

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CONSTANCE A. BINION and U.S. POSTAL SERVICE,
POST OFFICE, Chicago, IL

*Docket No. 97-2888; Submitted on the Record;
Issued April 3, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant had no loss of wage-earning capacity as a result of her April 12, 1991 injury; and (2) whether appellant has established entitlement to greater than a 17 percent permanent impairment to her right lower extremity for which she has received a schedule award.

On April 12, 1991 appellant, then a 32-year-old letter carrier, twisted her leg while in the performance of her duties. The Office accepted the claim for a right knee strain and expanded the claim to include the diagnoses of right knee internal derangement and a torn meniscus, for which appellant underwent surgery on November 26, 1991 and May 6, 1996. Appellant received appropriate compensation for all periods of temporary total disability due to the injury from November 26, 1991 to April 26, 1995.

On April 29, 1995 appellant returned to work, accepting a new offered position of modified distribution clerk, Level 5, Step O, with a salary of \$35,604.00, requiring duties found within her medical limitations. Appellant stayed in this job until May 6, 1996, when she stopped work to undergo an approved arthroscopic surgery on her right knee. Appellant returned to her modified position on a part-time level on September 24, 1996 and resumed full-time work effective October 21, 1996.

By decision dated December 10, 1996, the Office found that the position of modified distribution clerk fairly and reasonably represented appellant's wage-earning capacity. As the modified position was equal to that of her date-of-injury position of a letter carrier, the Office found that appellant did not have any loss of wage-earning capacity. On December 26, 1996 appellant filed a Form CA-8 alleging that she was entitled to compensation for holiday pay from October 14, 1996 through January 20, 1997. By decision dated March 17, 1997, the Office denied appellant's compensation claim.

By decision dated August 28, 1997, the Office issued appellant a schedule award for a 17 percent permanent impairment for her right lower extremity for the period May 19, 1997 through April 26, 1998.

The Board finds that the Office properly found that appellant's actual earnings as a modified distribution clerk represented her wage-earning capacity.

Pursuant to section 8115(a) of the Federal Employees' Compensation Act,¹ in determining compensation for disability, wage-earning capacity is determined by the actual wages received by an employee, if the earnings fairly and reasonably represent her wage-earning capacity. The Board has previously explained that 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 employee's wage-earning capacity, must be accepted as such measure.²

In the present case, appellant has actual earnings resulting from her work as a modified distribution clerk beginning September 24, 1996 and continuing through December 10, 1996, the date the Office determined appellant's 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 employee's wage-earning capacity must be accepted as such measure.³ The Office determined that appellant's current position provided her with a wage-earning capacity substantially equal to or greater than the wages of the position held at the time of her injury. In this case, the Office found that the current pay rate for the job and step of letter carrier when appellant was injured is \$35,409.00 per annum. The pay rate for appellant's current position is \$36,135.00 per annum. The Office thus properly determined that appellant had no loss of wage-earning capacity as her actual wages meet or exceed the current pay rate for the position she held at the time of injury.⁴

The Board further finds that the Office properly determined that appellant is not entitled to holiday pay. In a January 27, 1997 letter, the Office inquired whether appellant's prior job as a letter carrier and her current position included holiday pay and received no response. Inasmuch as appellant has not submitted any evidence to indicate that she is entitled to holiday pay and her actual wages exceed the current pay rate for the position she held at the time of injury, the Office properly determined that appellant is not entitled to holiday pay.

The Board further finds that appellant is not entitled to greater than a 17 percent permanent impairment rating for which she has received a schedule award.

¹ 5 U.S.C. § 8115(a).

² *Gregory A. Compton*, 45 ECAB 154 (1993).

³ *Dennis E. Maddy*, 47 ECAB 259 (1995).

⁴ *See Compton*, *supra* note 2.

Under section 8107 of the Act⁵ and section 10.304 of the implementing federal regulations,⁶ 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 for all claimants, the Office adopted the American Medical Association, (A.M.A.) *Guides to the Evaluation of Permanent Impairment* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.⁷

In this case, Dr. David J. Smith, a Board-certified orthopedic surgeon and appellant's treating physician, stated, in a letter dated May 19, 1997, that appellant had arthroscopy for tear of the posterior horn of the medial meniscus and chondromalacia of the patellofemoral joint. He noted that her knee was scoped in November 1991 and May 1996. Dr. Smith's examination findings revealed a mild effusion and tenderness along the medial joint line. He noted a positive patellofemoral grate sign and found appellant had good stability. The range of motion was noted at -5 to 115 degrees. Dr. Smith opined that appellant's disability was a permanent impairment. He stated that appellant reached maximum medical improvement and that the impairment was estimated at 20 percent.

In a July 27, 1997 report, Dr. Carlo Bellabarba, the Office medical adviser and Board-certified in orthopedic surgery, stated that Dr. Smith's postoperative evaluations up to May 19, 1997 describe persistent patellofemoral symptoms. Utilizing the range of motion figures from Dr. Smith's May 19, 1997 report and reliance on the A.M.A., *Guides*,⁸ the Office medical adviser noted that the range of motion for flexion of 115 degrees equaled a zero percentage impairment and the range of motion for extension of -5 degrees equaled a 10 percent impairment. Based on further reference to the *Guides*,⁹ the Office medical adviser found a two percent permanent impairment due to partial medial meniscectomy and a five percent permanent impairment for patellofemoral pain with crepitation.¹⁰ He found that the records did not contain any mention of a sensorimotor deficit. Utilizing the Combined Values Chart on page 322, the Office medical adviser found a 17 percent permanent impairment to appellant's lower right extremity with the date of maximum medical improvement being May 19, 1997.

The Board finds that the July 27, 1997 report of the Office medical adviser properly applied the specific tables of the A.M.A., *Guides* in his calculation of the extent of permanent partial loss of use of appellant's right lower extremity due to a right medial meniscus tear, which was treated arthroscopically on November 26, 1991 and May 1996. As noted above the Office medical adviser utilized the applicable table and references of the A.M.A., *Guides* to the range of

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 20 C.F.R. § 10.304.

⁷ *James A. England*, 47 ECAB 115 (1995).

⁸ A.M.A., *Guides*, at 3/78, Table 41.

⁹ *Id.* at 3/85, Table 64.

¹⁰ *Id.* at 3/83, Table 62.

knee motion noted in Dr. Smith's clinical findings. Dr. Smith, who was advised by the Office in an April 8, 1997 letter to utilize the A.M.A., *Guides* in calculating his impairment rating, failed to do so in arriving at his 20 percent impairment rating. Accordingly, the medical evidence of record does not establish that appellant has a greater than the 17 percent impairment found by the Office medical adviser.

The decisions of the Office of Workers' Compensation Programs dated August 28 and March 17, 1997 and December 10, 1996 are hereby affirmed.

Dated, Washington, D.C.
April 3, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member