

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LORRAINE C. MARCH and U.S. POSTAL SERVICE,
POST OFFICE, Phoenix, AZ

*Docket No. 02-1058; Submitted on the Record;
Issued November 12, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's reemployment as a casual clerk fairly and reasonably represents her wage-earning capacity; and (2) whether appellant is entitled to more than a four percent permanent impairment of her left lower extremity for which she received a schedule award.

The Board has duly reviewed the entire case record on appeal and finds that the Office properly determined that appellant's actual wages as a casual clerk fairly and reasonably represent her wage-earning capacity.

On July 16, 1998 appellant, then a 53-year-old rural carrier associate, filed a traumatic injury claim alleging that on July 14, 1998 she suffered various injuries when she was knocked down by the door of her car. Appellant stopped work on July 14, 1998. The Office accepted appellant's claim for a lumbar compression fracture, left knee meniscal tear and a left fibula fracture. The condition of right shoulder tendinitis was subsequently accepted. Appellant received appropriate compensation for all periods of temporary total disability.

Although appellant was first released to work modified duty four hours per day on September 28, 1998 with gradual increases in the amount of hours she could work the employing establishment had no light-duty work available. On January 8, 1999 appellant underwent left knee arthroscopic surgery and received all appropriate compensation. On April 1, 1999 she was released to work modified duty for four hours a day and gradually increased to work five hours a day on July 22, 1999 but light-duty work remained unavailable at the employing establishment. Appellant began working light duty five hours per day on August 15, 1999 and successfully returned to an eight-hour workday on May 9, 2000. The record indicates that all times she did not work was due to the unavailability of light duty.

On May 4, 2001 the employing establishment offered appellant a permanent rehabilitation assignment as a casual clerk within the limitations defined by appellant's

physician. She has been working in the permanent rehabilitation assignment since May 19, 2001. By decision dated September 17, 2001, the Office determined that appellant was reemployed as a casual clerk effective May 19, 2001 and that her actual wages in this position fairly and reasonably represent her wage-earning capacity.

It is well established that once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.¹ After it has determined that an employee has a disability causally related to his or her federal employment, the Office may not reduce compensation without establishing that the disability ceased or that it is no longer related to the employment. Section 8115(a) of the Federal Employees' Compensation Act provides that in determining compensation for disability, the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.² Generally, wages actually earned are the best measure of a 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 Office procedures indicate that a determination regarding whether actual wages fairly and reasonably represent wage-earning capacity should be made after a claimant has been working in a given position for 60 days.⁶

In this case, appellant effectively returned to work on May 19, 2001 as a casual clerk. The modified casual clerk position is permanent and full time and does not constitute part-time, sporadic, seasonal or temporary work.⁷ Moreover, she worked in the position for 60 days prior to the Office's initial wage-earning capacity determination and the record does not reveal that the position was a makeshift position designed for appellant's particular needs.⁸ The Board, therefore, finds that the Office properly determined that appellant's position as a modified casual clerk fairly and reasonably represents her wage-earning capacity. In addition, the evidence of record reveals that appellant's date-of-injury position earned \$410.85 per week and appellant is

¹ See *Lawrence D. Price*, 47 ECAB 120 (1995); *Charles E. Minniss*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (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.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (December 1993); see *William D. Emory*, 47 ECAB 365 (1996).

⁷ See *William D. Emory*, *supra* note 6.

⁸ *Id.*

now earning \$540.42 per week.⁹ When she accepted the position as a modified casual clerk, her actual wages met or exceeded the comparable rate of pay as her date-of-injury salary. Based on the evidence of record, appellant's actual earnings as a modified casual clerk fairly and reasonably represent her wage-earning capacity and the Office properly determined that there was no loss of wage-earning capacity. Although appellant argued in her appeal before the Board that she was laid off from the employing establishment on or about September 17, 2001, the Board's jurisdiction is limited to a review of the evidence, which was in the case record before the Office at the time of its final decision, which was rendered on September 17, 2001.¹⁰ Therefore, the Board is precluded from reviewing and addressing appellant's assertion that she was laid off from the employing establishment on September 17, 2001. Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 8128(a).¹¹

The Board also finds that appellant has no more than four percent permanent impairment of her left lower extremity.

In a medical report dated January 10, 2001, Dr. John H. Crothers, a Board-certified orthopedic surgeon and appellant's attending physician, opined that appellant could be declared stationary with supportive care. Dr. Crothers advised that appellant could return to 8 hours a day work for 40 hours a week so long as there was no bending and heavy lifting, especially bending and twisting at the same time; no activities which repetitively required appellant to work with her arms above shoulder height; and no squatting or climbing.

On February 15, 2001 the Office requested Dr. Crothers to determine the extent of permanent impairment to appellant's left knee due to the employment injury.

On March 20, 2001 the Office requested Dr. Crothers to determine the extent of permanent impairment to appellant's right shoulder due to the employment injury.

In a medical report dated April 18, 2001, Dr. Crothers noted that appellant was involved in an auto accident the day before and diagnosed an acute sprain of the neck and contusion of the base of the neck and strain of the low back superimposed on the industrial injury.

On May 15, 2001 Dr. Crothers completed the form report entitled, The Shoulder, which the Office had previously sent with regard to determining the extent of permanent impairment.

⁹ The job offer of May 4, 2001, reflects the salary of the casual clerk position to be \$28,102.00 annually, which equates to \$540.42 per week. It appears from the record that appellant's new pay rate was not corrected in the Federal Employees' Compensation System, as evidenced in the compensation rate paid from, May 9 to July 28, 2001. Accordingly, the Office should reflect this change in compensation rate effective May 19, 2001, when appellant effectively returned to work.

¹⁰ See 20 C.F.R. § 501.2(c). The Board additionally notes that the record contains a letter from appellant dated September 21, 2001, in which she references the fact that she was told not to come into work on or after September 18, 2001. As the Office rendered its decision on September 17, 2001 appellant's September 21, 2001 letter would be considered new evidence.

¹¹ 20 C.F.R. § 10.606(b) (1999).

He advised that there was no measurable impairment based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), fifth edition. Dr. Crothers noted that there was pain discomfort in the right shoulder and pain in the area of the acromioclavicular joint, which was documented in the emergency room visit following the work injury. Forward elevation of the right side was noted to be 160 degrees as opposed to 180 degrees of the left side. Backward elevation, abduction, adduction, internal and external rotation and extension of the right side was equal to that of the left side. He advised that appellant's weakness of the upper extremity was secondary to pain. Dr. Crothers responded "no" to the question of whether there were any additional factors of disability in regard to the shoulder pathology such as causalgia or reflex sympathetic dystrophy, ankylosis. For the question requesting the date of maximum improvement, Dr. Crothers stated that the shoulder was currently stable. He noted that he recommended surgery for the shoulder, but it had been denied thus far.

Also on May 15, 2001 Dr. Crothers completed the form report entitled, The Knee, which the Office had sent with regard to determining the extent of permanent impairment. He noted that appellant had a meniscectomy involving her knee with loss of shock absorption and attributed a two percent lower extremity impairment according to Table 17-33, page 546 of the A.M.A., *Guides*, fifth edition. Dr. Crothers stated that appellant had moderate pain resulting from the patella femoral and that appellant was unable to kneel, climb, crawl or stoop. Pain is increased with heavy foot controls. Flexion and extension measurements were noted to be normal, with no ankylosis. No weakness or atrophy of the lower extremity as a result of the knee pathology was noted. Dr. Crothers stated that appellant had a meniscectomy and a stable rim was left behind. He noted that posterior 1/3 was removed. No ligament instability was noted. A patellectomy was not applicable in appellant's case. There was no varus or valgus deformity of the knee. Appellant was noted to have evidence of post-traumatic irregularity or arthritis, which affected class 4/A of patella. She was noted to rely on a patellar alignment sleeve and had an additional loss of function due to 1/3 loss of shock absorption due to meniscus median removed as a result of the meniscectomy. Dr. Crothers stated that appellant had reached maximum medical improvement at the present time and advised that he selected the present time as being the date of maximum medical improvement as he had not been asked previously.

In a memorandum dated September 25, 2001, the Office requested its Office medical adviser to indicate the permanent functional loss of use of the left lower extremity and date of maximum medical improvement for schedule award purposes. The Office medical adviser was supplied with a copy of the case record. In an October 5, 2001 report, the Office medical adviser noted that relevant medical reports and objective studies pertaining to appellant's left lower extremity and the clinical treatment rendered. The Office medical adviser further noted that Dr. Crothers' May 9, 2001, narrative report and the form report pertaining to the measurement of permanent functional loss of the knee, which noted that there was moderate pain, patellofemoral, with inability to kneel, climb, crawl and pain increased with heavy foot controls. Based on the evidence of record, the Office medical adviser recommended grading the pain complaints a maximum Grade III as per the Grading Scheme (Table 16-10, page 482). This was noted to be pain that may interfere with some activities, or a 60 percent grade of a maximal 7 percent (femoral nerve), equivalent to a 4.2 percent or rounded off to a 4 percent impairment for pain factors. As range of motion was described as full, a zero percent impairment was given.

Records further indicate that there was no atrophy or weakness, so a zero percent impairment was given. There was no instability, so a zero percent impairment was given. The records further indicate that appellant utilizes a patella alignment sleeve. The Office medical adviser further noted that the records indicated that appellant had a zero percent impairment for atrophy or weakness and a zero percent impairment for loss of motion. Accordingly, the Office medical adviser found that appellant had a four percent impairment of the left lower extremity. The date of maximum medical improvement was said to be reached by May 9, 2001, approximately 16 months following the operative procedure.¹²

In a decision dated October 15, 2001, the Office granted appellant a schedule award for a four percent impairment of the left lower extremity.

The schedule award provisions of the Act¹³ and its implementing regulation¹⁴ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled 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 A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

In this case, the Office medical adviser properly utilized the findings in Dr. Crothers' form report of May 15, 2001, entitled The Knee and correlated them to specific provisions in the A.M.A., *Guides*, fifth edition. The Office medical adviser determined, based on these findings, that appellant's pain was Grade 3, distorted superficial tactile sensibility (diminished light touch and two-point discrimination), with some abnormal sensations or slight pain, that interferes with some activities and provided a 60 percent sensory deficit.¹⁵ He further noted that the affected nerve was the femoral nerve and provided the maximum rating for a nerve deficit as being 7 percent.¹⁶ The medical adviser then multiplied the nerve deficit of 7 percent by the maximum rating for pain of 60 percent to determine that appellant sustained a 4 percent permanent impairment of the left lower extremities. As there was full range of motion, no atrophy or weakness and no instability, the Office medical adviser properly utilized the findings in Dr. Crothers' report to determine that appellant sustained a four percent permanent impairment to the left lower extremity.

¹² The Office medical adviser noted that a second method of calculating a schedule award would be based on diagnosed-based estimates by utilizing Table 17-33 of the 5th edition of the A.M.A., *Guides*. Under that method, a medial meniscectomy would be equivalent to a two percent impairment. No other value would be combined with this. As the first method utilized a higher schedule award, the Office medical adviser recommended that method be adopted by the Office in this case.

¹³ 5 U.S.C. § 8107.

¹⁴ 20 C.F.R. § 10.404 (1999).

¹⁵ See Table 16-10, page 482 of the A.M.A., *Guides*.

¹⁶ Table 17-37, page 552 of the A.M.A., *Guides*.

The Board has carefully reviewed Dr. Crothers' form report of May 15, 2001, in conjunction with the Office medical adviser's conclusions and notes that the Office medical adviser properly utilized the relevant standards of the A.M.A., *Guides*. As the Office medical adviser properly applied the A.M.A., *Guides* to the information provided in Dr. Crothers' report and reached an impairment rating of four percent, appellant has no more than a four percent permanent impairment of the left lower extremity.¹⁷

The October 15 and September 17, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
November 12, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

¹⁷ The Board notes that the Office accepted the condition of right shoulder tendinitis. Dr. Crothers, in his May 15, 2001 form report entitled, The Shoulder, specifically advised there was no measurable impairment based on the A.M.A., *Guide*, fifth edition. Accordingly, based on the information presently of record, appellant is not entitled to a schedule award for her right upper extremity. The Board further notes that in his May 15, 2001 form report, Dr. Crothers noted that he recommended surgery for the shoulder, but it had been denied thus far. However, it appears from the record that the Office did not issue a final decision denying such recommended surgery and, therefore, the Board does not have jurisdiction over the matter; *see* 20 C.F.R. § 501.2(c).