

**United States Department of Labor
Employees' Compensation Appeals Board**

C.S., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
West Springfield, MA, Employer)

**Docket No. 10-1487
Issued: March 15, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 10, 2010 appellant filed a timely appeal from a December 15, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined appellant's wage-earning capacity pursuant to 5 U.S.C. § 8115; and (2) whether he has more than a 25 percent left leg permanent impairment.

FACTUAL HISTORY

On March 17, 2006 appellant, then a 47-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he suffered a back injury in the performance of duty on March 14, 2006 when he landed awkwardly while walking down steps. On May 2, 2006 the

Office accepted a lumbar sprain/strain. In addition, it accepted aggravation of left knee osteoarthritis on October 18, 2006.¹

The record indicates that appellant returned to light-duty work and underwent a left total knee replacement surgery by Dr. Andrew Lehman, an orthopedic surgeon, on July 24, 2007. Appellant returned to work at six hours a day on November 26, 2007. He accepted a full-time light-duty job offer on February 27, 2008. On April 24, 2008 appellant accepted a full-time modified letter carrier position.

On August 1, 2008 appellant filed a claim for wage-loss compensation (Form CA-7) and checked a box that he was claiming a schedule award. With respect to his light-duty position, the Office requested pay rate information from the employing establishment. In a March 9, 2009 response, the employing establishment reported appellant's current annual salary was \$52,203.00 and the current annual pay rate for the date-of-injury job was \$50,723.00.

By decision dated March 23, 2009, the Office determined that appellant's actual earnings fairly and reasonably represented his wage-earning capacity. It found that he had no loss of wage-earning capacity. Appellant requested a hearing before an Office hearing representative on April 16, 2009.

In a report dated April 8, 2009, Dr. Lehman stated that appellant had reached maximum medical improvement (MMI) in July 2008, one year after the surgery. He opined that under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*), appellant had a 37 percent left leg impairment pursuant to Table 17-33. Dr. Lehman noted that appellant had a good result from the total knee replacement surgery.

By report dated July 7, 2009, Dr. Lehman opined that under the sixth edition of the A.M.A., *Guides*, appellant had a 25 percent left leg impairment pursuant to Table 16-3. The Office referred the evidence to an Office medical adviser for review. In a report dated July 10, 2009, the medical adviser reviewed the medical evidence and Table 16-3. He noted that the default value for Class 2 was 25 percent, and he assigned a Grade Modifier 1 for functional history, one for physical examination and for clinical studies a Grade Modifier 4, resulting in no net adjustment from the default value. The medical adviser concurred with Dr. Lehman the left leg impairment was 25 percent and he opined that the date of MMI was July 16, 2008.

In a decision dated July 14, 2009, the Office issued a schedule award for a 25 percent permanent impairment to the left leg. The period of the award was 72 weeks from July 16, 2008.

A hearing before an Office hearing representative was held on September 29, 2009 with respect to both the March 23 and July 14, 2009 Office decisions. Appellant argued that he did have a loss of wage-earning capacity as he worked overtime prior to the employment injury. He submitted a list of earnings by pay period from 2004 through pay period 6 of 2006, including the

¹ A November 22, 2006 Statement of Accepted Facts (SOAF) reports that appellant had a September 3, 2005 claim that was accepted for left knee osteoarthritis and he was working with restrictions at the time of the March 14, 2006 injury. This prior claim has not been combined with the current Office file.

number of overtime hours worked in each period. With respect to the schedule award, appellant argued that the Office had time to issue a decision under the fifth edition of the A.M.A., *Guides* and it should have issued a decision prior to May 1, 2009.

By decision dated December 15, 2009, an Office hearing representative affirmed the March 23 and July 14, 2009 Office decisions.

LEGAL PRECEDENT -- ISSUE 1

Under section 8115(a) of the Federal Employees' Compensation 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.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

Office procedures state that after a claimant has been working for 60 days, the Office will make a determination as to whether actual earnings fairly and reasonably represent wage-earning capacity.⁴ The Office's procedure manual provide guidelines for determining wage-earning capacity based on actual earnings:

“a. *Factors considered.* To determine whether the claimant's work fairly and reasonable represents his or her WEC, the CE [claims examiner] should consider whether the kind of appointment and tour of duty (see FECA PM 2-900.3) 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.

“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:

‘(1) *The job is part-time* (unless the claimant was apart-time worker at the time of injury) or sporadic in nature;

‘(2) *The job is seasonal* in an area where year-round employment is available....

² 5 U.S.C. § 8115(a).

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

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1995).

‘(3) *The job is temporary* where the claimant’s previous job was permanent.’”⁵

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,⁶ has been codified at 20 C.F.R. § 10.403. The Office first calculates an employee’s wage-earning capacity in terms of percentage by dividing the employee’s earnings by the current pay rate for the date-of-injury position.⁷

ANALYSIS -- ISSUE 1

Appellant returned to a full-time position as a modified letter carrier, and the record contains a job offer signed by appellant on April 24, 2008. He worked for more than 60 days, and there is no indication the job was part time, seasonal or temporary. As noted above, generally wages earned are the best measure of wage-earning capacity. In the absence of contrary evidence, the Office properly found earnings in the light-duty job fairly and reasonably represented appellant’s wage-earning capacity.

The employing establishment provided evidence that the current earnings were \$52,203.00 a year or \$1,003.90 a week. The current date-of-injury position pay rate was \$50,723.00 annually or \$975.44 weekly. In accord with 20 C.F.R. § 10.403, the Office divides the actual earnings by the current date-of-injury position pay rate. Since the actual earnings exceed the date of injury current pay rate, there is no loss of wage-earning capacity.⁸

On appeal, appellant did not discuss the wage-earning capacity issue. At the September 29, 2009 hearing, he indicated that prior to the employment injury he regularly worked overtime, and therefore he felt these earnings should have been used in calculating his wage-earning capacity. The hearing representative explained in some detail the provisions of 5 U.S.C. § 8114(e), which specifically excludes overtime pay in determining a claimant’s pay rate. Application of the *Shadrick* formula initially involves dividing the current actual earnings by the current pay rate for the date-of-injury position. The current pay rate for the date-of-injury position is the current base annual pay for the same grade and step as the date-of-injury position.⁹ According to the employing establishment, in this case the current pay rate was \$50,723.00. If current actual earnings are less than 100 percent of this amount, then the percentage is applied to the “pay rate for compensation purposes,” which is determined under 5 U.S.C. §§ 8101(4) and 8114.¹⁰ In this case the initial comparison of appellant’s earnings with the date-of-injury

⁵ *Id.* at Chapter 2.814.7(a) (July 1997).

⁶ 5 ECAB 376 (1953).

⁷ 20 C.F.R. § 10.403(d).

⁸ *See Gregory A. Compton*, 45 ECAB 154 (1993).

⁹ *See Lottie M. Williams*, 56 ECAB 302, 306 (2005).

¹⁰ 20 C.F.R. § 10.403(e) provides that the employee’s wage-earning capacity in terms of dollars is computed by first multiplying the pay rate for compensation purposes by the percentage of wage-earning capacity. 20 C.F.R. § 10.5(s) defines pay rate for compensation purposes as the employee’s pay as determined under 5 U.S.C. § 8114.

position current salary (Level 1, Step G), results in a percentage greater than 100. Therefore there is no loss of wage-earning capacity in this case.

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of the Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.¹¹ Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.¹² For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*.¹³

ANALYSIS -- ISSUE 2

An attending physician, Dr. Lehman, opined in a July 7, 2009 report that appellant had a 25 percent left leg permanent impairment under the sixth edition of the A.M.A., *Guides*. He identified Table 16-3, although he did not specifically explain how he applied this table. The Office medical adviser provided a more detailed explanation regarding the application of Table 16-3. Under this table a good result from a total knee replacement is a Class (CDX) 2 impairment with a 25 percent leg impairment as the default value.¹⁴ As the A.M.A., *Guides* explain, the default value may be adjusted based on grade modifiers for functional history (GMFH), physical examination (GMPE) and clinical studies (GMCS). The formula for net adjustment is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁵ In this case the Office medical adviser found a grade modifier of one (mild problem) for functional history and physical examination, with a grade modifier of four (very severe problem) for clinical studies. Applying the formula results in $-1 + -1 + 2 = 0$, resulting in no net adjustment to the default value.

Based on the probative medical evidence and application of the sixth edition of the A.M.A., *Guides*, the Board finds the Office properly determined that appellant had a 25 percent left leg permanent impairment. The number of weeks of wage-loss compensation for a schedule award is determined by the compensation schedule at 5 U.S.C. § 8107(c). For complete loss of use of the leg, the maximum number of weeks of compensation is 288 weeks. Since appellant's impairment was 25 percent, he is entitled to 25 percent of 288 weeks or 72 weeks of compensation. It is well established that the period covered by a schedule award commences on the date that the

¹¹ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

¹² A. George Lampo, 45 ECAB 441 (1994).

¹³ FECA Bulletin No. 09-03 (issued March 15, 2009).

¹⁴ A.M.A., *Guides* 511, Table 16-3.

¹⁵ *Id.* at 521.

employee reaches MMI from residuals of the employment injury.¹⁶ In this case, the Office medical adviser concluded that the date of maximum medical improvement was July 16, 2008, approximately one year after surgery when restrictions were considered permanent. The award therefore properly runs for 72 weeks commencing on July 16, 2008.

On appeal, appellant reiterates his argument that there was a delay in processing his schedule award and he should not be penalized for such delay. He stated that he would have had a greater impairment under the fifth edition of the A.M.A., *Guides*. The Board notes that while appellant filed a CA-7 form in August 2008, he did not submit a report from Dr. Lehman until April 8, 2009. Office procedures require additional development regarding a schedule award, including referral to an Office medical adviser.¹⁷ There was no unreasonable delay in developing a schedule award issue. As noted above, all schedule award decisions issued after May 1, 2009 are based on the sixth edition of the A.M.A., *Guides*, and the July 14, 2009 Office decision was properly determined under the sixth edition in this case.

CONCLUSION

The Board finds that the Office properly determined appellant's wage-earning capacity pursuant to 5 U.S.C. § 8115. The Board further finds that appellant did not establish more than a 25 percent left leg permanent impairment.

¹⁶ *Albert Valverde*, 36 ECAB 233, 237 (1984).

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 15, 2009 is affirmed.

Issued: March 15, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board