U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANGEL E. CORDERO and DEPARTMENT OF AGRICULTURE, PLANT PROTECTION QUARANTINE OFFICE, Jamaica, NY

Docket No. 02-1118; Submitted on the Record;
Issued November 7, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, A. PETER KANJORSKI

The issues are: (1) whether appellant has established his entitlement to a schedule award; and (2) whether appellant is entitled to compensation for a loss of wage-earning capacity.

The Office of Workers' Compensation Programs accepted that on May 2, 2000 appellant, then a GS-5, step 1 plant protection quarantine officer working on the Asian Long-horned Beetle program, sustained multiple lacerations of his arms, legs and torso when he was attacked by three unsecured pit bull dogs.[1] The Office also accepted that appellant sustained post-traumatic stress disorder related to the attack and that he subsequently had to undergo surgical revision of extensive scar tissue and adhesions, tenolysis and neurolysis on October 16, 2001 and March 25, 2002. Appellant stopped work the date of injury and received appropriate compensation benefits.[2] He was scheduled to return to limited-duty eight hours per day on September 18, 2000 at the GS-5 level at John F. Kennedy (JFK) Airport terminal. Appellant's supervisor indicated that he returned to his date-of-injury job with the same hours and duties on November 18, 2001. Continued psychotherapy was recommended as he feared his job would place him in danger.

Appellant had been scheduled for new officer training for the GS-7 position in October 2000, but was unable to attend due to his physical condition; it was rescheduled for January 2001. He ceased training in February 2001 and returned to a position at JFK Airport.

Appellant submitted May 1, 2001 medical evidence from Dr. Benjamin Hirsch, a psychologist, who recommended psychotropic medication and opined that appellant lost an opportunity for advancement because of sequelae of his May 2, 2000 injuries. He diagnosed injury-related agitation and depression.

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[1] Appellant was working as an advanced trainee plant protection and quarantine officer leading to a GS-7 journeyman level position.

[2] A third-party recovery was also pursued against the pit bull dogs' owner.

On September 5, 2001 appellant's representative argued that appellant was demoted from a GS-7 position to a GS-5 position after recuperating from his injuries. The representative argued that appellant would have a loss of wage-earning capacity that would be continuous for the rest of his life. He also alleged that appellant was entitled to a schedule award for permanent impairment and that other conditions besides multiple lacerations and post-traumatic stress syndrome should be accepted.

On September 25, 2001 appellant filed a Form CA-7 claim for a schedule award.

Since none of the medical evidence of record discussed permanent impairment with respect to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), the Office determined that a second opinion was necessary and on December 17, 2001 it referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. Lester Lieberman, a Board-certified orthopedic surgeon.

By report dated January 5, 2002, Dr. Lieberman reviewed appellant's factual and medical history, provided the results of appellant's physical examination, including his extremity range of motion deficits, numbness and pain, concluded that he had injury-related impairments, but indicated that appellant had not yet reached maximum medical improvement.

By decision dated February 19, 2002, the Office rejected appellant's claim for a schedule award finding that the weight of the medical evidence of record which addressed permanent impairment established that appellant had not yet reached maximum medical improvement, such that he was not yet entitled to a schedule award. The Office also found that appellant had no loss of wage-earning capacity as he had started training for a job with a higher pay level but had not completed it and had returned to his former employment at JFK Airport. It therefore found that he had no loss of wage-earning capacity, as the medical evidence did not establish that he could not return to his date-of-injury job. The Office cited to *Paul D. Farnsley*[3] to support the holding that the probability that an employee, if not for an injury-related condition, might have had greater earnings is not proof of a loss of wage-earning capacity and does not afford a basis for payment of compensation under the Federal Employees' Compensation Act.

The Board finds that appellant has not established his entitlement to a schedule award.

The Act[4] provides compensation for both disability and physical impairment. "Disability" means the incapacity of an employee, because of an employment injury, to earn the wages the employee was receiving at the time of injury.[5] In such cases, the Act compensates an employee for loss of wage-earning capacity. In cases of physical impairment, the Act

[3] 46 ECAB 341 (1994).

[4] 5 U.S.C. §§ 8101-8193.

[5] *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17).

compensates an employee, pursuant to a compensation schedule, for the permanent loss of use of certain specified members of the body, regardless of the employee's ability to earn wages.[6]

The schedule award provisions of the Act[7] specify the number of weeks of compensation to be paid for permanent loss of use of various members of the body. The Act does not, however, specify the manner in which the percentage loss of use of a member shall be determined. The method used in making such a determination is a matter that rests with the sound discretion of the Office.[8] 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.[9] The A.M.A., *Guides* have been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[10]

However, to be entitled to a schedule award, appellant's conditions must have stabilized and reached maximum medical improvement, such that it will not improve further.[11] The question of when maximum medical improvement has been reached is a factual one which depends on the medical findings in the record. The determination of such date in each case is to be made based upon the medical evidence in that case.[12] The period covered by the schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injuries.[13] Where an employee's condition has not yet stabilized and reached maximum medical improvement as supported by the medical evidence of record, no schedule award is payable. Therefore, as the only medical evidence of record which addresses appellant's level of permanent impairment is Dr. Lieberman's report and as he stated that appellant had not yet reached maximum medical improvement, he is not yet entitled to a schedule award.

The Board further finds that appellant is not entitled to compensation for a loss of wage-earning capacity compensation.

Under section 8115(a) of the Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing they do not fairly and reasonably represent the injured

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[6] *See Yolanda Librera (Michael Librera)*, 37 ECAB 388 (1986).

[7] 5 U.S.C. § 8107.

[8] *Danniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

[9] *Henry L. King*, 25 ECAB 39, 44 (1973); *August M. Buffa*, 12 ECAB 324-25 (1961).

[10] 20 C.F.R. § 10.404 (1999).

[11] *Joseph R. Waples*, 44 ECAB 936 (1993).

[12] *Id.*

[13] *Id.*

employee's wage-earning capacity, must be accepted as such measure.[14] However, because an employee, if not for an injury-related condition, might have had greater earnings is not proof of a loss of wage-earning capacity and does not afford a basis for payment of compensation under the Act.[15]

At the time of appellant's injuries, he was being paid as a GS-5, step 1. However, due to his injuries, he was not able to complete training for a higher pay level GS-7 position. When he returned to regular duty on November 18, 2001, he returned to his former job category, grade and step. As he had started but not completed training for a job with a higher GS-7 pay level and had returned to his former employment full-time regular duty at JFK Airport at his regular GS-5 pay rate, he was then and is now being paid at the current rate of pay of his date-of-injury position and, therefore, has no loss of wage-earning capacity under the *Shadrick* formula,[16] and, further, as the medical evidence did not establish that he could not return to his date-of-injury job, no such wage-earning capacity was demonstrated. Consequently, appellant has not demonstrated any loss of wage-earning capacity compensation entitlement.

Accordingly, the February 19, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 7, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[14] *Dennis E. Maddy*, 47 ECAB 259 (1995).

[15] *See supra* note 3.

[16] *See Albert C. Shadrick*, 5 ECAB 376 (1953). This is the accepted formula for calculating loss of wage-earning capacity based upon the difference between the current rate of appellant's date-of-injury position and the current pay rate of his subsequent position.