U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KEENAN V. ROSS and U.S. POSTAL SERVICE,
BULK MAIL CENTER, Richmond, CA

Docket No. 98-767; Submitted on the Record;
Issued November 9, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant has more than an 11 percent permanent impairment of the right upper extremity, for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant's modified mailhandler position represented his wage-earning capacity.

The Board has duly reviewed the case record in the present appeal and finds that appellant has no more than an 11 percent permanent impairment of his right upper extremity.

On June 3, 1994 appellant, then a 35-year-old mailhandler, sustained an injury to his right shoulder while in the performance of duty. He filed a claim for his injury that same day. The Office initially accepted appellant's claim for right shoulder strain and subsequently authorized surgery to repair a torn rotator cuff, which was performed on September 14, 1995.[1] Following surgery, appellant returned to work in a limited-duty capacity on December 16, 1995.[2] Additionally, appellant received appropriate wage-loss compensation.

On April 18, 1997 the Office requested that appellant's treating physician, Dr. Michael F. Charles, a Board-certified orthopedic surgeon, provide an evaluation regarding the nature and extent of appellant's permanent impairment. Dr. Charles submitted a report dated May 15, 1997, which was subsequently reviewed by the Office medical adviser on August 18, 1997. By decision dated December 12, 1997, the Office granted appellant a schedule award for an 11 percent permanent impairment of his right upper extremity. The award covered a period of 34 weeks from October 23, 1996 to June 20, 1997

[1] After his injury on June 3, 1994 appellant continued to work in his regular capacity until September 8, 1995.

[2] Appellant unsuccessfully attempted to return to work on October 27, 1995. His treating physician, however, advised that he remain on temporary total disability through December 15, 1995.

Section 8107 of the Federal Employees' Compensation Act[3] sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) as an appropriate standard for evaluating schedule losses, and the Board has concurred in such adoption.[4]

In the instant case, while Dr. Charles provided measurements with respect to range of motion and grip strength, he did not provide a rating of appellant's impairment under the A.M.A., *Guides* (4th ed. 1993).[5] Additionally, he identified October 23, 1996 as the date of maximum medical improvement. Upon reviewing Dr. Charles' May 15, 1997 findings, the Office medical adviser calculated a one percent impairment due to loss of internal rotation utilizing Figure 44 at page 45 of the A.M.A., *Guides.* Furthermore, the Office medical adviser calculated a 10 percent impairment due to loss of grip strength utilizing Table 34 of the A.M.A., *Guides* at page 65.[6] Finally, the Office medical adviser reached her conclusion of an 11 percent impairment of the right upper extremity by combining the above noted impairments due to loss of motion and strength in accordance with the Combined Values Chart at page 322 of the A.M.A., *Guides*. This calculation of the percentage of impairment of appellant's right upper extremity sufficiently conforms to the A.M.A, *Guides* (4th ed. 1993) and, therefore, constitutes the weight of the medical evidence.[7] Consequently, appellant has failed to provide any probative medical evidence that he has greater than an 11 percent impairment.[8]

The Board further finds that the position of modified mailhandler represents appellant's wage-earning capacity.

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[3] 5 U.S.C. § 8107.

[4] *James J. Hjort*, 45 ECAB 595 (1994).

[5] Inasmuch as Dr. Charles did not provide an impairment rating utilizing the A.M.A., *Guides* (4th ed. 1993), his opinion is of diminished probative value in determining the extent of appellant's permanent impairment; *see Paul R. Evans, Jr.*, 44 ECAB 646, 651 (1993).

[6] Under the A.M.A., *Guides*, loss of grip strength is determined by a formula of abnormal strength subtracted from normal strength and then divided by normal strength to yield a percentage of strength loss index. The grip strength of the affected hand is compared with the grip strength of the opposite extremity, which is assumed to be normal. If both extremities are affected, the strength measurements are compared to the average normal strengths listed in Tables 31-33. A.M.A., *Guides*, pp. 64-65 (4th ed. 1993). In the instant case, the measurements provided by Dr. Charles yielded an 11 percent strength loss index, which translated to a 10 percent upper extremity impairment.

[7] *See Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

[8] The Act provides that for a total or 100 percent loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1). In the instant case, appellant does not have a total or 100 percent loss of use of his left arm, but rather an 11 percent loss. As such, appellant is entitled to 11 percent of the 312 weeks of compensation, which is 34 weeks.

On August 20, 1996 appellant accepted a limited-duty job offer as a modified mailhandler, with no decrease in pay. By decision dated April 18, 1997, the Office advised appellant that his position as a modified mailhandler, with retained wages, fairly and reasonably represented his wage-earning capacity. In an accompanying memorandum, the Office noted that because of appellant's June 3, 1994 injury, he was unable to return to the position he held on the date of injury. The Office further explained that the August 20, 1996 limited-duty position appellant accepted was consistent with his work restrictions and that appellant had not sustained any wage loss as a result of accepting this position.

Section 8115(a) of the Act provide that in determining compensation for partial disability, "the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity."[9] Generally, wages actually earned are the best measure of wage-earning capacity, and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[10]

In the present case, appellant returned to work in a limited-duty capacity on December 16, 1995.[11] He later accepted another limited-duty job offer on August 20, 1996, which was consistent with the permanent restrictions identified by Dr. Charles on September 23, 1996. Moreover, as previously noted appellant did not sustain any loss of wages as a result of accepting the August 20, 1996 modified mailhandler position. At the time the Office issued its decision on April 18, 1997, appellant had worked in this capacity for approximately eight months. Appellant's performance of this position in excess of 60 days is persuasive evidence that it represents his wage-earning capacity. There is no evidence that this position is seasonal, temporary, less than full-time or make shift work designed for appellant's particular needs.[12] Therefore, the Office properly found that appellant had no loss of wage-earning capacity.[13]

[9] *George E. Williams*, 44 ECAB 530, 533 (1993).

[10] 5 U.S.C. § 8115(a).

[11] The Office's April 18, 1997 decision identifies October 27, 1995 as the date appellant returned to limited duty. As previously noted, appellant was unsuccessful in his attempt to return to work at that time, and his treating physician advised him not to return to work until December 16, 1995.

[12] *Elbert Hicks*, 49 ECAB ___ (Docket No. 95-1448, issued January 20, 1998).

[13] *Monique L. Love*, 48 ECAB ___ (Docket No. 95-188, issued February 28, 1997).

The decisions of the Office of Workers' Compensation Programs dated December 12 and April 18, 1997 are hereby affirmed.

Dated, Washington, D.C.
November 9, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member