

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EARNESTINE SMITH and U.S. POSTAL SERVICE,
POST OFFICE, Houston, Tex.

*Docket No. 96-2241; Submitted on the Record;
Issued July 22, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant had no employment-related loss of wage-earning capacity effective January 5, 1995; (2) whether appellant has more than a 41 percent permanent impairment of her right finger for which she received a schedule award; and (3) whether the Office properly denied appellant's request for reconsideration of its loss of wage-earning capacity determination under 5 U.S.C. § 8128.

The Office accepted that appellant sustained a laceration and fracture of her right middle finger on July 25, 1994 in the performance of duty. The Office paid appellant the appropriate compensation based on her average work week as a temporary employee.

In a form report, Dr. Richard R. Vanik, a Board-certified surgeon and appellant's attending physician, found that appellant could resume light-duty employment on October 27, 1994. He indicated that he had treated appellant's fracture of her right long finger with a surgical osteotomy of the right middle phalanx and internal fixation of the fracture. He further noted that appellant would "not regain full extension of her finger."

The employing establishment offered appellant a position as a modified carrier in accordance with her physician's restrictions. On November 1, 1994 appellant returned to work in a limited-duty capacity at the same pay rate as in her former position. Appellant continued to miss work intermittently. The Office paid appellant compensation for her lost hours.

In a report dated January 5, 1995, Dr. Vanik found that appellant could work eight hours per day with restrictions on grasping objects with her right hand and lifting heavy objects with her right upper extremity.

Appellant returned to full-time employment in her modified carrier position until May 6, 1995, the date that her contract for work as a temporary employee with the employing establishment ended.

On May 15, 1995 appellant filed a claim for a schedule award. By letter dated May 19, 1994, the Office requested that Dr. Vanik evaluate appellant to determine the extent of any permanent impairment resulting from her employment injury in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993).

On May 30, 1995 appellant filed a claim for continuing compensation on account of disability (Form CA-8) requesting compensation from May 7 to May 26, 1995.

By decision dated June 15, 1995, the Office found that appellant was reemployed in a modified-duty capacity effective November 1, 1994 in a position that fairly and reasonably represented her wage-earning capacity. The Office terminated appellant's compensation based on its finding that her actual wages met or exceeded the wages of the job she held at the time of injury, and that she therefore had no loss of wage-earning capacity.

In a report dated July 17, 1995, Dr. Vanik opined that appellant had reached maximum medical impairment. He found that the measured range of motion of appellant's right long finger was normal at the metatarsophalangeal (MP) joint which constituted no impairment, 0 to 60 degrees at the proximal interphalangeal (PIP) joint which constituted a 24 percent impairment, and 25 to 40 degrees at the distal interphalangeal (DIP) joint, which constituted a 23 percent impairment. Dr. Vanik added the impairment ratings to find that appellant had a 47 percent impairment of the finger, which constituted a 9 percent impairment of the hand.

Appellant requested a hearing before an Office hearing representative regarding the Office's loss of wage-earning capacity determination. At the hearing, held on November 30, 1995, appellant argued that the employing establishment did not renew her contract as a temporary employee due to her employment injury. Appellant submitted a copy of arbitration proceedings between the employing establishment and her union indicating that a temporary employee may be separated at any time except for pretextual reasons.

In a decision dated March 25, 1996, the Office hearing representative modified and affirmed the Office's June 15, 1995 decision. The Office hearing representative found that from November 1, 1994 until January 5, 1995 appellant worked in a part-time limited-duty position and properly received compensation from the Office for the difference between the hours she worked at the time of injury and the hours she worked in her modified position. The hearing representative found that as of January 5, 1995, the date appellant's attending physician released her for full-time employment, she worked in a position which met or exceeded her hours she worked at the time of her injury. The hearing representative therefore modified the prior Office decision to reflect that appellant had no loss of wage-earning capacity as of January 5, 1995 due to her July 1994 employment injury.

In a report dated April 22, 1996, an Office medical adviser found that Dr. Vanik had properly applied Figures 19, 21, and 23 on pages 32 to 34 of the A.M.A., *Guides* in determining that appellant had a 23 percent impairment in range of motion of the DIP joint, a 24 percent

impairment in range of motion of the PIP joint, and no impairment of the MP joint of her right long finger. The Office medical adviser noted, however, that Dr. Vanik had added the impairment findings rather than combining the findings in accordance with the A.M.A., *Guides*. The Office medical adviser combined the impairment findings using the combined values chart and concluded that appellant had a 41 percent impairment of her right long finger.¹

By decision dated May 14, 1996, the Office granted appellant a schedule award for a 41 percent right finger impairment. The period of the award ran for 12.30 weeks from July 17 to October 11, 1995.

Appellant requested reconsideration of the Office's decision that she had no loss of wage-earning capacity and submitted additional factual evidence. By decision dated May 16, 1996, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant review of the prior decision.

The Board finds that the Office properly determined that appellant had no employment-related loss of wage-earning capacity effective January 5, 1995.

Section 8115(a) of the Federal Employees' Compensation Act² provides that in determining compensation for partial disability, "the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity." In the present case, the Office based its finding that appellant had no loss of wage-earning capacity on a determination that her actual earnings in a modified position with the employing establishment beginning January 5, 1995 represented her wage-earning capacity. The Board has stated, "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

The evidence in this case establishes that appellant's actual earnings as a modified carrier fairly and reasonably represented her wage-earning capacity. Appellant worked in this position from January 5, 1995 until May 6, 1995, the date her contract for temporary employment with the employing establishment ended. As appellant was in a temporary position at the time of her employment injury, it was proper for the employing establishment to reemploy her in a temporary position.⁴

On appeal, appellant alleged that the employing establishment erroneously failed to renew her contract due to her work restrictions resulting from her employment injury. Appellant

¹ A.M.A., *Guides* 34, 322.

² 5 U.S.C. § 8115(a).

³ *Floyd A. Gervais*, 40 ECAB 1045 (1989).

⁴ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity* Chapter 2.814.4(b)(3) (1993), which states, "A temporary job will be considered unsuitable unless the claimant was a temporary employee when injured and the temporary job reasonably represents the claimant's wage-earning capacity."

maintained that as of May 7, 1995, she sustained a loss of wage-earning capacity as her contract with the employing establishment ended on May 6, 1995.

Once a loss of wage-earning capacity is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings.⁵ A modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.⁶ The burden of proof is on the party attempting to show the award should be modified.⁷

There is no evidence that appellant's actual earnings did not fairly and reasonably represent her wage-earning capacity and thus she has not shown that the Office's original determination, as modified by the hearing representative, with regard to her wage-earning capacity was erroneous. Appellant has not alleged, and the evidence does not show, that she stopped work on May 6, 1995 due to a material change in the nature and extent of her injury-related condition. Nor has appellant argued or shown that she was retrained or otherwise vocationally rehabilitated such that her actual wages would not adequately represent her wage-earning capacity. Consequently the Office properly determined that, effective January 5, 1995 appellant had no work-related loss of wage-earning capacity.

The Board further finds that appellant has no more than a 41 percent permanent impairment of her right finger for which she received a schedule award.

Under section 8107 of the Act,⁸ and section 10.304 of the implementing federal regulations,⁹ schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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* have been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.¹⁰

In the present case, Dr. Vanick, appellant's attending physician, properly applied the A.M.A., *Guides* in obtaining the impairment findings for appellant's right finger due to loss of range of motion. Dr. Vanick, however, added his impairment findings rather than combining the findings in accordance with the A.M.A., *Guides*. The Office medical adviser appropriately

⁵ See *Clarence D. Ross*, 42 ECAB 556 (1991).

⁶ *Charles D. Thompson*, 35 ECAB 220 (1983).

⁷ *Jack E. Rohrbaugh*, 42 ECAB 320 (1991).

⁸ 5 U.S.C. § 8107.

⁹ 20 C.F.R. § 10.304.

¹⁰ *James J. Hjort*, 45 ECAB 595 (1994).

combined Dr. Vanick's impairment findings using the combined values chart on page 322 of the A.M.A., *Guides* and concluded that appellant had a 41 percent impairment of her right finger. Accordingly, the Board finds that the weight of the medical evidence, based on the estimate of impairment found by the Office medical adviser, establishes that appellant has no more than 41 percent impairment of her right long finger.

The Board further finds that the Office properly denied appellant's request for reconsideration of its loss of wage-earning capacity determination under section 8128.

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Act. Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and the specific issue(s) within the decision which claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

“(i) Showing that the Office erroneously applied or interpreted a point of law, or

“(ii) Advancing a point of law or fact not previously considered by the Office, or

“ Submitting relevant and pertinent evidence not previously considered by the Office.”¹¹

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.¹² Evidence that repeats or duplicates evidence already in the case record has no evidentiary values and does not constitute a basis for reopening a case.¹³ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.¹⁴

In the present case, the Office terminated appellant's compensation benefits on the grounds that she had no further loss of wage-earning capacity based upon her actual earnings in a modified position with the employing establishment. In support of her request for reconsideration, appellant submitted evidence regarding the employing establishment's policy of not rehiring temporary employees who had an employment injury. However, the Board has held that evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁵ As this evidence does not show either that appellant sustained a material change in the nature of her condition, was rehabilitated, or that the Office's original wage-earning capacity determination was erroneous, it is not relevant in the instant case.

¹¹ 20 C.F.R. § 10.138(b)(1).

¹² See 20 C.F.R. § 10.138(b)(2).

¹³ *Daniel Deparini*, 44 ECAB 657 (1993).

¹⁴ *Id.*

¹⁵ See *Edward Matthew Diedemper*, 31 ECAB 224 (1979).

Appellant's attorney submitted a statement dated April 18, 1996, in which he argued that the employing establishment "terminated [appellant] as a pretense to except themselves from further legal obligations." However, the Office previously considered this argument and thus it does not constitute a basis for reopening the case.

As appellant has not established that the Office erroneously applied or interpreted a point of law, advanced a point of law or fact not previously considered by the Office or submitted relevant and pertinent evidence not previously considered by the Office, she has not established that the Office abused its discretion in denying her request for review under section 8128 of the Act.

The decisions of the Office of Workers' Compensation Programs dated May 16, May 14 1996 and March 23, 1996 are hereby affirmed.

Dated, Washington, D.C.
July 22, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member