

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY CIRCELLI and U.S. POSTAL SERVICE,
POST OFFICE, Erie, PA

*Docket No. 98-732; Submitted on the Record;
Issued December 1, 1999*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant has more than 13 percent permanent impairment of his right upper extremity for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant had no loss of wage-earning capacity.

The Board has duly reviewed the case on appeal and finds it not in posture for decision.

Appellant filed a claim on November 1, 1990 alleging that he injured his left hand in the performance of duty. The Office accepted appellant's claim for crush injury of the hand and surgical repair. On November 16, 1994 the Office granted appellant a schedule award for 13 percent permanent impairment of his left hand. Appellant requested an oral hearing. By decision dated and finalized March 20, 1995, the hearing representative remanded the claim for recalculation of appellant's schedule award and determination of any loss of wage-earning capacity. By decision dated July 17, 1995, the Office determined that appellant had no more than 13 percent impairment of his left hand and no loss of wage-earning capacity. Appellant requested an oral hearing and by decision dated July 30, 1996 and finalized August 1, 1996, the hearing representative affirmed the Office's July 17, 1995 decision. Appellant requested reconsideration on June 18, 1997 and the Office reviewed appellant's claim on the merits on September 23, 1997.

Under section 8107 of the Federal Employees' Compensation Act¹ and section 10.304 of the implementing federal regulations,² 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

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.304.

results and to ensure equal justice for all claimants the Office adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment*³ as a standard for determining the percentage of impairment and the Board has concurred in such adoption.⁴

Dr. James Jon Barber, a Board-certified plastic surgeon and appellant's attending physician, noted in early February 1991 that appellant was experiencing ulnar nerve entrapment. Dr. Barber performed an ulnar nerve release on March 1, 1991. In a report dated August 15, 1991, he noted appellant's history of injury and medical history. Dr. Barber stated that when appellant began active range of motion following his November 1990 employment injury, appellant began to show signs of carpal tunnel syndrome and ulnar nerve entrapment at the elbow and wrist. He stated that in regards to appellant's overall function that he had reached maximum medical improvement. Dr. Barber noted that appellant had diffuse arthritis of his elbow and shoulder as well as the hand injuries. He found complaints of numbness and weakness and rated appellant's loss of strength at 40 to 50 percent of the limb as a composite.

The Office referred appellant for a second opinion evaluation to Dr. Michael R. Zernich, a Board-certified orthopedic surgeon. In a report dated November 29, 1991, Dr. Zernich noted appellant's history of injury and medical history. He noted that appellant had undergone ulnar nerve release and stated that appellant's symptoms referred more to the left forearm than to the originally injured hand. Dr. Zernich noted appellant's findings of arthritis in his elbow and shoulder. He stated, "I failed to reveal how these findings could possibly be related to his having sustained a crush injury to his hand. These are undoubtedly unrelated situations." Dr. Zernich indicated that appellant had symptoms of reflex sympathetic dystrophy which did not require treatment and found that appellant had not yet reached maximum medical improvement.

In a report dated January 23, 1993, Dr. Barber stated that he was explaining the causal relationship to appellant's accepted employment injury. He stated:

"The development of a carpal tunnel syndrome if not immediately related to the workplace, remains subclinical prior to an injury and then develops full blown signs and symptoms. This occurs either after rehabilitation, malus, or overuse of the hands. Whether these were indeed developed by the injury itself or whether they were dormant prior to this, I cannot comment."

The Office again referred appellant to Dr. Zernich for a second opinion evaluation to determine appellant's current injury-related conditions and disability. Dr. Zernich completed a report on October 5, 1993 and found that appellant continued to show symptoms of reflex sympathetic dystrophy. He recommended conservative treatment for carpal tunnel symptoms and recommended nerve blocks for reflex sympathetic dystrophy.

The Office referred appellant to Dr. H. Andrew Wissinger, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve a conflict of medical evidence regarding the necessity of carpal tunnel release. The Office did not request that he address other issues in

³ A.M.A., *Guides* 4th ed. (1993).

⁴ *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

appellant's claim. In a report dated April 13, 1994, Dr. Wissinger noted appellant's history of injury and performed a physical evaluation. He found that appellant had full range of motion in his left arm and diminished sensation along the superficial dorsal branch of the radial nerve. Dr. Wissinger diagnosed multi-system injury to the left ring and little fingers, as well as ulnar nerve dysfunction not related to the November 1, 1990 injury and found no evidence of median nerve dysfunction. He concluded that the proposed surgery had no relationship to appellant's accepted injury.

In a report dated March 23, 1995, Dr. Barber noted appellant's history of injury and stated that appellant developed problems resulting from his injury including mild fractural pain syndrome and reflex dystrophy. He stated that appellant's carpal tunnel symptoms had abated, but that he continued to exhibit ulnar nerve symptoms. Dr. Barber stated, "[Appellant's] main problems at this time continued to be pain in the area of the elbow radiating to the area of the forearm. He does continue with subjective complaints of pain over the area of the hypothenar eminence and some minimal wasting to the area of the hypothenar muscles. Dr. Barber indicated appellant also is subjectively highly sensitive to pain and upon his last physical therapy examination does show approximately a 50 percent decrease in strength to the area of the arm and hand." On April 4, 1995 Dr. Barber again noted appellant's history of injury and noted that following surgery, appellant developed reflex sympathetic dystrophy and myofascial pain syndrome. He stated that appellant continued to have pain in the area of the forearm with subjective and objective weakness to the left hand. Dr. Barber stated that appellant developed "postoperative repair" to this ulnar nerve involvement to the area of the left fourth and fifth digit. He concluded, "Certainly this may be related to the initial trauma and/or development postoperatively of malus/overuse because of pain and intensive therapy. This is certainly also a reflection of repetitive action syndrome due to the patient's actions prior to and exasperated by this injury."

In a supplemental report dated May 25, 1995, Dr. Wissinger performed a physical examination and stated that there was no history of injury to the left elbow on November 1, 1990. He stated, "The problems with the ulnar nerve presented themselves much later. This is the basis for my opinion that the ulnar nerve dysfunction is not causally related to the work injury of November 1, 1990." Dr. Wissinger further stated that appellant had not mentioned a shoulder problem and that he had no reason to believe that appellant has difficulties with his shoulder that can be related to his injury of November 1, 1990.

In this case, the Office accepted that appellant sustained a crush injury to his left hand on November 1, 1990 and resulting surgery. Appellant's attending physician, Dr. Barber, a Board-certified plastic surgeon, diagnosed additional conditions of ulnar nerve entrapment, for which he performed surgery and carpal tunnel syndrome for which he recommended surgery. The Office referred appellant for a second opinion evaluation with Dr. Zernich, a Board-certified orthopedic surgeon. Dr. Zernich found that the ulnar nerve entrapment was not causally related to appellant's employment injury, recommended conservative treatment for carpal tunnel syndrome and diagnosed reflex sympathetic dystrophy. The Office properly found that there was a conflict of medical opinion evidence between Dr. Barber, appellant's attending physician, and Dr. Zernich, the Office referral physician, regarding the need for surgery to treat carpal

tunnel syndrome. Section 8123(a) of the Act,⁵ provides, “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.” The Office properly referred appellant for an impartial medical examination by Dr. H. Andrew Wissinger, a Board-certified orthopedic surgeon. In his reports, Dr. Wissinger concluded that appellant did not require surgery as he did not have a median nerve condition. In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁶

Dr. Wissinger’s reports are not sufficiently well rationalized to constitute the weight of the medical opinion evidence. He did not offer any explanation for his conclusion that appellant did not have carpal tunnel syndrome and did not require further treatment. Dr. Wissinger’s opinion that appellant’s ulnar nerve condition is not causally related to his employment injury is based on the conclusion that the condition arose after the employment injury, in fact, the record indicates that there was a very short lapse of time between appellant’s November 1990 injury and resultant surgery and his ulnar nerve condition. Neither the Office nor Dr. Wissinger discussed Dr. Barber’s opinion that this was a consequential injury due to rehabilitation from appellant’s hand injury. Furthermore, Dr. Wissinger did not appear to consider that if appellant’s shoulder condition, diagnosed as arthritis, preexisted his employment injury and affected his schedule member, then any impairment due to his condition should be considered. Finally, the copies of the operative reports from Dr. Barber reviewed by Dr. Wissinger are not included in the record before the Board.

For these reasons, the Board finds that the case is not in posture for decision regarding the extent and degree of appellant’s permanent impairment due to his accepted employment injury. On remand, the Office should incorporate the operative reports in the record, prepare a statement of accepted facts and list of specific questions and refer appellant to an appropriate Board-certified specialist to resolve the existing conflicts of medical opinion evidence regarding the causal relationship between his ulnar nerve condition and his employment injury, the causal relationship between the diagnosed reflex sympathetic dystrophy and his employment injury, whether appellant has preexisting arthritis which affects his schedule member and determining any permanent impairment due to accepted conditions.

The Board further finds that appellant has no loss of wage-earning capacity.

Appellant returned to light duty on April 4, 1991 earning the same wages as his date-of-injury position. Appellant requested compensation for wage loss on December 14, 1994 alleging that he sustained a loss of wage-earning capacity as he did not receive a promotion which he would have received if not for his injury. By decision dated July 17, 1995, the Office found that appellant had not sustained a loss of wage-earning capacity.

⁵ 5 U.S.C. §§ 8101-8193, 8123(a).

⁶ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

Section 8115 of the Act,⁷ titled “Determination of wage-earning capacity,” states in pertinent part:

“In determining compensation for partial disability, ... the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to --

- (1) the nature of his injury;
- (2) the degree of physical impairment;
- (3) his usual employment;
- (4) his age;
- (5) his qualifications for other employment;
- (6) the availability of suitable employment; and
- (7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition.”

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.⁸

In the present case, appellant worked as a modified maintenance worker from April 4, 1991. Appellant’s performance of this position for four years is persuasive evidence that it represents his wage-earning capacity. There is no evidence that this position is seasonal, temporary, less than full-time, make-shift work designed for appellant’s particular needs.⁹

Appellant alleged that he was entitled to compensation for loss of wage-earning capacity as he had not received a promotion that he believed he would have received, but for his injury. He stated that the loss of this promotion resulted in a loss of wage-earning capacity. The Board has held that the probability that an employee, if not for his or her work-related condition, might have obtained other positions with greater earnings is not proof of a loss of wage-earning capacity and does not afford a basis for payment of compensation under the Act.¹⁰

⁷ 5 U.S.C. § 8115.

⁸ *Elbert Hicks*, 49 ECAB ____ (Docket No. 95-1448, issued January 20, 1998).

⁹ *Monique L. Love*, 48 ECAB ____ (Docket No. 95-188, issued February 28, 1997).

¹⁰ *Richard M. Knight*, 42 ECAB 320, 324 (1991).

Consequentially, the Office properly determined that appellant had no loss of wage-earning capacity.

The decision of the Office of Workers' Compensation Programs dated September 23, 1997 is set aside and remanded for further development regarding appellant's schedule award determination and affirmed as it relates to appellant's wage-earning capacity determination.

Dated, Washington, D.C.
December 1, 1999

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member