United States Department of Labor
Employees' Compensation Appeals Board

KATHY A. ATTERBERRY, Appellant	)	
and	)	**Docket No. 05-551**
	)	**Issued: September 2, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Fulton, MO, Employer	)	

Appearances:
Billy Lee Atterberry, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 4, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 23, 2004 nonmerit decision denying appellant's request for an oral hearing and an April 7, 2004 merit decision determining her wage-earning capacity.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant's actual earnings in the modified mail processing clerk position she held on April 7, 2004 fairly and reasonably represented her wage-earning capacity; and (2) whether the Office properly denied appellant's request for an oral hearing.

[1] In her appeal, appellant states that she is "requesting an appeal on [her] neck, left and right shoulders." The Board notes that the Office denied her request to expand her claim to include a bilateral shoulder condition by decision dated November 10, 2003. Since more than one year has elapsed between the date of that decision and the filing of this appeal, the Board lacks jurisdiction to review this decision. *See* 20 C.F.R. § 501.3(d)(2).

FACTUAL HISTORY

On April 28, 2001 appellant, then a 51-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date, she sustained injuries to her right leg, right elbow and left wrist. On May 24, 2001 her claim was accepted for left wrist strain and contusions of the right elbow and right thigh. She returned to light duty on May 2, 2001.

Appellant was treated by Dr. Gregory K. Ivins, a Board-certified surgeon, and Dr. James F. Eckenrode, a Board-certified orthopedic surgeon. In a disability note dated May 29, 2001, Dr. Ivins stated that she had a torn cartilage in her wrist which required a brace for protection. In notes dated November 13, 2001, Dr. Eckenrode reported that a magnetic resonance imaging (MRI) scan revealed a possible tear of the ulnar attachment of her triangular fibrocartilage complex and indicated that she was unable to perform her preinjury job.

On April 18, 2002 the Office authorized a left wrist arthroscopy, which occurred on May 1, 2002. In unsigned notes dated May 30, 2002, Dr. Eckenrode stated that appellant's range of motion had returned following the surgery and that he was unable to identify any definite pathology. However, he reported that she continued to complain of pain.

A functional capacity evaluation performed on appellant on July 18, 2002 revealed that she did not demonstrate the functional capacity to perform her job as rural mail carrier at full duty. At the evaluator's recommendation, she engaged in work hardening sessions to improve her functional abilities.

In a report dated July 24, 2002, Dr. Eddie W. Runde, Board-certified in occupational medicine, diagnosed left wrist and hand pain but found that appellant's subjective complaints were out of proportion to objective findings. He released her to work, provided that she be restricted from pushing or pulling over 10 pounds continuously or over 17 pounds intermittently. In a report dated July 31, 2002, Dr. Runde lessened appellant's restrictions, recommending that she lift or carry up to 27 pounds continuously and 32 pounds intermittently. He further indicated that appellant would have been expected to have reached maximum medical improvement by that time.

In a work hardening exit report dated August 15, 2002, the evaluator, Paul Krewson, stated that appellant demonstrated the ability to safely and dependably perform her job with a 50-pound weight restriction; that she seemed to have plateaued; and that her complaints of pain appeared to be disproportionately higher than observed pain behaviors.

On August 15, 2002 appellant accepted a limited-duty job offer as postmaster, which restricted lifting or carrying over 40 pounds continuously or over 50 pounds intermittently.

On September 24, 2002 appellant filed a claim for recurrence of disability (Form CA-2a), alleging that on August 30, 2002 she experienced excruciating pain from her fingers to the shoulder of her left arm and moderate to sharp pain in her right shoulder and neck, which required her to stop work. She stated that her pain had been ongoing since her April 27, 2001 injury and that she was unable to complete her job tasks when she returned to work.

Appellant submitted an August 9, 2002 discharge report from Dr. Runde in which he recommended that she be returned to full duty with no work restrictions. He further indicated that her "continued complaints of pain are difficult to relate to her actual injury."

By decision dated December 21, 2002, the Office denied appellant's claim for recurrence on the grounds that the evidence failed to establish that the claimed condition resulted from the accepted work injury.[2]

By letter dated January 11, 2003, appellant requested "the proper paper work to file an appeal on workers' compensation decision."[3]

In an informational letter dated February 13, 2003, the Office advised appellant that there were no specific forms for filing an appeal and that she needed only to send a request in writing along with any additional medical evidence she would like to be considered.

In a report dated March 5, 2003, Dr. Eckenrode detailed the history of his treatment of appellant, indicating that he had last seen her on September 13, 2002. He stated that he was "not sure of the continuing cause of [her] pain" but that he thought that she was "genuine in that she [had] significant ongoing pain in her wrist." Dr. Eckenrode opined that because of her continuing wrist pain, some loss of motion and some loss of strength that she had a 20 percent impairment of her left upper extremity due to her work-related injury.

On March 6, 2003 Dr. Ivins recommended that appellant return to light duty, provided that she engaged in no lifting greater than 20 pounds with the left arm and that she avoided working with left arm above horizontal level, *i.e.* limit shoulder motion to 90 degrees laterally. He indicated that she was testing the effects of left shoulder injections; was scheduled for a custom left wrist brace; and would be reevaluated on April 3, 2003.

On March 14, 2003 appellant accepted a limited-duty job offer which encompassed her medical restrictions.

In a statement dated March 26, 2003, appellant contended that, among other things, injuries to her neck and shoulders that were revealed in a magnetic resonance imaging (MRI) scan should be considered by the Office as new injuries.

By letter dated April 14, 2003, the Office advised appellant that additional evidence would be required to warrant expansion of her claim to include a consequential injury to both shoulders, including a diagnosis and a rationalized medical opinion showing a causal relationship between her current condition and the original injury.

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[2] Because more than one year has elapsed from the date of this decision to the filing of this appeal, the Board lacks jurisdiction to review the merits of the recurrence issue. *See* 20 C.F.R § 501.3(d)(2).

[3] The Office's regulations require that an application for reconsideration must be submitted in writing and define an application for reconsideration as the request for reconsideration "along with the supporting statements and evidence." See 20 C.F.R. § §10.605 and 10.607(b). *See also Jeffrey M. Sagrecy*, 55 ECAB ___ (Docket No. 04_1189, issued September 28, 2004). The Board notes that appellant's letter seeking information from the Office does not constitute a request for reconsideration. The Board further notes that it lacks jurisdiction over the Office's December 21, 2002 denial of her claim for a recurrence of disability, as more than one year had elapsed between the date of the Office's decision and the filing of this appeal. *See* 20 C.F.R § 501.3(d)(2).

Appellant submitted numerous notes and reports from Dr. Ivins dated May 1, 2001 through September 4, 2003. A March 6, 2003 report reflected that her left shoulder rotator cuff syndrome was not responding to conservative therapy; that her left wrist pain was not responding to conservative therapy or to arthroscopic surgery; and that she suffered from left hand carpal tunnel syndrome with aberrant distribution versus a coexisting Guyon's tunnel syndrome. In a report dated April 3, 2003, Dr. Ivins noted his impressions of left distal ulnar pain; mild left carpal tunnel syndrome; mild left ulnar paresthesias; persistent left shoulder impingement; and mild right shoulder pain. A June 4, 2003 report noted continued improvement in appellant's left upper extremity. In clinic notes dated September 4, 2003, Dr. Ivins related her complaints of left shoulder pain and decreased motion, as well as left wrist pain and ulnar hand paresthesias. He noted his impression of persistent left shoulder impingement; recurrence of left hand ulnar nerve paresthesias; and persistent distal ulnar pain. Dr. Ivins provided no opinion as to causal relationship.

Appellant submitted a report of a bilateral shoulder MRI scan dated September 18, 2002. She also provided a statement dated May 7, 2003, reporting the history of her injury and alleging that her neck and shoulder pain was due to her accepted employment-related injury and was exacerbated by the work hardening program.

In a July 30, 2003 report, the district medical director, Dr. Daniel Zimmerman, opined that it was not medically reasonable to accept that the plethora of symptoms reported on August 30, 2002 were a consequence of appellant's left hand injury or the work hardening program. Characterizing her symptoms as nonphysiologic, Dr. Zimmerman found that there was no basis to expand appellant's claim.

By decision dated November 10, 2003,[4] the Office denied appellant's request to expand her claim to include a bilateral shoulder condition on the grounds that the evidence failed to establish a causal relationship between the alleged condition and the accepted April 27, 2001 work-related injury, work hardening program or work activities on August 30, 2002.

By appeal request form signed on December 26, 2003, appellant requested an oral hearing. The file contains a copy of an envelope addressed to the Office and bearing the phrase "HEARING REQUEST," reflecting a postmark, of December 29, 2003.

In a report dated January 14, 2004, Dr. Ivins found that appellant's left wrist was stable with good range of motion and no crepitus; no pain with gentle range of motion; no swelling; and no erytherna or increased warmth. He further noted that, although she had some ulnar nerve paresthesias, appellant had good use of her intrinsics. Dr. Ivins advised that appellant should be able to perform her job activities, which required lifting up to 20 pounds and pushing a 400-pound cart up to 30 minutes at a time, provided that she wore a wrist brace.

On January 20, 2004 appellant accepted a limited-duty position as modified mail processing clerk, which conformed to the restrictions recommended by her physician.

[4] Because more than one year has elapsed from the date of this decision to the filing of this appeal, the Board lacks jurisdiction to review this decision. *See* 20 C.F.R. § 501.3(d)(2).

By decision dated January 23, 2004, the Office's Branch of Hearings and Review denied appellant's request for an oral hearing. The Office determined that her request was untimely because it was not made within 30 days of the November 10, 2003 decision. It further indicated that it had exercised its discretion and further denied appellant's request for the reason that the relevant issue of the case could be addressed by requesting reconsideration and submitting additional evidence.

A memorandum to the file dated April 7, 2004, reflects that as of that date appellant had been working in her modified position for at least 60 days.

By decision dated April 7, 2004, the Office issued a formal loss in wage-earning capacity decision. The Office found that since she had demonstrated the ability to perform the duties of her modified position for at least two months, the position was deemed suitable to her partial disability. Furthermore, since appellant's actual earnings met or exceeded the wages of her preinjury position, her entitlement to compensation for wage loss ended the date she became reemployed with no loss in earning capacity.[5]

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of the Federal Employees' Compensation Act provides that the United States "shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty."[6]

Section 8106(a) provides in pertinent part as follows:

> "If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of the difference between her monthly pay and her monthly wage-earning capacity after the beginning of the partial disability, which is known as his basic compensation for partial disability."[7]

Under section 8115(a) of the Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity.[8] 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.[9] The formula for

[5] The Office's computation of compensation reflected appellant's weekly pay rate at the time of injury as $760.53; current pay rate for job held at time of injury as $782.79; and pay rate earned in modified position as $791.87.

[6] 5 U.S.C. § 8102(a).

[7] *Id*. at § 8106(a).

[8] 5 U.S.C. § 8115(a); *see Loni J. Cleveland*, 52 ECAB 171, 176-77 (2000).

[9] *Id.*

determining loss of wage-earning capacity, developed in the *Albert C. Shadrick* decision,[10] has been codified at 20 C.F.R. § 10.403. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.[11]

ANALYSIS -- ISSUE 1

The Board finds that appellant's actual wages fairly and reasonably represent her wage-earning capacity. On January 20, 2004 she accepted a limited-duty job offer as a modified mail processing clerk, which conformed with the restrictions outlined by her physician, Dr. Ivins. The Board finds that the medical evidence established that appellant could perform the modified duties of the position. In a January 14, 2004 clinic note, Dr. Ivins indicated that her left wrist was stable with good range of motion and no crepitus; no pain with gentle range of motion; no swelling; and no erytherna or increased warmth. He further noted that, although appellant had some ulnar nerve paresthesias, she had good use of her intrinsics. Dr. Ivins specifically opined that she would be able to perform the duties of her job, including lifting up to 20 pounds and pushing a 400-pound cart for up to 30 minutes at a time, so long as she wore a wrist brace. Appellant began working in the modified position on January 24, 2004 and continued working in the position through April 7, 2004, the date the Office issued a formal loss in wage-earning capacity decision. The fact that she continued earning wages in this capacity through the date of the Office's decision supports her capacity to earn such wages.[12]

Since appellant's actual wages in her modified position fairly and reasonably represent her wage-earning capacity, the Board must determine whether the Office properly calculated her wage-earning capacity based on her actual earnings on January 24, 2004. The Board finds that the Office properly applied the *Shadrick* formula in reducing her compensation benefits. First, the Office must determine appellant's "wage-earning capacity in terms of percentage" by dividing her earnings by the current or updated pay rate for the position she held at the time of injury.[13] In this case, the Office properly determined her wage-earning capacity in terms of percentage by dividing her actual average earnings for the period January 24 to April 7, 2004, of $791.87 per week by the current or updated, pay rate for the job held at the time of injury or $782.79, to find no loss of wage-earning capacity.[14] The record establishes that her actual earnings in her modified position as of January 24, 2004 are greater than the wages she would have earned in her date-of-injury position. For this reason, the Office properly reduced appellant's wage-loss compensation to zero.

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[10] 5 ECAB 376 (1953).

[11] 20 C.F.R. § 10.403(c).

[12] The Office procedure manual provides that, after a claimant has been working for 60 days, the Office will determine whether her actual earnings fairly and reasonably represent her wage-earning capacity and, if so, shall issue a formal decision no later than 90 days after the date of return to work. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997).

[13] 20 C.F.R. § 10.403(c).

[14] *See* "Computation of Compensation," attachment to the Office's April 7, 2004 decision.

LEGAL PRECEDENT -- ISSUE 2

Section 8124 of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of a final decision by the Office.[15] The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.[16]

Section 10.616(a) of Title 20 of the Code of Federal Regulations further provides, "A claimant injured on or after July 4, 1966, who had 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."[17]

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 for such hearings, including when the request is made after the 30-day period for requesting a hearing and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[18] In these instances, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[19]

ANALYSIS -- ISSUE 2

The Office issued a decision on November 10, 2003 denying appellant's request to expand her claim to include a bilateral shoulder condition. The record reflects that she sought a hearing following this decision by letter postmarked December 29, 2003. This hearing request was denied as untimely on January 23, 2004. The Office properly advised appellant that it had exercised its discretionary authority and denied that her request for the additional reason that the relevant issue of the case could be addressed by a request for reconsideration before the district Office and the submission of additional evidence. No further action was taken by her until March 24, 2004 when she submitted another request for an oral hearing "concerning her shoulders and neck." The Board notes that the Office responded to her request with an informational letter dated December 9, 2004, indicating that her request for a hearing had been denied by decision dated January 23, 2004 and referring appellant to the appeal rights attached thereto.

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[15] 5 U.S.C. § 8124(b)(1).

[16] *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

[17] 20 C.F.R. § 10.616(a). *See also Gerard F. Workinger*, 56 ECAB ___ (Docket No. 04-1028, issued January 18, 2005).

[18] *Samuel R. Johnson*, 51 ECAB 612 (2000); *Eileen A. Nelson*, 46 ECAB 377 (1994).

[19] *Claudio Vasquez*, 52 ECAB 496 (2001); *Johnny S. Henderson*, 34 ECAB 216 (1982).

Appellant's request for a hearing was dated December 29, 2003, more than 30 days after the Office issued its November 10, 2004 decision. Therefore, she was not entitled to a hearing as a matter of right. The Office properly exercised its discretion in denying a hearing upon appellant's untimely request by determining that the issue could be equally well addressed by requesting reconsideration and submitting new evidence on her pay rate.[20] The Board has held that the only limitation on the Office's discretionary authority is reasonableness. 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 logic and probable deduction from established facts.[21] In the present case, the evidence of record does not establish that the Office abused its discretion in denying appellant's hearing request.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation on the grounds that her actual earnings in the modified mail processing clerk position she held on April 7, 2004 fairly and reasonably represented her wage-earning capacity. The Board further finds that the Office properly denied appellant's request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 7 and January 23, 2004 are affirmed.

Issued: September 2, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[20] *See Joseph R. Giallanza*, 55 ECAB ___ (Docket No. 03-2024, issued December 23, 2003).

[21] *See Andre Thyratron*, 54 ECAB ___ (Docket No. 02-1833, issued December 20, 2002).