

**United States Department of Labor
Employees' Compensation Appeals Board**

B.J., Appellant

and

**DEPARTMENT OF DEFENSE, DEFENSE
DISTRIBUTION DEPOT, Norfolk, VA,
Employer**

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**Docket No. 08-443
Issued: July 18, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 3, 2007 appellant filed an appeal from a September 13, 2007 merit decision of the Office of Workers' Compensation Programs and a November 19, 2007 decision that denied her request for a hearing. 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 appellant's actual earnings as a distribution processing expediter fairly and reasonably represented her wage-earning capacity; and (2) whether the Office properly denied her request for a hearing.

FACTUAL HISTORY

On February 8, 2005 appellant, then a 57-year-old materials examiner and identifier, sustained multiple injuries when she tripped on a pallet in the course of her federal duties.¹ She stopped work that day, and received appropriate continuation of pay and compensation.

In a September 22, 2005 report, Dr. Lawrence A. Morales, an attending Board-certified orthopedic surgeon, advised that appellant was fit for light duty performing data entry. On September 19, 2005 the Office referred her to Dr. Edward W. Gold, a Board-certified orthopedic surgeon. Appellant returned to limited duty on September 26, 2005. In reports dated October 12, 2005, Dr. Gold reviewed the history of injury and that appellant had returned to light duty in September 2005. He diagnosed chronic neck and knee pain and advised that her condition was a work-related aggravation of preexisting problems that had not resolved. Dr. Gold advised that appellant could work eight hours a day with permanent restrictions of no reaching above the shoulder, kneeling or climbing and a 15-pound restriction on pushing, pulling and lifting. A Form 50, notification of personnel action, indicates that appellant's position was changed from materials examiner and identifier to distribution processing identifier, effective October 30, 2005, at the same pay of \$18.54 per hour. Appellant did not stop work,² and Dr. Morales continued to report that her restrictions had not changed.

By decision dated September 13, 2007, the Office determined that appellant's actual wages in the distribution processing expediter position fairly and reasonably represented her wage-earning capacity, with a zero percent loss of wage-earning capacity.

On October 19, 2007 appellant requested a hearing. By decision dated November 19, 2007, an Office hearing representative denied the hearing request.

LEGAL PRECEDENT -- ISSUE 1

Section 8115(a) of the Federal Employees' Compensation Act³ 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.⁴ Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.⁵ The

¹ The claim was accepted for sprain/strain of the neck, sprain/strain of both knees, broken tooth, lip laceration, and derangement of both knees.

² On April 25, 2007 the Office issued a preliminary notification that appellant was at fault in the creation of an overpayment in compensation in the amount of \$22,241.79 for the period September 26, 2005 to September 2, 2006 because she did not inform the Office when she returned to work. It finalized the overpayment on June 27, 2007. Appellant repaid the overpayment in full. She did not file an appeal of the overpayment decision with the Board and it is not an issue in this appeal.

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

⁵ *Lottie M. Williams*, 56 ECAB 302 (2005).

formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,⁶ 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.⁷ Office procedures provide that the Office can make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represents her wage-earning capacity and any work stoppage did not occur because of any change in the injury-related condition affecting the ability to work.⁸

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained multiple injuries due to the February 8, 2005 employment injury.⁹ Appellant stopped work that day and, by report dated September 22, 2005, Dr. Morales, advised that she could return to light duty. She returned to work on September 26, 2005 and assumed a permanent position as distribution processing expediter on October 30, 2005. Appellant did not stop work. Dr. Morales has continued to advise that her work restrictions have not changed.

The Board finds that appellant's actual earnings as a distribution processing expediter fairly and reasonably represent her wage-earning capacity. Appellant returned to work on September 26, 2005, assumed the position of distribution processing expediter on October 30, 2005, and was working in this position as of September 13, 2007, the date the Office issued its wage-earning capacity determination. She worked in the position for more than 60 days, and there is no evidence that it was seasonal, temporary or make-shift work designed for her particular needs.¹⁰ As such, appellant's wages in this position fairly and reasonable represent her wage-earning capacity and are accepted as the best measure of her wage-earning capacity.¹¹

As appellant's actual earnings in the position of distribution processing expediter 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. The Board finds that the Office properly determined that appellant had no loss of wage-earning capacity based on her actual earnings. The current weekly earnings of \$779.41 per week as a distribution processing expediter equaled the current weekly wages of the date-of-injury position as a materials expediter and identifier. Appellant therefore had no loss of wage-earning capacity under the *Shadrick* formula.

⁶ 5 ECAB 376 (1953).

⁷ 20 C.F.R. § 10.403(c).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997); *Selden H. Swartz*, 55 ECAB 272 (2004).

⁹ *Supra* note 1.

¹⁰ *J.C.*, 58 ECAB ____ (Docket No. 07-1165, issued September 21, 2007).

¹¹ *See Loni J. Cleveland*, *supra* note 4.

LEGAL PRECEDENT -- ISSUE 2

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted in writing, within 30 days of the date of the decision for which a hearing is sought. If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.¹² 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, and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.¹³ The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.¹⁴

ANALYSIS -- ISSUE 2

In its November 19, 2007 decision, the Office denied appellant's request for a hearing on the grounds that it was untimely filed. It found that appellant was not, as a matter of right, entitled to a hearing as her request, dated October 19, 2007, had not been made within 30 days of its September 13, 2007 decision. The record reflects that appellant's request was dated October 19, 2007, more than 30 days after the date of the September 13, 2007 decision. The Board finds that the Office properly determined that she was not entitled to a hearing as a matter of right as her request was untimely filed.¹⁵

The Office also has the discretionary power to grant a request for a hearing when a claimant is not entitled to such as a matter of right. In the November 19, 2007 decision, it properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue in this case could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.¹⁶ In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for a hearing that could be found to be an abuse of discretion. The Office therefore properly denied her request.

¹² *Claudio Vazquez*, 52 ECAB 496 (2001).

¹³ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

¹⁴ *Claudio Vazquez*, *supra* note 12.

¹⁵ *Id.*

¹⁶ *See Mary Poller*, 55 ECAB 483 (2004).

CONCLUSION

The Board finds that the Office met its burden of proof to establish that appellant's actual wages as a distribution processing expediter fairly and reasonably represented her wage-earning capacity. The Office properly denied her request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 19 and September 13, 2007 be affirmed.

Issued: July 18, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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