348.00 per year. The Office determined, as that there were no foreseen medical issues, assignment of a field nurse was not necessary.[1] Appellant thereafter underwent a right knee arthroscopy and partial medial meniscectomy on November 7, 2001 performed by his treating Board-certified orthopedist, Dr. Daniel O. Ryan. He advised that appellant returned to light duty with restrictions on November 19, 2001.

Thereafter appellant submitted various medical reports from Dr. Ryan dated February 7 to August 8, 2002; and Dr. Gaylon R. Rogers, an orthopedist, dated September 24, 2002. In his report of July 25, 2002, Dr. Ryan advised that appellant reached maximum medical improvement with permanent restrictions of 2 hours of walking, 3 hours of standing, sitting breaks of 10 minutes per hour and a workshift not to exceed 8 hours.

On November 16, 2002 the employing establishment offered appellant a full-time position as a carrier technician from 7:30 a.m. to 4:00 p.m. with a salary of $44,446.00. The position duties included carrier case label maintenance, editing books, COA maintenance, carrier line-of-travel change, technician and nixie work. The position was in compliance with the medical restrictions set forth by Dr. Ryan of no more than 2 hours per day of walking with a 10-minute break every hour and no more than 3 hours per day of standing. Appellant accepted the position and began working on November 18, 2002.

In a questionnaire dated December 31, 2002, the employing establishment noted that appellant's base salary for a carrier technician was $45,101.00 per year and advised that this position was permanent.

By decision dated May 1, 2003, the Office indicated that appellant had been employed as a full-time carrier technician effective November 14, 2002, which was over 60 days and that the pay in that position of $867.32 per week was equivalent to the pay rate for the position appellant held at the time of his injury; thus, no loss of wages occurred. The Office concluded that the position of full-time carrier technician fairly and reasonably represented appellant's wage-earning capacity.[2]

By letter dated July 1, 2003 and postmarked July 2, 2003, appellant requested an oral hearing before an Office hearing representative.

By decision dated September 3, 2003, the Office denied appellant's request for an oral hearing. The Office found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district Office and submitting evidence not previously considered.

[1] The records reveals that appellant filed a separate claim for a back injury sustained in the performance of duty, file No. 06-2012092.

[2] On October 4, 2002 appellant filed a claim for a schedule award. The Board does not have jurisdiction over this claim in the present appeal as the Office has not rendered a decision on this matter. *See* 20 C.F.R. § 501.2(c).

LEGAL PRECEDENT -- Issue 1

Section 8115(a) of the Federal Employees' Compensation Act[3] provides that in determining compensation for partial disability, "the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity."[4] The 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 more than 60 days,[5] and the Office may determine wage-earning capacity retroactively after the claimant has stopped work,[6] actual earnings will be presumed to fairly and reasonably represent wage-earning capacity only in the absence of contrary evidence.[7]

ANALYSIS -- Issue 1

In the present case, appellant was a full-time letter carrier at the time of his injury on August 29, 2001. The record reveals that appellant had been working as a full-time carrier technician effective November 14, 2002, performing duties including carrier case label maintenance, editing books, COA maintenance, carrier line-of-travel change and technician and nixie work. The position was in compliance with the medical restrictions set forth by Dr. Ryan of no more than 2 hours per day of walking with a 10-minute break every hour and no more than 3 hours per day of standing.

As appellant was a full-time employee, the job itself was a full-time position and, therefore, he need only to have worked limited duty for 60 days to make a formal finding of wage-earning capacity. In this case, appellant's actual earnings of $44,446.00 per year as set forth in the job offer of November 16, 2002 exceeded his date-of-injury earnings of $43,348.00 per year. As such, the Board finds that the Office properly determined that such employment fairly and reasonably represented his wage-earning capacity and, as he had no loss of wage-earning capacity he was thus not entitled to compensation for wage loss.

LEGAL PRECEDENT -- Issue 2

Section 8124(b)(1) of the Act provides that "a claimant for compensation not satisfied with a decision of the Secretary ... 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."[8] Section 10.617 and 10.618 of the federal regulations implementing this section of the Act

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8115(a).

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a (April 1995); *see William D. Emory*, 47 ECAB 365 (1996).

[6] *Id*. at Chapter 2.814.7e (April 1995).

[7] *See Mary Jo Colvert*, 45 ECAB 575 (1994).

[8] 5 U.S.C. § 8124(b)(1).

provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[9] Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.[10] The Office's procedures concerning untimely requests for hearings and review of the written record are found in the Federal (FECA) Procedure Manual, which provides:

> "If the claimant is not entitled to a hearing or review (*i.e.*, the request was untimely, the claim was previously reconsidered, etc.), H&R [the Boards of Hearings and Reviews] will determine whether a discretionary hearing or review should be granted and, if not, will so advise the claimant, explaining the reasons."[11]

ANALYSIS -- Issue 2

In the present case, appellant requested a hearing in a letter dated July 1, 2003 and postmarked July 2, 2003. Section 10.616 of the federal regulations provides: "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."[12] As the postmark date of the request was more than 30 days after issuance of the May 1, 2003 Office decision, appellant's request for a review of the written record was untimely filed.

In the present case, the Office notified appellant that it had considered the matter in relation to the issue involved and indicated that additional argument and evidence could be submitted with a request for reconsideration. The Office has broad administrative discretion in choosing means to achieve its general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[13] There is no indication that the Office abused its discretion in this case.

CONCLUSION

The Board, therefore, finds that the Office properly determined the full-time limited-duty position, which appellant performed fairly and accurately represented his wage-earning capacity. The Board further finds that the Office properly denied appellant's request for a hearing as untimely.

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[9] 20 C.F.R. §§ 10.616, 10.617.

[10] *Delmont L. Thompson*, 51 ECAB 155 (1999); *Eddie Franklin*, 51 ECAB 223 (1999).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4 (October 1992).

[12] 20 C.F.R. § 10.616.

[13] *Samuel R. Johnson*, 51 ECAB 612 (2000).

ORDER

IT IS HEREBY ORDERED THAT the September 3 and May 1, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 22, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member