U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VENA LEE VAIRD and DEPARTMENT OF THE NAVY, CHARLESTON NAVAL SHIPYARD, Charleston, S.C.

Docket No. 97-254; Submitted on the Record;
Issued February 12, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, BRADLEY T. KNOTT

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained greater than a 29 percent permanent impairment of the right upper extremity, for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly reduced appellant's wage-loss compensation effective May 29, 1996 based on his ability to perform the selected position of full-time automobile service writer/estimator.

The Office accepted that on June 14, 1989 appellant, then a 44-year-old pipefitter, sustained a ruptured biceps tendon while lifting a basket out of a strainer. Dr. Gerald Shealy, an attending Board-certified orthopedic surgeon, repaired the "ruptured long head of the biceps tendon of [the] right upper extremity on June 19, 1989." Appellant returned to limited duty on June 27, 1989 with restrictions against using his right arm.[1]

In a January 9, 1990 report, Dr. Shealy noted that appellant's right biceps strength was progressing well, but that he showed signs of right carpal tunnel syndrome.[2] The Office conducted further development, obtaining a May 15, 1990 second opinion report from Dr. Howard L. Brilliant, a Board-certified orthopedic surgeon, who opined that appellant's carpal tunnel symptoms were unrelated to the June 14, 1989 right shoulder injury. Dr. Shealy responded in June 19, 1990 reports, stating that appellant did not have a history of carpal tunnel syndrome prior to the June 1989 injury, that the injury was likely to have caused the carpal tunnel syndrome and that the condition required surgical intervention. By decision dated

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[1] Appellant's preinjury position required heavy manual labor with lifting up to 50 pounds. Appellant submitted physical therapy notes from August 1989 to October 1991.

[2] January 29 and February 14, 1990 nerve conduction velocity and electromyography studies showed delays in motor and sensory median conduction at the wrist indicating carpal tunnel syndrome, worse on the right than the left, without evidence of paraspinal abnormalities or radiculopathy.

July 12, 1990, the Office denied appellant's claim for right carpal tunnel syndrome, based on a lack of medical evidence demonstrating causal relationship.

On June 6, 1991 appellant claimed a schedule award,[3] based on a January 10, 1991 evaluation by Dr. Shealy. Dr. Shealy noted:

> "[Appellant's] right biceps was noted to be 55 percent of his left biceps strength.
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> "Range of motion of the right wrist measures: extension 50 degrees; flexion 40 degrees; radial deviation is 20 degrees; and ulnar deviation is 30 degrees. Pronation and supination are normal. Extension of the elbow is 0 and flexion is 130 degrees. Range of motion of the shoulder measures: extension 20 degrees; flexion 120 degrees; abduction is 15 degrees; internal rotation is 50 degrees; and external rotation is 75 degrees. Two point discrimination in the hand is measured to be less than six mm [millimeter]. Grip strength in the right hand is 24 kg [killigrams] v[ersu]s. 54 kg in the left hand.
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> "Based on this evaluation and utilizing the A[merican] M[edical] A[ssociation], *Guides to the Evaluation of Permanent Impairment*, [hereinafter, the A.M.A., *Guides*] … [appellant] has a 20 percent impairment of his dominant right upper extremity secondary to loss of strength in his biceps muscle … based on Table 23, upper extremity impairment for loss of strength in the third edition of the A.M.A., *Guides.* In addition, he has a 7 percent impairment of his right shoulder secondary to loss of motion, specifically, abduction, internal rotation and flexion."[4]

In an August 30, 1991 report, an Office medical adviser reviewed Dr. Shealy's January 10, 1991 evaluation and opined that it indicated a 29 percent permanent impairment of the right upper extremity.

By decision dated September 12, 1991, the Office awarded appellant a schedule award for a 29 percent permanent impairment of the right upper extremity.[5]

Dr. Shealy submitted progress notes dated May 1992 to March 1994, noting swelling, pain and weakness in the right upper extremity, with some relief from anti-inflammatory injections. He continued to prescribe work restrictions related to the right arm from July to October 1994.[6]

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[3] Appellant submitted a request for reconsideration received by the Office on June 17, 1991. It is not clear from appellant's request which issue he wanted reconsidered or what action the Office pursued regarding this request.

[4] Dr. Shealy submitted progress notes dated November 1990 through June 1991 noting right upper extremity pain and weakness, with tenderness in the shoulder, wrist and forearm.

[5] The period of the award ran from January 10, 1991 to October 4, 1992, equivalent to 90.48 weeks of compensation at $429.56 per week.

[6] Appellant participated in physical therapy from April 29, 1994 through 1996.

On November 3, 1994 appellant claimed a November 11, 1994[7] recurrence of disability following his June 26, 1989 return to light duty. The employing establishment stated that on January 3, 1994 appellant was placed on permanent medical restrictions, such that the employing establishment could "no longer provide work because he cannot perform his duties as pipefitter." Appellant's case was placed on the periodic rolls effective November 11, 1994.[8] The Office referred appellant for vocational rehabilitation services on March 10, 1995.[9]

In a March 30, 1995 report, Dr. Shealy stated that appellant had a permanent impairment of the his right upper extremity "secondary to rupture of his biceps tendon as well as residual median neuropathy following carpal tunnel surgery."[10] On August 30, 1995 he performed "arthroscopy, repair of rotator cuff and acromioplasty, right shoulder" to treat chronic impingement syndrome.

In a March 5, 1996 report, Dr. Shealy found that appellant had reached maximum medical improvement after right shoulder surgery and was discharged from care. Dr. Shealy noted range of motion in the right shoulder of 25 degrees extension, "flexion 95 degrees, abduction 100 degrees, internal rotation 30 degrees and external rotation 65 degrees." Referring to the A.M.A., *Guides*, Dr. Shealy found an "11 percent permanent residual impairment of his dominant right shoulder secondary to the injury he has sustained." He noted permanent restrictions against lifting over 10 pounds, overhead or repetitive usage of the right arm.[11] Appellant subsequently claimed a schedule award, alleging an increase over the 29 percent permanent impairment previously awarded.

On May 29, 1996 appellant accepted employment as an automotive service writer/ estimator at Montgomery Ward Auto Express.[12] In a May 31, 1996 meeting with Mr. Steven A. Yuhas, his vocational rehabilitation counselor, appellant "reported that the position is within his assigned work restrictions (primarily walking/standing and lifting no more than 10 pounds)," with clerical duties related to preparing itemized work orders, estimating repair costs and quoting prices to customers. "His employer is aware of his restrictions regarding his shoulder." Appellant told Mr. Yuhas that he would work 40 hours per week, at $5.00 an hour." However, in

[7] In an October 31, 1994 letter, the employing establishment advised appellant that he would be separated from the employing establishment due to his medical disability effective November 11, 1994.

[8] Dr. Shealy submitted progress notes dated May 4, 1994 to February 2, 1995, noting appellant's persistent right shoulder symptoms, somewhat relieved with subacromial injections.

[9] Appellant participated in vocational rehabilitation and remedial training through May 1996. The employing establishment closed on April 1, 1996.

[10] Dr. Shealy noted right shoulder range of motion as follows: "extension 52 degrees; flexion 130 degrees; abduction 126 degrees; internal rotation 62 degrees; and external rotation 78 degrees. Based on this evaluation and utilizing the fourth edition of the A.M.A., *Guides*, … [appellant] has a six percent impairment of his dominant right shoulder secondary to his persistent symptoms."

[11] In an April 18, 1996 report, Dr. Shealy noted that appellant was "unable to perform present occupation if no light duty available."

[12] U.S. Department of Labor, *Dictionary of Occupational Titles*, #620.261-018.

a June 28, 1996 letter, appellant stated that he worked only 30 to 33 hours per week, earning $4.25 per hour, not $5.00. He attached a pay stub for the period June 16 to 22, 1996 showing 31.4 hours worked.

In a May 30, 1996 letter, the Office noted that appellant had been reemployed full time as of May 29, 1996 as a service writer/estimator at Montgomery Ward, earning $5.00 per hour.

In a July 15, 1996 letter, the Office advised appellant that he had informed Mr. Yuhas on May 29 and 31, 1996 that he accepted employment as an automobile repair service writer, working 40 hours per week at $5.00 per hour. However, appellant worked only 30 to 33 hours per week at $4.25 per hour. The Office requested a confirmation letter from his employer regarding appellant's wages and hours per week. The Office noted that if appellant was "hired to work less than 40 hours, this job does not reasonably and fairly represent your wage-earning capacity, when the medical evidence indicates that you're capable of working 40 hours.… [T]here are … service writer [positions] available in your commuting area for 40 hours per week at $200.00 per week. Regardless, your wage-earning capacity will be based on a 40-hour work week."

By decision dated July 22, 1996, the Office denied appellant's claim for an increased schedule award on the grounds that the evidence submitted failed to demonstrate an additional impairment of the right arm. The Office found that Dr. Shealy's March 5, 1996 schedule award calculation of an 11 percent permanent impairment of the right shoulder, confirmed by the Office medical adviser, "resulted in a percentage which is less than the original award."

In a July 30, 1996 report, Mr. Yuhas noted that appellant's case was in closed status. Mr. Yuhas stated that on June 28, 1996 appellant reported working "an average of 33 to 36 hours per week, although he anticipated working 40 hours per week." The position remained open as of June 28, 1996, within appellant's work restrictions. "According to previous information provided … by [appellant], he earned $5.00 per hour, 40 hours per week."

In a July 31, 1996 rehabilitation status report, an Office rehabilitation specialist noted that the position of service writer was reasonably available in appellant's area, with entry level positions paying $5.00 per hour. "In addition [Mr. Yuhas] … reconfirmed that" appellant was qualified to perform other full-time jobs paying $5.00 per hour." The Office concluded that although appellant "report[e]d that he is only work[ing] part time, earning $4.25 per hour, it has been established that he is capable of working full time, earning capacity of $5.00 per hour."

By decision dated August 5, 1996, the Office reduced appellant's wage-loss compensation benefits effective May 29, 1996, based on his ability to perform the full-time position of service writer/estimator, with wages of $200.00 per week. The Office noted a weekly pay rate in the date-of-injury position of $657.90, with an adjusted earning capacity per week in that position of $190.79, resulting in a loss of wage-earning capacity of $467.11 per week. Multiplying this loss of wage-earning capacity by the 75 percent compensation rate resulted in $350.33, increased by appropriate cost-of-living increases to $359.00. Appellant's new compensation rate each four weeks was $1,436.00, or $1,314.30 after insurance deductions.

Regarding the first issue, the Board finds that appellant has not established that he sustained greater than a 29 percent permanent impairment of the right upper extremity, for which he received a schedule award.

Section 8107 of the Federal Employees' Compensation Act[13] and section 10.304 of the implementing regulations[14] provide that schedule awards are payable for permanent impairment of specified body members, functions or organs, but do not specify how to determine the percentage of impairment. Therefore, the Office has adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoptions.[15] 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 on life activities and determine the date of maximum medical improvement.[16] When the effect of impairment is loss of motion of the shoulder, the physician must provide measurements for three functional units of motion: flexion and extension, representing 50 percent of shoulder function; abduction and adduction, representing 30 percent of shoulder function; and internal rotation and external rotation, representing 20 percent of shoulder function.[17] These values are then compared to the percentages of impairment provided in the A.M.A., *Guides* for loss of flexion, extension, abduction, adduction or rotation.[18] The percentages of impairment are then combined according to the appropriate formula provided in the A.M.A., *Guides.* Proper use of the A.M.A., *Guides* ensures consistent results and equal justice for all claimants.

Appellant claimed that Dr. Shealy's March 5, 1996 evaluation substantiated a percentage of impairment greater than the 29 percent permanent impairment reflected in his January 10, 1991 report. Compared to the January 10, 1991 report, the March 5, 1996 report reflects an increase of 5 degrees extension, loss of 25 degrees flexion, increase of 85 degrees abduction, loss of 20 degrees internal rotation, and loss of 10 degrees external rotation. The Board notes that, in his January 10, 1991 report, Dr. Shealy found impairment due to loss of strength, but did not find an impairment due to weakness in his March 5, 1996 report. As the Office found in its July 22, 1996 decision denying appellant's claim for an increased schedule award, Dr. Shealy's March 5, 1996 report indicates that appellant's right shoulder improved since January 10, 1991, reflecting a lessened degree of impairment. Consequently, appellant did not meet his burden of proof in establishing that he sustained greater than a 29 percent permanent impairment of the right upper extremity, for which he received a schedule award.

Regarding the second issue, the Board finds that the Office improperly reduced appellant's compensation benefits.

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[13] 5 U.S.C. § 8107.

[14] 20 C.F.R. § 10.304.

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

[16] A.M.A., *Guides*, 9.

[17] A.M.A., *Guides*, 34.

[18] A.M.A., *Guides*, figures 36 to 44.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.[19] Section 8115(a) of the Act provides that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.[20] In this case, the Office used the selected position of full-time service writer/estimator, although appellant was only working as a part-time service writer/estimator.

The Office appears to have based its August 5, 1996 decision reducing appellant's compensation on appellant working 40 hours per week. However, the Office was well aware that appellant was working less than 40 hours per week. In a June 28, 1996 letter, appellant advised that he worked only 30 to 33 hours per week and included a pay stub for the period June 16 to 22, 1996 showing 31.4 hours worked. The Office noted in a July 15, 1996 letter that appellant was working between 30 and 33 hours per week, but that his "wage-earning capacity would be based on a 40-hour work week." Also, an Office rehabilitation specialist noted in a July 31, 1996 report that appellant was working less than 40 hours per week. Thus, the Office based its August 5, 1996 wage-earning capacity decision on an incorrect high salary.

Moreover, the Office did not provide appellant proper notice of the reduction in compensation. Office procedures in effect at the time of the August 5, 1996 decision provide that a claimant will be given 30 days' "prereduction notice" of the wage-earning capacity determination before a compensation reduction.[21] These procedures provide that such notice, in a loss of wage-earning capacity situation, should contain the title, description, and requirements of the selected position, and the computation of the proposed reduction of compensation. In this case, the Office did not provide appellant such advance notice. The Office's May 30, 1996 letter could not serve as a preliminary notice as that letter did not inform appellant of the computation of the proposed reduction of compensation. The Office's July 15, 1996 letter, although it mentioned that appellant's new compensation rate would be based on the full-time service writer position, could not serve as preliminary notice as it was sent less than 30 days prior to the Office's August 5, 1996 decision reducing his compensation. Therefore, appellant was not afforded an opportunity to present additional argument or evidence supporting continued partial disability before his compensation was reduced. Instead, the Office's August 5, 1996 decision reduced compensation, effective May 29, 1996, without prior notice.

[19] *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

[20] *Pope D. Cox*, 39 ECAB 143, 148 (1988); *see* 5 U.S.C. § 8115(a).

[21] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.13(d) (December 1993).

Consequently, the Office's August 5, 1996 reduction of compensation, viewed as a wage-earning capacity determination, was improper.[22]

The decision of the Office of Workers' Compensation Programs dated August 5, 1996 is hereby reversed; the decision of the Office dated July 22, 1996 is hereby affirmed.

Dated, Washington, D.C.
February 12, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[22] *David W. Green*, 43 ECAB 883 (1992).