U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AFEGALAI L. BOONE and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Anaheim, CA

Docket No. 01-2224; Submitted on the Record;
Issued May 15, 2002

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 clerk; and (2) whether the Office properly denied appellant's June 26, 2001 request for a hearing before an Office hearing representative.

On May 12, 1999 appellant, then a 52-year-old transitional employee carrier, filed an occupational disease claim asserting that the numbness in her hands and arms was a result of her federal employment.[1] The Office accepted her claim for bilateral carpal tunnel syndrome and authorized surgical releases. Appellant received compensation for temporary total disability.

On June 14, 1999 the postmaster notified appellant that her employment as a transitional employee carrier was terminated effective June 30, 1999.[2] He explained that all such positions were eliminated from the main office and there was no other position available for appellant at that time.

On or about November 4, 2000 appellant was reappointed to a casual clerk position at the employing establishment. The position paid the same hourly rate as her date-of-injury job. On December 22, 2000 a vocational rehabilitation counselor reported that appellant was happy with her casual clerk position. As there were no apparent problems, the counselor closed appellant's vocational rehabilitation file.

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[1] Appellant's supervisor indicated that appellant had no regular work hours but worked 20 to 40 hours a week as a transitional employee carrier earning $13.61 an hour. The injury compensation specialist at the employing establishment advised that appellant had worked off and on, either as a postal clerk or postal carrier, since 1966. She advised that appellant was a temporary part-time employee.

[2] Appellant's term was due to expire that date.

Although appellant's position as a casual clerk was originally designated a Christmas appointment not to exceed December 31, 2000, she continued working as a casual employee in 2001. Her term of employment was set to expire at the end of June 2001.

In April 2001, the Office obtained a current work capacity evaluation. In May 2001, the Office obtained a second opinion from a Board-certified orthopedic surgeon that appellant could work eight hours a day with restrictions.

In a decision dated May 25, 2001, the Office determined that appellant's actual earnings as a casual clerk fairly and reasonably represented her wage-earning capacity. The position was in accordance with her medical restrictions. Appellant had worked in the position since November 4, 2000 for 40 hours a week. The position was classified as a transitional casual clerk position and appellant earned the same pay in this position as her date-of-injury position currently paid.

In a letter postmarked June 26, 2001, appellant requested a hearing before an Office hearing representative.

In a decision dated August 3, 2001, the Office found that appellant was not entitled to a hearing as a matter of right because her request was untimely. The Office considered appellant's request, nonetheless and denied a discretionary hearing on the grounds that appellant could equally well address the issue in her case through the reconsideration process.

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

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 reasonably represent the wage-earning capacity.[3] 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.[4]

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 [U.S. Postal Service] position is proper, as long as it will last at least 90 days and reemployment of a term or transitional [U.S. Postal Service]

[3] 5 U.S.C. § 8115(a).

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

worker in another term or transitional position is likewise acceptable. However, the reemployment may not be considered suitable when:

"(1) *The job is part-time* (unless the claimant was a part-time worker at the time of injury) or sporadic in nature;

"(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

"(3) *The job is temporary* where the claimant's previous job was permanent."[5]

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-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).[6]

The evidence in this case is sufficient to support that appellant's appointment and tour of duty as a casual clerk were equivalent to those in her date-of-injury position as a transitional employee carrier.[7] Both appointments were temporary, with terms of less than a year. Both tours of duty were at least 20 hours a week. Appellant was reappointed to the casual clerk position on November 4, 2000 and continued working as a casual employee well into the following year. When the Office issued its decision on wage-earning capacity on May 25, 2001 she had worked as a casual clerk at least 90 days.

As there was no evidence to show that appellant's actual earnings, as a casual clerk 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.

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

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

[7] 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).

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 clerk paid the same hourly rate as the position of transitional employee carrier currently paid, appellant's wage-earning capacity was at 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 May 25, 2001 decision.

The Board also finds that the Office properly denied appellant's June 26, 2001 request for a hearing before an Office hearing representative.

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

> "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 the issuance of the decision, to a hearing on [her] claim before a representative of the Secretary."[8]

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.[9] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[10] 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.[11]

Because appellant made her June 26, 2001 request for a hearing more than 30 days after the Office's May 25, 2001 decision, she is not entitled to a hearing as a matter of right.[12] The Office considered the matter and denied a discretionary hearing because appellant could equally well address the issue in her case through the reconsideration process. As appellant may indeed address the issue of wage-earning capacity by following the Office's instructions for requesting

[8] 5 U.S.C. § 8124(b)(1).

[9] 20 C.F.R. § 10.616(a).

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

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

[12] *See John B. Montoya*, 43 ECAB 1148 (1992) (in computing a time period, the date of the event from which the designated period of time begins to run shall not be included while the last day of the period so computed shall be included unless it is a Saturday, a Sunday or a legal holiday). In the present case, because the 30th day fell on Sunday, June 24, 2001, appellant had until Monday, June 25, 2001 to postmark her request for a hearing before an Office hearing representative. Appellant's request was postmarked June 26, 2001 and was, therefore, untimely.

reconsideration, the Board finds that the Office acted within its discretion in denying appellant's request for a hearing.[13]

The August 3 and May 25, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
May 15, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

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