

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANE C. WILLIAMS and U.S. POSTAL SERVICE,
POST OFFICE, Carol Stream, Ill.

*Docket No. 96-2039; Submitted on the Record;
Issued July 16, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly adjusted appellant's compensation benefits on June 14, 1996 to reflect her reemployment as a full-time modified distribution clerk; and (2) whether appellant has met her burden of proof in establishing greater than a four percent permanent impairment of the right upper extremity.

On February 9, 1994 appellant, then a 50-year-old modified distribution clerk, filed a traumatic injury claim, alleging that she injured her right arm and elbow when she slipped on ice in the employing establishment's parking lot. The Office initially accepted appellant's claim for contusion of the right elbow and subsequently accepted it for a tear of the right rotator cuff. The Office authorized surgery for appellant, and she underwent an acromioplasty with resection of the coracoacromial ligament of the right shoulder on August 23, 1994. After her injury, appellant returned to a light-duty position, but she stopped work on August 23, 1994 due to her impending surgery. Appellant returned to work on January 2, 1995 as a full-time modified distribution clerk with restrictions imposed by her treating physician.

In a decision dated June 14, 1996, the Office advised appellant that she had been reemployed as a modified distribution clerk effective January 2, 1995. The Office determined that this position fairly and reasonably represented her wage-earning capacity and was suitable for her accepted medical condition of lateral epicondylitis. The Office found that the wages for this position were equal to her grade and step for her date-of-injury job. It concluded that there was no loss of wage-earning capacity and that appellant was not entitled to any wage-loss compensation.

By decision dated June 19, 1996, the Office issued appellant a schedule award for a four percent permanent impairment of her right upper extremity. The period of the award ran from September 1 to November 27, 1995 and was for 12.48 weeks of compensation.

The Board finds that the Office properly determined appellant's loss of wage-earning capacity based on her actual earnings after reemployment as a modified distribution clerk.

Once the Office accepts a claim, it has the burden of proving that the disability ceased or lessened in order to justify termination or modification of compensation. Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries, and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.¹ Section 8115(a) of the Federal Employees' Compensation Act provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity.² Generally wages earned are the best measure of 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.³ After the Office determines that appellant's actual earnings fairly and reasonably represent his or her wage-earning capacity, application of the principles set forth in the *Alfred C. Shadrick*⁴ decision will result in the percentage of the employee's loss of wage-earning capacity.⁵

In the present case, appellant was reemployed by the employing establishment and has actual earnings from her work as a modified distribution clerk. On the termination of disability form, the employing establishment did not fill in the section that would have indicated a change in her pay rate if the wages for appellant on her return to work would have been different than those for her date-of-injury wages. Therefore, appellant was reemployed at the same grade and step and same pay rate she was receiving before her accepted employment injuries. This information was confirmed by a limited salary analysis for appellant that was submitted by the employing establishment. Based on the evidence of record, appellant's actual earnings as modified distribution clerk fairly and reasonably represent her wage-earning capacity. Thus, the Office properly determined that there was no loss of wage-earning capacity effective January 2, 1995.

The Board further finds that this case is not in posture for decision with respect to the issue of whether appellant has established greater than a four percent permanent impairment of the upper right extremity.

¹ See generally 5 U.S.C. § 8115(a), *The Law of Workers' Compensation* § 57.22 (1989); see also *Betty F. Wade*, 37 ECAB 556 (1986).

² 5 U.S.C. § 8115(a); *Clarence D. Ross*, 42 ECAB 556 (1991).

³ *Hubert F. Myatt*, 32 ECAB 1994 (1981).

⁴ 5 ECAB 376 (1953).

⁵ See *Hattie Drummond*, 39 ECAB 904 (1988); *Shadrick*, *supra* note 4.

Section 8107 of the Act⁶ and its implementing regulation⁷ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of specified members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) have been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating losses.⁸

On June 12, 1995 appellant, together with a statement of accepted facts and her medical records, was referred to Dr. Dirk Nelson, a Board-certified orthopedic surgeon, for a second opinion examination and report. In a report dated July 13, 1995, Dr. Nelson noted some tenderness of the acromioclavicular joint and subacromial region. He found an active flexion of 155 degrees, an active abduction of 145 degrees, internal rotation of the upper lumbar spine to the right, and external rotation of 45 degrees on the right and 60 degrees on the left. Dr. Nelson diagnosed rotator cuff tendinitis and post-surgery status for rotator cuff surgery in the right shoulder. He reported that appellant would reach maximum medical improvement in two months after physical therapy was completed and indicated that this additional strengthening might improve appellant's pain complaints.

In a report dated October 17, 1995, an Office medical adviser reported that he applied the A.M.A., *Guides* to the results of the July 13, 1995 report by Dr. Nelson. He found that a 155 degree active flexion was the equivalent of a 1 percent permanent impairment under Figure 38 of the A.M.A., *Guides*, a 145 degree abduction was the equivalent of a 1 percent permanent impairment under Figure 41 of the A.M.A., *Guides*, and that a 70 degree internal rotation and a 45 degree external rotation were each the equivalent of a 1 percent permanent impairment under Figure 44 of the A.M.A., *Guides*. He found a total permanent impairment of four percent to the right upper extremity.

However, a review of the record indicates that appellant submitted a disability evaluation from her treating physician, Dr. Richard A. Brash, a general practitioner, dated October 18, 1995 in which he reported an active flexion of 120 degrees, an active abduction of 135 degrees, full external rotation and internal rotation of 60 degrees. In a report dated February 6, 1996, Dr. Brash found a 13 percent permanent impairment of the upper right extremity and an additional 5 percent impairment for weakness, atrophy, pain and discomfort. The Board notes that the Office did not address the disability evaluation provided by Dr. Brash. Although it is not clear what edition of the A.M.A., *Guides*, Dr. Brash utilized in reaching his assessment of appellant's permanent impairment rating, he was not advised by the Office, as provided in the Federal (FECA) Procedure Manual, of the proper procedure for rendering an impairment rating or instructed to use the fourth edition of the A.M.A., *Guides*, when providing his impairment

⁶ 5 U.S.C. § 8107(c).

⁷ 20 C.F.R. § 10.304.

⁸ *Quincy E. Malone*, 31 ECAB 846 (1980).

rating of appellant.⁹ In addition, both Drs. Brash and Nelson have indicated that appellant was experiencing pain which is compensable under the A.M.A., *Guides*.

The case will be remanded to the Office for further evaluation of the permanent impairment to appellant's upper right extremity in accordance with the appropriate standards of the A.M.A., *Guides*. The Office should also advise Dr. Brash that he should evaluate appellant's impairment and submit a supplemental report using the fourth edition of the A.M.A., *Guides* as reference. After such further development of the evidence as it deems necessary, the Office should issue a *de novo*, decision on the percentage of permanent impairment to appellant's right upper extremity.

The decision of the Office of Workers' Compensation Programs dated June 14, 1996 is affirmed. The decision of the Office dated June 19, 1996 is hereby set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
July 16, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808(6)(a) (December 1994).