U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CATHERINE K. GRABOWSKI and DEPARTMENT OF VETERANS AFFAIRS, VETERANS HOSPITAL, West Haven, CT

Docket No. 00-1056; Submitted on the Record;
Issued March 6, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity based on her actual earnings in a part-time position; and (2) whether appellant has more than a 17 percent permanent impairment of the right upper extremity, for which she received a schedule award.

On February 9, 1977 appellant, then a 27-year-old registered nurse, sustained an injury while in the performance of her duties when a patient slipped and she attempted to support his weight. The Office accepted her claim for strain to the right side of the neck, shoulder and back and for cervical spondylosis, C4-6. The Office authorized a cervical discectomy and fusion on July 21, 1997.[1]

Appellant's attending neurosurgeon, Dr. Joseph M. Piepmeier, reported that appellant reached maximum medical improvement by July 21, 1998. On November 13, 1998 he reported that appellant was capable of working only four hours a day. Dr. Piepmeier completed work restriction evaluations indicating that appellant could work four hours intermittently with physical limitations. He also reported that he did not anticipate an increase in the number of hours per day appellant would be able to work.

Appellant returned to work within the permanent restrictions established by her physician. She took four hours of leave without pay on a daily basis beginning December 20, 1998 and received compensation accordingly.

In a decision dated November 22, 1999, the Office noted that appellant had become reemployed as a nurse with modified duties for 20 hours a week effective December 20, 1998. The Office determined that this position fairly and reasonably represented appellant's wage-

[1] On June 26, 1980 appellant sustained another injury while in the performance of her duties when a storm window she was attempting to lower suddenly slipped down, jerking her right arm. The Office accepted her claim for right trapezius and cervical strain.

earning capacity and adjusted her compensation based on her ability to earn wages in her new position.

The Board finds that the Office improperly determined appellant's wage-earning capacity based on her actual earnings in a part-time position.

When an employee cannot return to the date-of-injury job because of disability due to a work-related injury or disease but does return to alternative employment with an actual wage loss, the Office must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's wage-earning capacity.[2] The Office's procedure manual provides in relevant part as follows:

> "*Factors Considered*. To determine whether the claimant's work fairly and reasonably represents his or her WEC [wage-earning capacity], the CE [claims examiner] should consider whether the kind of appointment and tour of duty (see FECA PM 2-0900.3) are at least equivalent to those of the job held on date of injury. Unless they are, the CE may not consider the work suitable.
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> "For instance, reemployment of a temporary or casual worker in another temporary or casual (USPS) position is proper, as long as it will last at least 90 days, and reemployment of a term or transitional (USPS) worker in another term or transitional position is likewise acceptable. However, the reemployment may not be considered suitable when:
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> > "(1) *The job is part-time* (unless the claimant was a part-time worker at the time of injury) or sporadic in nature;
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> > "(2) *The job is seasonal* in an area where year-round employment is available. If an employee obtains seasonal work voluntarily in an areas where year-round work is generally performed, the CE should carefully determine whether such work is truly representative of the claimant's WEC; or
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> > "(3) *The job is temporary* where the claimant's previous job was permanent."[3]

The Office of Personnel Management recognizes five kinds of tours of duty: (1) full time (40 hours per week); (2) part time (16 to 32 hours per week); (3) intermittent (no regularly scheduled hours); (4) seasonal (fewer than 12 months per year, with either a full-time, part-time

[2] *See* 5 U.S.C. § 8115(a) (providing that the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonably represent the employee's wage-earning capacity).

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7.a. (July 1997) (original emphasis).

or intermittent schedule); and (5) on call (usually at least 6 months per year on an as-needed basis, with either a full-time or part-time schedule).[4]

In this case, appellant's date-of-injury position was full time, 40 hours a week. As a result of her February 9, 1977 employment injury, she was eventually unable to return to this tour of duty. On December 20, 1998 she returned to part-time employment, working only four hours a day with restrictions on a permanent basis. Because Office procedures for determining wage-earning capacity based on actual earnings require that the tour of duty be at least equivalent to that of the job held on the date of injury and because the record fails to show that appellant's tours of duty were at least equivalent, the Office abused its discretion in finding that appellant's actual earnings in this part-time reemployment fairly and reasonably represented her wage-earning capacity. The Board will reverse the Office's November 22, 1999 decision on wage-earning capacity.

On July 14, 1998 appellant filed a claim for a schedule award. The Office requested that Dr. Piepmeier evaluate appellant and provide clinical findings for determining the extent of her permanent impairment. On July 21, 1998 he reported that appellant had reached maximum medical improvement. Dr. Piepmeier stated that appellant had persistent pain in the right hand, numbness in the C6 distribution, hypoflexia at the triceps and biceps and no long tract signs. Appellant had extreme limitation of range of motion of the cervical spine, for which he provided findings. Dr. Piepmeier reported that appellant's strength was generally 4/5 except in the right hand in the grasp, which was 3/5.

On October 5, 1998 an Office medical adviser reviewed Dr. Piepmeier's findings. He noted that according to Table 13, page 51, of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), the maximum upper extremity impairment due to sensory changes in the C6 distribution was 8 percent. The A.M.A., *Guides* provided for impairment based on actual grip or pinch strength measurements, and Dr. Piepmeier was asked to submit such measurements.

Grip and pinch strength measurements were obtained on July 28, 1999. Dr. Piepmeier reviewed the measurements and reported on September 16, 1999 that they appeared appropriate. The Office medical adviser reviewed the findings and, following the procedure set forth on pages 64 and 64 of the A.M.A., *Guides*, determined that appellant had a strength loss index of 13 percent, which equated to a 10 percent impairment of the upper extremity under Table 34, page 65. On October 12, 1999 the Office medical adviser clarified that a 10 percent impairment of the upper extremity due to loss of strength and an 8 percent impairment of the upper extremity due to sensory loss yielded a 17 percent total impairment using the Combined Values Chart on page 322 of the A.M.A., *Guides*. The only range of motion abnormalities, he noted, involved the cervical spine, which was not ratable based on Office criteria.

In a decision dated November 22, 1999, the Office issued a schedule award for a 17 percent permanent impairment of the right upper extremity.[5]

[4] *Id* at Chapter 2.900.3.a(2).

[5] The award mistakenly refers to the right hand instead of the right upper extremity.

The Board finds that appellant has no more than a 17 percent permanent impairment of the right upper extremity, for which she received a schedule award.

Section 8107 of the Federal Employees' Compensation Act[6] authorizes the payment of schedule awards for the loss or permanent impairment of specified members, functions or organs of the body.[7] The Office evaluates the degree of impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[8]

An Office medical adviser properly reviewed the clinical findings reported by appellant's attending physician, Dr. Piepmeier, and properly applied the standards set forth in the fourth edition of the A.M.A., *Guides*. Table 13, page 51, shows that the maximum upper extremity impairment due to unilateral sensory deficit of the C6 spinal nerve is 8 percent. The medical adviser implicitly graded appellant's sensory deficit at the maximum level of severity under the grading scheme and procedure set forth in Table 11, page 48, thereby rating appellant's impairment at the greatest percentage allowed.

In addition to the 8 percent impairment due to sensory deficit, the medical adviser determined that appellant had a 10 percent impairment due to loss of strength. He reviewed the grip and pinch strength findings obtained on July 28, 1999. The Office medical adviser noted extreme variation in maximum efforts and, in accordance the procedures set forth in the A.M.A., *Guides*, found that the most consistent data could be derived from the rapid exchange grip technique. He properly applied the formula for calculating appellant's strength loss index and properly determined under Table 34, page 65, that appellant had a 10 percent impairment of the right upper extremity due to loss of strength.

The A.M.A., *Guides* provides that the impairment of a structure with mixed motor and sensory fibers is calculated by combining the sensory and motor deficit impairments using the Combined Values Chart on page 322. In this case, the individual impairments for sensory and motor deficits combine to 17 percent, which is the percentage awarded by the Office.

The Act compensates permanent loss or impairment by the payment of a specific number of weeks of compensation. The Act's compensation schedule specifies a maximum of 312 weeks of compensation payable for the total loss of an arm[9] and the schedule compensates partial loss of use at a proportionate rate.[10] Accordingly, compensation for a 17 percent impairment of the right upper extremity is 17 percent of 312 weeks, or 53.04 weeks of compensation, which the Office awarded.[11]

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[6] 5 U.S.C. § 8107.

[7] The Act specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

[8] 20 C.F.R. § 10.404.

[9] 5 U.S.C. § 8107(c)(1).

[10] *Id*. at § 8107(c)(19).

[11] For an employee with one or more dependents, schedule compensation is paid at a rate of 75 percent of the employee's monthly pay. 5 U.S.C. §§ 8107(a), 8110(b).

The period of compensation for a permanent impairment commences on the date that the employee reaches maximum medical improvement from the employment injury. Maximum medical improvement means that the physical condition of the injured member has stabilized and will not improve further.[12] The determination of maximum medical improvement depends primarily on medical evidence.[13] The date of maximum medical improvement usually coincides with the date of the medical examination that determined the extent of permanent impairment.[14]

In this case, Dr. Piepmeier consistently reported that appellant had reached maximum medical improvement by July 21, 1998. The Office began the period of the award on July 20, 1998. This *de minimis* discrepancy was not adverse to appellant, who was entitled to no more than 53.04 weeks of schedule compensation in any case.

Finally, a claimant may not receive both a schedule award and disability compensation concurrently.[15] Appellant took four hours of leave without pay on a daily basis beginning December 20, 1998, which was during the period of her schedule award. Because she was entitled to 53.04 weeks of compensation for permanent impairment beginning July 21, 1998, she was not also entitled to receive concurrent compensation for disability beginning December 20, 1998. If upon the expiration of the schedule award, however, the Office determined that appellant was entitled to continuing compensation for disability, such compensation could begin at that time.

The November 22, 1999 wage-earning capacity decision of the Office of Workers' Compensation Programs is reversed. The November 22, 1999 schedule award decision of the Office is affirmed.

Dated, Washington, DC
March 6, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

[12] *James Kennedy, Jr.*, 40 ECAB (1989).

[13] *Albert Valverde*, 36 ECAB 233 (1984).

[14] *See James Lewis*, 35 ECAB 627 (1984).

[15] *Adele Hernandez-Piris*, 35 ECAB 839 (1984).