

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARILINDA G. ACEVEDO and DEFENSE LOGISTICS AGENCY,  
DEFENSE DISTRIBUTION REG EAST, Memphis, TN

*Docket No. 99-752; Submitted on the Record;  
Issued September 19, 2000*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether appellant has more than a three percent lower extremity impairment to each of her legs, for which she received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect her wage-earning capacity in the position of a receptionist.

The Office accepted appellant's claim for bilateral heel spurs, bone spurs between the right fourth and fifth toes, a left ankle ganglion and corrective surgeries. Subsequent to the work injury of February 4, 1991, appellant developed diabetes and experienced complications therefrom. Appellant was paid appropriate compensation and placed on the periodic rolls for temporary total disability compensation. By decision dated December 31, 1997, the Office issued a schedule award for a three percent permanent impairment to each of appellant's lower extremities. The Office proposed to reduce appellant's compensation benefits on July 29, 1998. By decision dated September 2, 1998, the Office determined that appellant's wage-earning capacity was based on the selected position of receptionist.

The Board finds that the medical evidence establishes that appellant has no more than a three percent lower extremity impairment to each of her legs.

Section 8107 of the Federal Employees' Compensation Act provides that, if there is permanent disability 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.<sup>1</sup> 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

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<sup>1</sup> 5 U.S.C. § 8107. This section enumerates specific members or functions of the body, for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.304(b).

justice for all claimants, the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.<sup>2</sup>

In his May 25, 1994 report, Dr. William B. Blair, a Board-certified orthopedic surgeon and Office referral physician, noted that appellant remained symptomatic with persistent effects of the bilateral corrective surgeries which were performed. Given the time period since the surgeries, Dr. Blair stated that it was doubtful that appellant's present symptom complex would resolve anymore than was currently present. Dr. Blair stated that appellant's impairment was based on deficiencies of sensation of the medial plantar nerve. Addressing Table 68 of page 89 in Chapter 3, he noted the maximal impairment of the lower extremity for the medial plantar branch was 5 percent. Multiplying this by a 50 percent grade taken from Table 10 on page 48, Dr. Blair stated that appellant was entitled to a 2.5 percent impairment of both lower extremities. Dr. Blair further opined that appellant was capable of working an eight-hour day with restrictions on the amount of standing. An evaluation of the upper extremities with strength testing was also provided.

On December 9, 1997 the Office referred Dr. Blair's report to an Office medical adviser to compute the percentage of permanent impairment. The Office medical adviser reviewed the record and in a December 11, 1997 report, noted that Table 68, page 89 of the A.M.A., *Guides* was the applicable table for lower extremity nerve deficits.<sup>3</sup> The medical adviser indicated that the maximum impairment for nerve deficits in the medial plantar nerve for decreased sensation was five percent for both the right and left lower extremity. Utilizing Table 11, page 48 of the A.M.A., *Guides*, the medical adviser used Dr. Blair's estimate 50 percent to account for a Grade 3 sensory deficit or pain<sup>4</sup> and multiplied the percentage for decreased sensation of the medial plantar nerve to find a 3 percent permanent impairment for both the right and left lower extremities.

As the medical adviser's rounded up figure of a three percent permanent impairment for both the right and left lower extremities is in accord with Dr. Blair's opinion and there is no other evidence to establish greater impairment, the medical evidence establishes that appellant has no more than a three percent lower extremity impairment to each of her legs.

The Board further finds that the Office properly reduced appellant's compensation to reflect her wage-earning capacity in the selected position of receptionist.

Section 8115 of the Act<sup>5</sup> provides 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

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<sup>2</sup> A. George Lampo, 45 ECAB 441 (1994).

<sup>3</sup> A.M.A., *Guides* (4<sup>th</sup> ed. 1993), 89, Table 68.

<sup>4</sup> A.M.A., *Guides* (4<sup>th</sup> ed. 1993), 48, Table 11.

<sup>5</sup> 5 U.S.C. §§ 8101-8193, 8115.

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 his wage-earning capacity in her disabled condition.<sup>6</sup>

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 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. Finally, application of the principles set forth in *Albert C. Shadrick*<sup>7</sup> will result in the percentage of the employee's loss of wage-earning capacity. The basic range of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay with no dependents or 75 percent with one or more dependents.<sup>8</sup>

In a February 23, 1998 OWCP-5c report, Dr. Thomas Madden, a podiatrist and appellant's attending physician, stated that appellant could work eight hours a day with limitations. He further stated that appellant would need to be off her feet and working in a sedentary-type position. The rehabilitation specialist noted that, in the past, appellant had vision problems caused by diabetes and that such condition arose subsequent to the accepted work injury. The rehabilitation specialist further noted that Dr. Gerald Marten-Ellis, an ophthalmologist, in his report of April 22, 1998, opined that appellant should be put into a position where the visual tasks would be less arduous. In a report of June 18, 1998, the rehabilitation specialist determined that the position of receptionist was within appellant's physical limitations and was available in suitable numbers to establish it as reasonably available within her commuting area.

The Office properly found that appellant was no longer totally disabled for all work as a result of her accepted employment injury. It followed established procedures for determining appellant's employment-related loss of wage-earning capacity. When it issued its September 2, 1998 decision, the Office relied on the June 18, 1998 final report of the rehabilitation specialist. Because the rehabilitation specialist is an expert in the field of vocational rehabilitation, the Office may rely on his or her findings as to whether the selected position is reasonably available and vocationally suitable.<sup>9</sup> Further, the Board notes that the Office is not required to consider medical conditions arising subsequent to the work-related injury or disease in determining an employee's wage-earning capacity.<sup>10</sup> In this case, appellant's diabetes mellitus and her related

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<sup>6</sup> *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

<sup>7</sup> 5 ECAB 376 (1953).

<sup>8</sup> *Karen L. Lonon-Jones*, 50 ECAB \_\_\_\_ (Docket No. 97-155, issued March 18, 1999).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8.b(2) (December 1993).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b) (December 1995). See *Harold D. Snyder*, 38 ECAB 763 (1987).

visual problems arose subsequent to the accepted work-related conditions. Therefore, the record establishes that appellant is physically capable to perform the work of a receptionist and that the position is reasonably available. Moreover, the Office properly calculated appellant's wage-earning capacity based on the difference between her weekly wages at the time of her injury, \$213.58 and the average weekly wage of a receptionist, \$236.00, using the *Shadrick* formula.<sup>11</sup>

Appellant alleged that she was totally disabled and stated that she was recovering from an operation. She also submitted medical reports from her physicians. In an August 21, 1998 report, Dr. Madden stated that appellant has chronic heel pain syndrome and advised that he was not sure whether the condition was from heel spurs or an inflamed nerve or whether the problem was coming from her back. He noted appellant's other problems concerning the accepted conditions and advised that a neurological consult could rule out whether her foot pain is secondary to her lower back pain. He reiterated his belief that appellant never fully recovered from the last procedure and needed additional surgery. Dr. Madden continued to opine that appellant would do very well with a sitting job.

In an August 27, 1998 report, Dr. Marten-Ellis again reiterated his opinion that appellant should be placed in a position where the visual tasks would be less arduous due to the fluctuations in her vision as a result of her diabetes.

As the selected position allows appellant to sit or stand at her own discretion, Dr. Madden's report continues to support the medical suitability of the selected position. The Board further notes that as appellant's diabetes condition and subsequent visual problems were first diagnosed subsequent to her work injury of February 4, 1991, its effects may not be considered when determining whether or not appellant can perform the duties of the selected position.<sup>12</sup> Accordingly, the report from Dr. Marten-Ellis is of diminished probative value in determining the suitability of the selected position.

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<sup>11</sup> See *Albert C. Shadrick*, *supra* note 7.

<sup>12</sup> See *supra* note 10.

The decisions of the Office of Workers' Compensation Programs dated September 2, 1998 and December 31, 1997 are hereby affirmed.

Dated, Washington, DC  
September 19, 2000

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member