U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIE J. SMITH and DEPARTMENT OF THE AIR FORCE, SACRAMENTO AIR LOGISTICS CENTER, McCLELLAN AIR FORCE BASE, McClellan, Calif.

Docket No. 96-2181; Submitted on the Record;
Issued November 4, 1998

DECISION and ORDER

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

The issues are: (1) whether appellant has established that he sustained greater than a 45 percent impairment of the left upper extremity causally related to an accepted September 1, 1987 left wrist fracture and subluxation with subsequent degenerative arthritis, for which he received a schedule award; (2) whether the Office of Workers' Compensation Programs properly issued its June 24, 1996 decision denying appellant's request for a merit review; and (3) whether the Office properly found that appellant had no loss of wage-earning capacity as of March 1, 1996 based on his actual earnings as a records clerk beginning in January 1988, and thus reduced his wage-loss compensation to zero.

In a December 30, 1988 report, Dr. Dennis Sullivan, an attending Board-certified orthopedic surgeon, provided a history of injury and treatment since March 4, 1988. He related appellant's symptoms of pain and weakness of the left wrist, with objective loss of wrist motion and atrophy of the left forearm. Dr. Sullivan noted that appellant was permanent and stationary as of September 1, 1988, and that December 16, 1988 nerve conduction studies showed "mild slowing of ulnar nerve conduction across the left elbow. On December 21, 1988 examination, Dr. Sullivan found limited left wrist motion as follows: dorsiflexion 50 degrees; palmar flexion 20 degrees; radial deviation 10 degrees; and ulnar deviation 30 degrees (normal). He also found a loss of 5 degrees elbow extension, and a 50 percent loss of grip strength.

Dr. Sullivan then used the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2nd ed. 1984) (hereinafter, the A.M.A., *Guides*) to calculate a schedule award. He found a 6 percent impairment of left upper extremity function due to loss of 35 degrees of wrist palmar flexion, a 3 percent impairment due to loss of 15 degrees of wrist of dorsiflexion, a 2 percent impairment due to loss of 10 degrees radial deviation, and no impairment due to loss of ulnar deviation or loss of range of elbow motion. Dr. Sullivan then added the 6, 3 and 2 percent impairments, resulting in an 11 percent impairment of the left upper extremity due to loss of range of motion. Dr. Sullivan then used Table 5, page 74 to assign a

Grade II impairment for weakness due to loss of function of the ulnar nerve, denoting "complete range of motion against gravity and against some resistance in the left hand. Maximum rating for this is 20 percent." Dr. Sullivan then used Table 4, page 73 to assign a Grade III impairment due to pain, denoting "decreased sensation with pain which interferes with activity, maximum grade of 60 percent." He then used Table 9, page 77 to determine that the maximum impairment rating for an ulnar nerve lesion above the forearm was 42 percent. He then multiplied the 60 percent impairment rating due to pain by the 42 percent value for ulnar nerve impairment, resulting in a 24 percent impairment due to loss of sensory function and pain. Dr. Sullivan then multiplied the 20 percent impairment due to loss of strength by the 42 percent value for ulnar nerve impairment, resulting in an 8 percent rating for loss of strength. Using the combined values chart, he combined the 8 percent impairment due to weakness with the 24 percent impairment due to pain, resulting in a loss of upper extremity function of 30 percent. "This, combined with the 11 percent loss of function due to limited motion … gives a total rating of loss of left upper extremity function of 38 percent. Reducing this value by 5 percent because the left upper limb is the nonpreferred upper limb for [appellant] gives a final value for loss of left upper extremity function at 33 percent."

In a February 21, 1989 report, an Office medical adviser performed a schedule award calculation based on Dr. Sullivan's December 30, 1988 report, noting that maximum medical improvement was reached on September 1, 1988, one year post injury. The medical adviser categorized appellant's pain as Grade 3 or 60 percent of maximum, multiplied this figure by 10 percent for ulnar nerve impairment, resulting in a 6.5 percent impairment. The medical adviser then calculated a 10 percent impairment based on range of motion: 2.5 percent for 15 degrees loss of dorsiflexion; 5 percent for 30 degrees loss of palmar flexion; 2 percent for loss of 10 degrees radial deviation; 0 percent impairment due to loss of ulnar deviation. The medical adviser calculated a 50 percent impairment due to weakness, multiplied by the 35 percent maximum value, to equal 18 percent. He then determined a 25 percent impairment due to sensory loss by multiplying a 60 percent value for loss of ulnar nerve function by the maximum value of 42 percent for impairment of the ulnar nerve. The medical adviser then used the combined values chart, adding the 25 percent impairment due to sensory loss to the 18 percent impairment due to weakness, resulting in 39 percent; he then added the 10 percent impairment due to loss of range of motion, equaling 45 percent. The medical adviser thus concluded that appellant had a 45 percent permanent impairment of the left upper extremity.

On May 31, 1989 appellant claimed a schedule award for permanent impairment of the left upper extremity causally related to the accepted September 1, 1987 injury, based on Dr. Sullivan's reports. By decision dated June 21, 1989, the Office awarded appellant a schedule award for a 45 percent permanent impairment of the left upper extremity.[1]

Appellant submitted periodic progress notes describing continued neck and left upper extremity pain, left wrist pain, immobility and weakness from January 1991 to April 1995, requiring medication.

[1] The schedule award ran from September 1, 1988 to May 11, 1991.

In a May 31, 1995 report, Dr. J. Ertl, an attending orthopedist, provided a history of injury and treatment, and noted a restricted range of left wrist motion, as follows: dorsiflexion 75 degrees; palmar flexion 45 degrees; radial deviation 5 degrees; ulnar deviation 20 degrees. He noted tenderness at appellant's snuffbox on the left, pain over the scapholunate area, and diagnosed chronic scapholunate disassociation with secondary arthrosis." Dr. Ertl opined that appellant could perform his customary clerical duties.

On July 5, 1995 appellant filed a claim for an increased schedule award, alleging that he had sustained greater than a 45 percent permanent impairment of the left upper extremity, based on the reports of Dr. Roy Pottenger, a Board-certified orthopedic surgeon consulting to the employing establishment.

In an October 16, 1995 report, Dr. Pottenger provided a history of injury and treatment, relating appellant's symptoms of "inability to do heavy lifting … tingling that goes up the [left] arm … [and] a ganglion formed on the volar aspect of the [left] wrist." On examination, he found a 50 percent loss of grip strength, restricted left wrist motion, noting appellant had significant pain and tenderness with all left wrist motions, swelling over the left radioscaphoid joint, and a weak grip strength compared to the right. Dr. Pottenger noted x-ray findings of an "avascular necrosis of the scaphoid … degenerative changes of the radioscaphoid joint and severe degenerative changes of worn articular cartilage and hypertrophic bone formation." He opined that the 1988 fall caused degenerative arthritis of the radioscaphoid joint, leading to the current loss of range of left wrist motion. Dr. Pottenger stated that appellant was permanent and stationary.

In a February 16, 1996 report, Dr. Pottenger noted findings on examination of restricted range of left wrist motion: "dorsiflexion 30 degrees; palmar flexion 30 degrees; ulnar deviation 10 degrees; radial deviation 0 degrees. Pain was elicited with any motion of the left wrist." He noted grip strength measurements using a Jamar dynamometer: "Right wrist 155, 150 and 145 pounds. Left wrist 20, 20 and 20 pounds. Pinch strength: Right 15, 15 and 16 pounds. Left four, four and five pounds."

By decision dated April 16, 1996, the Office found that appellant had not established that he sustained greater than a 45 percent permanent impairment to the left upper extremity, and was thus not entitled to an additional schedule award, based on Dr. Pottenger's February 16, 1996 findings.[2] Appellant disagreed with this decision, and in two April 25, 1996 letters requested reconsideration, reiterating that his left wrist function had deteriorated since 1989.

In an April 30, 1996 letter, the Office advised appellant that his April 25, 1996 letters requesting reconsideration were not a sufficient basis on which to reopen his claim for a merit review. The Office described the type of medical evidence necessary to establish his claim, including a physician's explanation as to why Dr. Sullivan's findings or calculations were

[2] In an April 2, 1996 report, Dr. Ellen Pichey, an Office medical adviser, noted reviewing the reports of Dr. Pottenger. Referring to the A.M.A., *Guides,* (fourth edition), Dr. Pichey found impairments due to loss of range of motion, strength and sensory deficit, and using the combined values chart, determined that appellant had a 45 percent permanent impairment of the left upper extremity.

incorrect. The Office advised that the record would be held "open for 45 days" to allow for submission of such evidence," and that if further information was not received, appellant's request for reconsideration would be denied. The record indicates that appellant did not submit additional evidence prior to the issuance of the June 24, 1996 decision.

By decision dated June 24, 1996, the Office denied appellant's request for reconsideration as his April 25, 1996 letter, the only evidence submitted in support of his request, was insufficient to warrant reconsideration of the April 16, 1996 decision.

Regarding the first issue, the Board finds appellant has not established that he sustained greater than a 45 percent impairment of the left upper extremity causally related to an accepted September 1, 1987 left wrist fracture and subluxation with subsequent degenerative arthritis, for which he received a schedule award.

Under section 8107 of the Federal Employees' Compensation Act[3] and section 10.304 of the implementing regulations,[4] schedule awards are payable for permanent impairment of specified body members, functions or organs. As the Act and regulations do not specify to determine percentages of impairment, the Office has adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment, to ensure consistent results and equal justice for all claimants. The Board has concurred in such adoptions.[5]

The A.M.A., *Guides* lists specific procedures for determining impairment of affected body parts. A physician must first determine the effect of the medical condition and date of maximum medical improvement. When the effect of impairment is pain or loss of sensation, the physician must first identify the area of involvement and the nerves innervating the area, then find the value for maximum loss of function of the nerve or nerves due to pain or loss of sensation, and then grade the degree of decreased sensation or pain according to a six-level scheme. Using the appropriate table, the physician then multiplies the value of the nerve by the degree of decreased sensation or pain to determine the percentage of impairment due to pain or loss of sensation. Similar guidelines exist for evaluating impairment due to loss of motion or impairment due to motor deficits.

In this case, the Board finds that the Office medical adviser, in his February 21, 1989 report, properly applied the appropriate tables and grading schemes of the A.M.A., *Guides* to Dr. Sullivan's December 30, 1988 findings, and accurately calculated a 45 percent permanent impairment of the left upper extremity.

Appellant does not contest the accuracy of the schedule award determination, but that his left wrist condition worsened subsequent to the June 21, 1989 schedule award such that he sustained greater than a 45 percent impairment of the left upper extremity. In support of this contention, he submitted reports from Dr. Pottenger. In an October 16, 1995 report,

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.304.

[5] *Leisa D. Vassar*, 40 ECAB 1287, 1290 (1989); *Francis John Kilcoyne*, 38 ECAB 168, 170 (1986).

Dr. Pottenger found significant pain with all left wrist motions, and x-ray findings of necrosis and severe degenerative changes of the radioscaphoid joint due to the left wrist fracture causing loss of range of motion. In a February 16, 1996 report, he noted dorsiflexion and palmar flexion limited to 30 degrees, ulnar deviation at 10 degrees, 0 degrees radial deviation, and left grip and pinch strengths of less than 30 percent of those on the right. While the findings in these reports differ from those made by Dr. Sullivan in his December 30, 1988 report regarding specific ranges of motion, x-ray findings and strength measurements, Dr. Pottenger did not refer to the A.M.A., *Guides* in his reports, relate specific findings to the appropriate tables of the A.M.A., *Guides*, grade appellant's impairment due to pain or loss of strength, or provide a schedule award calculation. Thus, his reports are of diminished probative value on the schedule award issue as the precise nature and degree of appellant's impairment cannot be ascertained from them.

The Board notes that appellant was advised by letter, April 30, 1996, of the type of medical evidence needed to establish his claim for an additional schedule award, but that appellant did not submit such evidence. Consequently, appellant has not established that he sustained greater than a 45 percent permanent impairment of the left upper extremity.

Regarding the second issue, the Board finds that the Office properly issued its June 24, 1996 decision denying appellant's request for a merit review.

To require the Office to open a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of the claim by written request to the Office identifying the decision and the specific issue(s) within the decision which the 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

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[6]

Section 10.328(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.[7]

In two April 25, 1996 letters, appellant requested reconsideration, reiterating that his left wrist function had deteriorated since 1989. These letters, the only evidence appellant submitted in support of his request for reconsideration, are repetitious of appellant's correspondence with the Office previously of record. They do not demonstrate that the Office committed legal error,

[6] 20 C.F.R. § 10.138(b)(1).

[7] 20 C.F.R. § 10.138(b)(2).

advance a new legal or factual point not previously considered by the Office, or contain new relevant and pertinent evidence.

The Board notes that the Office advised appellant by April 30, 1996 letter, that his April 25, 1996 letters requesting reconsideration were not a sufficient basis on which to reopen his claim for a merit review. The Office emphasized the necessity of obtaining a medical report explaining how and why Dr. Pottenger's schedule award calculation was incorrect, and that if additional information was not received in 45 days, his request for reconsideration would be denied. The record indicates that appellant did not submit additional evidence prior to the issuance of the June 24, 1996 decision.

Regarding the third issue, the Board finds that the Office properly found that appellant had no loss of wage-earning capacity as of March 1, 1996 based on his actual earnings as a records clerk. The relevant facts are as follows.

At the time of the accepted September 1, 1987 left wrist injury, appellant, then 42 years old, was employed as a metal tank sealer at WG-5 (wage grade), a position requiring lifting up to 44 pounds on a regular basis. The record indicates that appellant is right handed. Following the September 1, 1987 injury, appellant returned to work on November 12, 1987, medically restricted from lifting more than 25 pounds.

In a November 21, 1988 letter, the employing establishment noted that appellant was found medically not fit for duty as a metal tank sealer, as he was medically restricted from lifting more than 25 pounds, working with both hands, pushing and climbing. The record indicates that appellant performed several clerical jobs at WG-5 through 1996. An April 21, 1995 duty status report noted that appellant had worked as an aircraft records clerk since October 29, 1989, with work requirements of lifting up to 10 pounds, walking 1 hour per day and sitting 7 hours per day. A May 31, 1995 report from Dr. Ertl, an attending orthopedist, notes that appellant performed "primarily office work that did not require any heavy lifting or climbing." In a September 14, 1995 letter, the employing establishment directed appellant to report for a fitness-for-duty examination by Dr. Pottenger, who submitted an October 16, 1995 report finding appellant fit for duty as a clerk.

By decision dated March 1, 1996, the Office reduced appellant's wage-loss compensation to zero[8] based on his actual earnings as a records clerk beginning in January 1988, finding that he had no loss of wage-earning capacity. The Office found that effective January 1988, appellant held the position of aircraft records clerk, with wages of $426.80 per week. The Office found that appellant earned $10.67 per hour as a records clerk, and that the current pay rate for appellant's date-of-injury position was also $10.67 per hour.[9] The Office further found that the position fairly and reasonably represented appellant's wage-earning capacity.

[8] The record indicates that, other than during payment of the schedule award from September 1, 1988 to May 11, 1991, appellant did not receive wage-loss compensation on either the daily or periodic rolls other than for occasional medical visits.

[9] Although the record contains no corroboration of these pay rates, appellant does not contest them.

The Act provides for payment of loss of wage-earning capacity, such that a partially disabled employee is paid "monthly monetary compensation equal to 66 2/3 percent of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability, which is known as his basic compensation for partial disability."[10]

Regulations construing the Act further provide that "an injured employee who is unable to return to the position held at the time of injury (or to earn equivalent wages) but who is not totally disabled for all gainful employment is entitled to compensation computed on loss of wage-earning capacity."[11] An employee who is partially disabled as a result of an employment injury is therefore entitled to a loss of wage-earning capacity determination if he has met the threshold requirement of establishing that he is unable to return to his former employment or to earn equivalent wages. In the present case, appellant was transferred from his date-of-injury position as a metal tank sealer at WG-5 to the aircraft records clerk position, also at WG-5. The record indicates that appellant earned the same amount of wages as a records clerk as he did as a metal tank sealer, his date-of-injury position.[12] The Board notes that appellant performed the clerk position for more than six years.

Thus, the Board finds that the Office properly determined that appellant had no loss of wage-earning capacity as he had equivalent earnings to his date-of-injury position, and there is no evidence that the pay was subsequently reduced due to his injury-related condition.[13]

[10] 5 U.S.C. § 8106(a).

[11] 20 C.F.R. § 10.303.

[12] The Board notes that appellant did not submit medical evidence indicating that he was medically unable to perform the position of aircraft records clerk due to the September 1, 1987 injury.

[13] *Domenick Pezzetti*, 45 ECAB 787 (1994)

The decisions of the Office of Workers' Compensation Programs dated June 24, April 16 and March 1, 1996 are hereby affirmed.

Dated, Washington, D.C.
November 4, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member