United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, NEWARK LIBERTY INTERNATIONAL AIRPORT, Newark, NJ, Employer	)	**Docket No. 08-530** **Issued: July 22, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 12, 2007 appellant filed a timely appeal from a July 6, 2007 decision of the Office of Workers' Compensation Programs that found that she had the capacity to earn wages as security desk personnel and a November 23, 2007 decision that found that she had abandoned a telephonic 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 the Office met its burden of proof to reduce appellant's compensation benefits based on her capacity to earn wages as security desk personnel; and (2) whether she abandoned a telephonic hearing scheduled for November 8, 2007.

FACTUAL HISTORY

On September 2, 2005 appellant, then a 39-year-old transportation security screener, filed a claim alleging that she injured her back, neck and left arm in the course of her federal duties.[1] On December 23, 2005 the Office accepted that she sustained exacerbation of sprain/strains to the neck and thoracic region and a cervical disc herniation.[2] Appellant received appropriate compensation and was placed on the periodic rolls.

Appellant came under the care of Dr. John Dellorso, a Board-certified internist. In a work capacity evaluation dated February 9, 2006, Dr. Dellorso advised that maximum medical improvement had been reached and that appellant could work eight hours a day with restrictions that she could not climb or lift greater than 25 pounds. The employing establishment had no light duty available and, on April 19, 2006, she was referred to Roy Hirschfeld, a rehabilitation counselor, for vocational rehabilitation. As appellant was unable to secure employment,[3] on December 5, 2006 Mr. Hirschfeld identified the positions of security desk personnel and food order expediter as within the light strength category, within her work restrictions and qualifications, and reasonably available in the local labor market.

By letter dated April 25, 2007, the Office proposed to reduce appellant's compensation benefits based on her capacity to earn wages as security desk personnel. On May 21, 2007 appellant disagreed with the proposed reduction, contending that she was being treated unfairly.

By decision dated July 6, 2007, the Office reduced appellant's compensation benefits, effective July 8, 2007, based on her capacity to earn wages as security desk personnel.

On July 18, 2007 appellant requested a telephonic hearing. In a letter dated October 10, 2007, addressed to her at her address of record in New Jersey, the Office informed her that a telephone hearing was scheduled at 9:30 a.m. on November 8, 2007 and provided instructions for placing the telephone call. Appellant submitted a November 9, 2007 work capacity evaluation in which Dr. Dellorso reiterated his previous restriction with the addition that reaching be limited to three hours daily.

By decision dated November 23, 2007, the Office found that appellant had abandoned her hearing request.[4]

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[1] Appellant filed a recurrence claim of an injury sustained on May 22, 2005, adjudicated under file number 022503664 and accepted for sprain/strain of the neck and thoracic region. The Office determined that she sustained a new injury on September 2, 2005, and adjudicated the claim separately under file number 022509531.

[2] The cervical disc herniation claim was initially adjudicated under file number 02510686 but was doubled into the instant claim.

[3] Appellant did not attend arranged interviews and was generally uncooperative in the vocational rehabilitation process.

[4] The Office also issued an October 23, 2007 decision suspending appellant's compensation benefits because she did not timely submit a required EN1032 form. On October 30, 2007 appellant submitted the required form, and her compensation was reinstated. She did not file an appeal of that decision with the Board.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[5] An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.[6]

Section 8115 of the Federal Employees' Compensation Act[7] and Office regulations provide that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, the degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect her wage-earning capacity in her disabled condition.[8]

The Office must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which the Office relies must provide a detailed description of the condition.[9] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[10]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.[11] Finally, application of the principles set forth in *Albert C. Shadrick*[12] will result in the percentage of the employee's loss of wage-earning capacity.[13]

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[5] *James M. Frasher*, 53 ECAB 794 (2002).

[6] 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

[7] 5 U.S.C. §§ 8101-8193.

[8] 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson, supra* note 6.

[9] *William H. Woods*, 51 ECAB 619 (2000).

[10] *John D. Jackson, supra* note 6.

[11] *James M. Frasher, supra* note 5.

[12] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

[13] *James M. Frasher, supra* note 5.

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, the Office must consider the degree of physical impairment, including impairments resulting from both injury related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.[14]

ANALYSIS -- ISSUE 1

Dr. Dellorso's February 9, 2006 work capacity evaluation established that appellant was no longer totally disabled. The Office referred her for vocational rehabilitation counseling in April 2006. Because appellant was unable to secure employment, on December 5, 2006 the vocational rehabilitation counselor, Mr. Hirschfeld, identified two positions that fit her capabilities and physical limitations. The Office determined that she had the capacity to earn wages as security desk personnel, based on Dr. Dellorso's February 9, 2006 report.

The Board finds that the Office met its burden of proof in reducing appellant's compensation based on her ability to earn wages as security desk personnel. The relevant medical evidence consists of the February 9, 2006 work capacity evaluation from Dr. Dellorso. As noted, Dr. Dellorso advised that appellant could work eight hours a day with a restriction that she not climb and lift greater than 25 pounds. While appellant disagreed with the proposed reduction, the record does not contain any contemporaneous medical evidence to establish that she remained totally disabled of performing the duties required for the selected position of security desk personnel.

In a December 5, 2006 report, the Office rehabilitation counselor determined that appellant was able to perform the position of security desk personnel. He provided a job description, advised that the position required light strength and required no climbing with occasional lifting of 20 pounds, which was within appellant's medical restrictions and qualifications. The counselor noted that the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area, and that the wage of the position was $10.00 to $12.00 per hour.

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of security desk personnel represented appellant's wage-earning capacity.[15] The weight of the evidence of record establishes that she had the requisite physical ability, skill and experience to perform the position of security desk personnel and that such a position was reasonably available within the general labor market of her commuting area. The Office therefore properly determine that the position

[14] *John D. Jackson, supra* note 6.

[15] *James M. Frasher, supra* note 5.

of security desk personnel reflected appellant's wage-earning capacity, and using the *Shadrick* formula,[16] properly reduced her compensation effective July 8, 2007.[17]

LEGAL PRECEDENT -- ISSUE 2

The Office's regulations address the requirements for obtaining a hearing and provide that a teleconference may be substituted for the oral hearing at the discretion of the hearing representative.[18] Scheduling is at the sole discretion of the hearing representative, and is not reviewable.[19] The legal authority governing abandonment of hearings rests with the procedure manual of the Office which provides that a hearing can be considered abandoned only under very limited circumstances.[20] The following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. Under these circumstances, the Office will issue a formal decision finding that the claimant has abandoned his or her request for a hearing.[21]

ANALYSIS -- ISSUE 2

In the present case, on July 18, 2007 appellant requested a hearing and that she was open to the option of a teleconference. By letter dated October 10, 2007, the Office mailed appellant a notice that a telephone hearing was scheduled at 9:30 a.m. on November 8, 2007 and provided instructions for contacting the Office. The notice was mailed to her address of record.

The Board notes that the October 10, 2007 Office communication put appellant on notice that a telephone hearing had been scheduled. Appellant did not communicate with the Office either before or within 10 days after the scheduled hearing to request a postponement or explain why she did not telephone the Office for the scheduled hearing. The record supports that she did not request a postponement of the scheduled November 8, 2007 hearing, that she failed to appear by not participating in the scheduled teleconference, and that she failed to provide any notification for such failure within 10 days of the scheduled date of the telephone hearing.

On appeal, appellant contends that she did not receive the October 10, 2007 notice. There is no indication in the record that she did not receive this notification. The Board has held that, in the absence of evidence to the contrary, it is presumed that a notice mailed to an individual in the ordinary course of business was received by that individual. Under the mailbox rule, evidence of a properly addressed letter together with evidence of proper mailing may be used to establish

[16] *Supra* note 12.

[17] *James Smith*, 53 ECAB 188 (2001).

[18] 20 C.F.R. §§ 10.615, 10.616.

[19] 20 C.F.R. § 10.622(b).

[20] *Claudia J. Whitten*, 52 ECAB 483 (2001).

[21] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999); *D.F.*, 58 ECAB ____ (Docket No. 06-1815, issued November 27, 2006).

receipt.[22] The Board therefore finds that, as the conditions for abandonment as specified in the Office's procedure manual were met, the Office properly found that appellant abandoned her request for an oral hearing before an Office hearing representative.[23]

CONCLUSION

The Board finds that the Office met its burden of proof in reducing appellant's wage-earning capacity based on her ability to earn wages in the constructed position of security desk personnel, and that she abandoned a telephonic hearing scheduled for November 8, 2007.[24]

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 23 and July 6, 2007 be affirmed.

Issued: July 22, 2008
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[22] *Joseph R. Giallanza*, 55 ECAB 186 (2003).

[23] *Claudia J. Whitten, supra* note 20.

[24] The Board also notes that appellant submitted evidence subsequent to the last merit decision dated July 6, 2007. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).