U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MONIQUE A. GARRETT and DEPARTMENT OF THE AIR FORCE, AIR FORCE ACADEMY, Colorado Springs, Colo.

Docket No. 97-235; Submitted on the Record;
Issued October 14, 1998

DECISION and ORDER

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

The issues are: (1) whether appellant has met her burden of proof in establishing that she is entitled to wage-loss compensation after July 25, 1996 due to her accepted employment injuries of low back strain and contusion of the buttock; and (2) whether appellant has met her burden of proof in establishing any partial permanent impairment related to her accepted injuries for which she is entitled to a schedule award.

On April 11, 1995 appellant, then a 30-year-old secretary, filed a claim, alleging that she injured her right side, hip, buttock and lower leg when she fell on ice on the premises of the employing establishment. Appellant was seven months pregnant at the time of the incident. She stopped work on April 11, 1995. On April 18, 1995 the Office of Workers' Compensation Programs accepted appellant's claim for contusion of the buttock, but further found that appellant needed further evidence to support disability in relation to the accepted injury. Appellant returned to work after the birth of her child but continued to pursue approval of a claimed back condition. By decisions dated July 24 and December 13, 1995, the Office denied appellant's request for reconsideration on her claims for continuing compensation and for additional injury on the grounds that the evidence submitted was either irrelevant or repetitive and therefore was not sufficient to warrant merit review. In a merit decision dated November 6, 1995, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant modification of the prior decision. In a decision dated May 16, 1996, the Office accepted appellant's claim for low back strain. By decision dated August 20, 1996, the Office denied further compensation benefits subsequent to July 25, 1996 on the grounds that the weight of the medical evidence established no residuals of the accepted injuries. In a decision dated September 10, 1996, the Office denied appellant's claim for a schedule award on the grounds that the weight of the medical evidence established that she had no partial permanent impairment as a result of her low back strain or contusion of the buttock.

The Board has carefully reviewed the entire case record on appeal and finds that appellant is not entitled to wage-loss compensation after July 25, 1995.

Section 8102(a) of the Federal Employees' Compensation Act[1] sets forth the basis upon which an employee is eligible for compensation benefits. That section provides:

> "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty...."

In general the term 'disability' under the Act means 'incapacity because of injury in employment to earn the wage which the employee was receiving at the time of such injury.'[2] This meaning, for brevity, is expressed as "disability for work."[3]

Appellant is entitled to compensation for wage loss on and after July 25, 1996 if she was still disabled; *i.e.*, if she was unable to earn the wage that she was receiving on April 11, 1995.

In the present case, appellant returned to her date-of-injury position and performed her regular duties until May 1996. In a report dated May 13, 1996, Dr. Robert T. Pero, who is Board-certified in preventive medicine and is appellant's treating physician, restricted appellant to working four hours per day due to her low back strain and the need for appellant to participate in physical therapy for full recovery. He gradually increased appellant's hours to six hours a day. All claims for wage loss were accepted through July 25, 1996. In his last narrative report prior to July 25, 1996, which was dated June 28, 1996, Dr. Pero diagnosed stable right S1 dysfunction, mechanical low back pain secondary to the S1 dysfunction, rule out lumbar herniation, lumbar myofascial pain, sleep disturbance and history of depression related to stress in the workplace. Dr. Pero noted that he had referred appellant to Dr. Kenneth P. Finn, a Board-certified physiatrist. In a June 12, 1996 report, Dr. Finn concurred with Dr. Pero's diagnoses and noted that he found no evidence of neurologic compromise, but that appellant did have symptoms suggestive of a possible disc-related problem. He indicated that appellant should phase out her physical therapy, but that the four hours of physical therapy she was using was reasonable. He also noted that appellant's four-hour per day work restriction might need to be permanent. On July 25, 1995 Dr. Pero indicated that appellant could work six hours a day. He diagnosed low back pain without radiation and depression. Although Dr. Pero requested a functional capacity evaluation, the results were deemed invalid by the administering therapist due to submaximal effort.

Appellant was referred to Dr. Robert Schutt, Jr., a Board-certified orthopedic surgeon and Office referral physician, for examination and an opinion of whether she had any continuing disability related to her accepted injuries. In a report dated July 25, 1996, Dr. Schutt diagnosed lumbar contusion and a contusion of her right buttock, but found no evidence of an ongoing strain. He indicated that physical therapy had been appropriate but was no longer warranted. Dr. Schutt noted that it was common for a person to have back pain with pregnancy, however, at the present time there were no residuals of the accepted conditions either temporary or

[1] 5 U.S.C. § 8102(a).

[2] *John W. Normand*, 39 ECAB 1378 (1988); *Gene Collins*, 35 ECAB 544 (1984).

[3] *John W. Normand, supra* note 2; *Clarence D. Glenn*, 29 ECAB 779 (1978).

permanent. This report by Dr. Schutt is determinative with respect to the issue of whether appellant had any continuing disability for which she was entitled to wage-loss compensation. While the record contains work capacity forms from Dr. Pero, he has not provided any narrative reports addressing why appellant was restricted to working six hours a day or explaining why she had any continuing disability as a result of her accepted back injuries. Moreover, the report by Dr. Finn that the four-hour restriction "might" need to be permanent is speculative in nature[4] and therefore is not reasoned. Thus, there is no well-reasoned or rationalized evidence supportive of appellant's burden. On the other hand, the report by Dr. Schutt in which he provided a full history of injury and explained why appellant had no residuals from her accepted injuries is well reasoned and rationalized. Therefore it constitutes the weight of the medical evidence. Appellant is not entitled to wage-loss benefits after July 25, 1996.

The Board further finds, however, that the case is not in posture for decision with respect to the issue of whether appellant is entitled to a schedule award.

Section 8107 of the Federal Employees' Compensation Act[5] and its implementing regulation[6] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of specified members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. 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. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) have been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating losses.[7]

Appellant submitted a report dated August 1, 1996 by Dr. Pero in which he found a 5 percent permanent impairment of the right lower extremity based on a hip abduction of 25 degrees. The Office based its determination that appellant was not entitled to a schedule award entirely on Dr. Schutt's report that appellant had no residuals of her accepted condition without considering Dr. Pero's report. However, Dr. Schutt was not asked whether appellant had any permanent impairment from her injuries and on his work capacity form did provide some permanent restrictions for appellant, including limitations on bending, frequent lifting of over 25 pounds and occasional lifting of over 50 pounds. Thus, while he did find appellant capable of returning to her sedentary position, given the permanent restrictions he provided, this was not tantamount to a finding that appellant also had no permanent impairment as a result of her injury. The case must be remanded for further development of the evidence with respect to this issue.

It is well established that the schedule award provisions of the Act, which provide an award for loss of use of specified member or function of the body, are made without regard to

[4] *Charles A. Massenzo*, 30 ECAB 844 (1978).

[5] 5 U.S.C. § 8107(c).

[6] 20 C.F.R. § 10.304.

[7] *Quincy E. Malone*, 31 ECAB 846 (1980).

actual loss of wage-earning capacity resulting from the injury.[8] Proceedings under the Act are not adversarial in nature nor is the Office a disinterested arbiter, and the Office shares responsibility in the development of evidence.[9] The case will therefore be remanded to the Office for it to advise both Drs. Pero and Schutt that they should evaluate appellant's impairment using the fourth edition of the A.M.A., *Guides* as a reference. The physicians should then submit supplemental reports. After such further development as the Office deems necessary, it should issue a *de novo* decision on the percentage of partial permanent impairment, if any.

The decision of the Office of Workers' Compensation Programs dated August 20, 1996 is hereby affirmed. The decision of the Office dated September 10, 1996 is hereby set aside and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.
October 14, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[8] *See Stanley F. Stuczynski*, 12 ECAB 159 (1960).

[9] *William Cantrell*, 34 ECAB 1233 (1983).