

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TRISH A. FONTANA and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Pittsburgh, PA

*Docket No. 99-544; Submitted on the Record;
Issued October 3, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether appellant had any disability after March 22, 1997 causally related to her February 27, 1995 injury; and (2) whether appellant had greater than a six percent permanent impairment to her right upper extremity for which she received a schedule award.

On February 28, 1995 appellant, then a 27-year-old mail processor, filed a traumatic injury claim alleging that on February 27, 1995, while keying mail, she sustained right wrist sprain and a torn ligament. Her claim for compensation benefits was approved for right wrist and right thumb sprains.

On August 8, 1995 appellant had surgery on her right thumb for a carpometacarpal joint arthroplasty with abductor pollicis longus graft, forester's compartment release, and extensor pollicis brevis to abductor pollicis longus tendon transfer. Appellant returned to light-duty work with the employing establishment on February 5, 1996.

On March 22, 1997 appellant was placed in an indefinite nonduty/nonpay status until the completion of an investigation in which the employing establishment contended that she had falsified a postal document. The employing establishment summarized appellant's work history as follows: appellant was hired by the employing establishment on January 8, 1994 and worked until April 20, 1994; was rehired on September 17, 1994 and worked until June 16, 1995; and was rehired on August 5, 1995. The employing establishment alleged that on September 16, 1994 and October 20, 1994 appellant completed PS Form 2385 medical examination and assessment. The employing establishment alleged that when asked, "Do you now or have you ever had any of the following conditions [including back injuries]?" she checked "No." Furthermore, the employing establishment stated that, in the October 20, 1994 form, she responded in the negative when she was asked, "Do you know of any medical condition that you have which should be reviewed or evaluated before being appointed." The employing establishment noted that it uncovered a lawsuit appellant filed with regard to an automobile accident on June 29, 1994 wherein she asked for a judgment in her favor for restitution relating

to a lumbosacral sprain and cervical sprain which she sustained on June 29, 1994. In a July 2, 1997 letter to the Office of Workers' Compensation Programs, the employing establishment indicated that appellant had been removed from employment for cause effective May 28, 1997. Appellant contended that she did not mention these injuries because they were insignificant. An arbitrator upheld the employing establishment's decision to remove appellant.

On April 7, 1997 appellant filed a claim for a schedule award.

In an undated statement received by the Office on May 7, 1997, Dr. Glenn A. Buterbaugh, appellant's treating physician and a Board-certified orthopedic surgeon, determined that appellant had a 32 percent impairment of the thumb, and that maximum medical improvement had been reached.

On August 1, 1997 appellant filed a claim for compensation for wage loss commencing March 22, 1997, her last day of employment with the employing establishment.

By decision dated September 26, 1997, the Office denied appellant's claim for compensation for the period March 22 through August 8, 1997 on the grounds that the evidence failed to establish disability for work resulting from the February 27, 1995 employment injury.¹

On October 29, 1997 appellant requested an oral hearing with regard to the September 26, 1997 denial of wage-loss decision.

In order to determine the extent of any injury-related impairment resulting from the February 27, 1995 employment injury, the Office prepared a statement of accepted facts and referred it, together with appellant and the case record to Dr. Robert M. Yanchus, a Board-certified orthopedic surgeon, for a current medical evaluation.

In a report of a medical examination dated November 6, 1997, Dr. Yanchus noted the following results from appellant's physical examination:

"Examination of the right wrist revealed a 3½ [inch] scar over the radial aspect. ROM [range of motion] right MP [metacarpal] joint 0/55 degrees. IP [interphalangeal] 0/70 degrees. Abduction right CMC [carpometacarpal] 35 degrees. Adduction across palm 4 cm. Opposition 4 cm. Pronation/supination 90 degrees.

"ROM right wrist. Palmar flexion 65 degrees, dorsiflexion 60 degrees. Radial deviation 20 degrees, ulnar deviation 55 degrees. No findings of carpal tunnel syndrome. There was subjective pain on motion at the right CMC joint. Ulnar collateral ligament 1+ instability in both thumbs."

¹ The record reveals that the employing establishment removed appellant from employment effective May 28, 1997 for falsification of documents. In a June 27, 1997 decision, an arbitrator upheld the employing establishment's actions, finding that it had just cause.

Utilizing the third edition of the A.M.A., *Guides to the Evaluation of Permanent Impairment*, Dr. Yanchus found that appellant sustained a 16 percent impairment of the thumb, or a five percent impairment of the upper extremity.

On December 15, 1997 the Office medical adviser reviewed Dr. Yanchus' report, and utilizing his data, applied the fourth edition of the A.M.A., *Guides*. The medical adviser determined that appellant sustained an 18 percent impairment of the right thumb, which was equal to a seven percent impairment of the right hand and six percent impairment of the right upper extremity. The Office medical adviser listed the applicable tables and pages he utilized from the A.M.A., *Guides*.

In a decision dated December 23, 1997, the Office granted appellant a schedule award based on a six percent permanent loss of use of the right upper extremity.

By letter dated January 18, 1998, appellant requested an oral hearing regarding the December 23, 1997 decision.

A hearing was held regarding both decisions on May 20, 1998. Appellant testified that the last time she worked was for the employing establishment on March 21, 1997. She stated that she was in an automobile accident in 1994 when she pulled a muscle in her back, that she had no residuals from this injury and only received \$700.00 after legal expenses from the other party.

In a decision dated August 15, 1998, the hearing representative affirmed both the September 26, 1997 decision denying compensation benefits from March 22 to August 8, 1997 and the December 23, 1997 decision finding that appellant had a six percent impairment of her right upper extremity.

The Board finds that appellant did not have any disability causally related to her February 27, 1995 employment injury after March 22, 1997.

Section 8102(a) of the Federal Employees' Compensation Act² provides:

"The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty...."

In general, the term "disability" under the Act means "incapacity because of injury in employment to earn the wages which the employee was receiving

² 5 U.S.C. § 8102(a).

at the time of such injury.”³ This meaning, for brevity, is expressed as “disability for work,”⁴ i.e., if she was unable to earn the wages that he was receiving on February 27, 1995.

The record reveals that the employing establishment provided work for appellant within her physical restrictions. Appellant was terminated from her position by the employing establishment for “falsification of a postal document.” There is no evidence in the record that appellant was terminated due to any physical inability to perform her assigned duties, nor is there evidence that appellant stopped work due to her physical condition. As there is no evidence in the record that appellant was not capable of performing her assigned duties after March 22, 1997, she had no disability within the meaning of the Act.⁵

The Board further finds that appellant has no more than a six percent impairment to her right upper extremity.

Section 8107 of the Act provides that if there is a permanent impairment involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁶ Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants, the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the standard for evaluating schedule losses and the Board has concurred in such adoption.⁷

In the instant case, appellant’s physician, Dr. Buterbaugh, stated that appellant sustained a 32 percent impairment of the right thumb. However, Dr. Buterbaugh did not explain how he arrived at this assessment of disability, nor did he reference the A.M.A., *Guides*.⁸ Accordingly, Dr. Yanchus was selected by the Office to provide a clearer picture of the extent of impairment sustained by appellant. In determining that appellant had a 16 percent impairment of the right thumb and a five percent impairment of the right upper extremity, Dr. Yanchus stated measurements pursuant to the A.M.A., *Guides*, but applied the third edition of the A.M.A., *Guides*. The Office medical adviser utilized Dr. Yanchus’ figures regarding wrist motion and right thumb motion, and properly applied the fourth edition of the A.M.A., *Guides*. The Office medical adviser clearly noted the specific charts and tables of the A.M.A., *Guides* upon which he

³ *Gene Collins*, 35 ECAB 544, 548 (1984).

⁴ *Clarence D. Glenn*, 29 ECAB 779, 781 (1978).

⁵ *Major W. Jefferson, III*, 47 ECAB 295, 298 (1996); *John W. Normand*, 39 ECAB 1378 (1988).

⁶ 5 U.S.C. § 8107.

⁷ *James J. Hjort*, 45 ECAB 595 (1994).

⁸ After the issuance of the August 15, 1998 decision, appellant attempted to submit additional evidence in support of the claim. The Board’s review is limited to the evidence that was before the Office at the time of its final decision. The Board therefore cannot consider this evidence. 20 C.F.R. § 501.2(c).

relied in order to reach his determination, that appellant suffered from a six percent impairment to the upper extremity.⁹

As the Office medical adviser properly applied the A.M.A., *Guides* to the physical findings of Dr. Yanchus, and as there is no evidence in the record establishing that appellant has more than a six percent permanent impairment to her right upper extremity, the Office properly granted appellant a schedule award for six percent of the right upper extremity.

The decisions of the Office of Workers' Compensation Programs dated August 15, 1998 and December 23, 1997 are hereby affirmed.

Dated, Washington, DC
October 3, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

⁹ The right thumb motion as reported by Yanchus was as follows: MP -- joint 0 to 55 equals 1 percent impairment, page 27, Figure 13; IP joint -- 0 to 70 equals 1 percent impairment, page 26, Figure 10; abduction CMC joint -- 35 equals 3 percent, page 28, Table 6; adduction -- 4 cm equals 4 percent, page 28, Table 5; opposition -- 4 cm equals 9 percent, page 29, Table 7. Total right thumb is 18 percent impairment which is equal to 7 percent impairment to the right hand (page 18, Table 1) also equal to 6 percent impairment to the upper extremity (page 19, Table 2).