

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT C. MORRIS and U.S. POSTAL SERVICE,
POST OFFICE, Fort Worth, Tex.

*Docket No. 96-1928; Submitted on the Record;
Issued January 4, 1999*

DECISION and ORDER

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

The issues are: (1) whether appellant has more than 10 percent permanent impairment of his left lower extremity for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant's limited-duty position of mail processor represented his wage-earning capacity.

The Board has duly reviewed the case on appeal and finds that appellant has no more than 10 percent permanent impairment of his left lower extremity for which he received a schedule award.

Appellant, a mail processor, filed a claim on May 14, 1994 alleging that he injured his lower back and left leg in the performance of duty. The Office accepted appellant's claim for lumbar and left hip strain. The Office also authorized a partial lumbar laminectomy on October 4, 1994. Appellant requested a schedule award on October 15, 1995. The Office granted appellant a schedule award for a 10 percent permanent impairment of his left lower extremity on February 5, 1996.

Section 8107 of the Federal Employees' Compensation Act¹ 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. 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 American Medical Association, *Guides to*

¹ 5 U.S.C. §§ 8101-8193, 8107.

*the Evaluation of Permanent Impairment*² as a standard for evaluating schedule losses and the Board has concurred in such adoption.³

In a report dated April 29, 1994, appellant's attending physician, Dr. Myron L. Glickfeld, an osteopath, noted that appellant complained of pain radiating down into his left leg with numbness and tingling. He noted that appellant underwent a partial laminectomy at L3-4 and L4-5 with removal of the completely herniated fourth lumbar intervertebral disc. A magnetic resonance imaging (MRI) scan that was done on March 10, 1995 demonstrated a large extradural defect at L4-5 diagnosed as a recurrent disc injury. Appellant elected not to undergo a second surgery. Dr. Glickfeld found gait asymmetry with a limp in the left lower extremity. He found that appellant had diminished strength in the L5 distribution as reflected by great toe extension. Dr. Glickfeld applied the A.M.A., *Guides* and found appellant had 9.2 percent impairment of the left lower extremity. Neurologic testing revealed 25 percent deficit in the L5 distribution. Dr. Glickfeld applied the A.M.A., *Guides* and found a 1.25 percent impairment of the lower extremity. He provided appellant's range of motion for his spine and found that appellant's straight leg raising was diminished on the left to 36 degrees and on the right, 57 degrees. Dr. Glickfeld found that appellant reached maximum medical improvement on September 27, 1995 and concluded that appellant had an 18 percent impairment of the whole person including a 14 percent impairment of the spine.

The Office referred appellant's claim to the district medical adviser. The district medical adviser found that Dr. Glickfeld had properly calculated appellant's loss of sensation due to the L5 nerve root as one percent.⁴ He also concluded that appellant had a nine percent impairment due to loss of strength as noted by Dr. Glickfeld.⁵ However, as the remainder of Dr. Glickfeld's report addressed impairment of appellant's spine, the district medical director properly did not consider these impairments in reaching appellant's impairment rating. A schedule award is not payable for a member, function or organ of the body not specified in the Act or in the implementing regulations. As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back, no claimant is entitled to such an award.⁶

As there is no medical evidence in accordance with the Act, establishing that appellant has more than a 10 percent permanent impairment of his left lower extremity, the Office properly granted him a schedule award for 10 percent loss of use of his left lower extremity.

The Board further finds that the limited-duty position of mail processor represents appellant's wage-earning capacity.

² A.M.A., *Guides* (4th ed. 1993).

³ A. *George Lampo*, 45 ECAB 441, 443 (1994).

⁴ A.M.A., *Guides*, 130, Table 83; 48, Table 11.

⁵ A.M.A., *Guides*, 130, Table 83; 49, Table 12.

⁶ *George E. Williams*, 44 ECAB 530, 533 (1993).

The Office entered appellant on the periodic rolls on September 13, 1994. Dr. Glickfeld released appellant to return to limited duty four hours a day on June 17, 1995. Appellant returned to work for four hours a day on August 2, 1995. On September 25, 1995, the employing establishment offered appellant a limited duty position of mail processor, working six hours a day. Appellant accepted this position on September 27, 1995. On November 3, 1995 Dr. Glickfeld found appellant had reached maximum medical improvement and released him to return to work eight hours a day. Appellant returned to work on November 4, 1995 working eight hours a day and earning \$34,746.00 per year. By decision dated January 31, 1996, the Office found that the position of limited-duty mail processor fairly and reasonably represented appellant's wage-earning capacity. The Office terminated appellant's compensation benefits in accordance with section 8115 of the Act finding that appellant's actual wages met or exceeded those of his date-of-injury position.

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 limited-duty mail processor from November 4, 1995 through January 31, 1996. Appellant's performance of this position for 60

⁷ 5 U.S.C. § 8115.

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

days 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

Therefore, the Office properly found that appellant had no loss of wage-earning capacity and terminated his compensation benefits.¹⁰

The decisions of the Office of Workers' Compensation Programs dated February 5 and January 31, 1996 are hereby affirmed.

Dated, Washington, D.C.
January 4, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

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

¹⁰ Appellant earned \$34,413.00 per year in his date-of-injury position and received \$34,746.00 in his limited-duty position.