

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of RALPH WHITE, SR. and DEPARTMENT OF THE NAVY,  
NORFOLK NAVAL SHIPYARD, Portsmouth, Va.

*Docket No. 96-2404; Submitted on the Record;  
Issued March 1, 1999*

---

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether appellant sustained greater than a 12.5 percent permanent impairment of the right upper extremity and a 12.5 percent permanent impairment of the left upper extremity for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly adjusted appellant's compensation benefits based on the selected position of sales clerk.

On February 18, 1994 appellant, then a 49-year-old electrician, sustained a ruptured cervical disc and herniated nucleus pulposus at C5-6 when he fell from a ladder. He underwent a cervical discectomy on April 12, 1994.

In a letter dated March 28, 1995, Dr. Alfred P. Magness, II, a Board-certified neurosurgeon, stated that appellant should be permanently restricted to light-duty work with no lifting over 20 pounds and no bending.

An electromyography report dated July 11, 1995, indicated that appellant had bilateral ulnar neuropathies but no evidence of any active cervical radiculopathies on either side.

In a form report dated August 1, 1995, Dr. Magness indicated that as of March 28, 1995 appellant had permanent work restrictions of no bending and no lifting over 20 pounds. He stated that when appellant returned to his office on July 20, 1995 he was deemed totally disabled through at least August 31, 1995.

In a report dated August 30, 1995, Dr. Magness related that he first treated appellant in November 1991 for a ruptured cervical disc sustained in a motor vehicle accident on November 2, 1991. He related that appellant returned to regular work on March 3, 1992. Dr. Magness related that appellant was seen on September 7, 1993 for a left ulnar neuropathy, underwent surgery on September 23, 1993, and returned to regular work on December 2, 1993 with mild residual symptoms. He related that appellant sustained a disc herniation on

February 18, 1994 when he fell from a ladder and underwent surgery on April 12, 1994. Dr. Magness stated that appellant continued to have complaints of pain in his neck and low back and he did not make a full recovery. He stated that appellant was able to perform light-duty work with no lifting over 20 pounds.

By letter dated September 19, 1995, the Office advised appellant that he had been assigned a rehabilitation counselor and had been placed on the short-term compensation rolls effective June 1, 1995 to receive compensation benefits for temporary total disability.

On December 1, 1995 appellant filed a claim for a schedule award.

In a form report dated December 13, 1995, Dr. Magness diagnosed a “ruptured cervical disc [at] C5-6...work related” and “right ulnar neuropathy - not work related.” He noted that as of March 28, 1995, appellant had been given permanent light-duty restrictions of no lifting over 20 pounds and no bending. Dr. Magness stated that as of July 20, 1995 appellant had become totally disabled and would remain so until three to four months after his ulnar nerve surgery.

In a report dated December 27, 1995, a vocational rehabilitation specialist provided an educational history and work history for appellant and noted his work restrictions as set forth by Dr. Magness. The rehabilitation specialist provided a summary of testing results regarding appellant’s aptitudes and skills.

In a vocational rehabilitation report dated December 31, 1995, the vocational rehabilitation counselor provided appellant’s educational and job history and noted the permanent work restrictions provided by Dr. Magness in his March 28, 1995 report.

In notes dated January 16, 1996, Dr. Magness related that appellant returned for removal of his surgical clips from his ulnar nerve surgery.<sup>1</sup>

By letter dated January 22, 1996, the Office asked appellant to have his treating physician provide a report explaining whether he had any permanent impairment to either upper extremity as a result of his employment-related ruptured cervical disc at C5-6 with references to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed. 1993) (A.M.A., *Guides*).

In a report dated January 31, 1996, appellant’s rehabilitation counselor indicated that the job search for appellant would focus on the positions of sales clerk, cashier-checker, and hotel clerk and that recent contact with several employers revealed that these positions were available in appellant’s community in sufficient number and were all light-duty positions within appellant’s work restrictions.

By letter dated February 6, 1996, Dr. Magness advised the Office that appellant had a nine percent permanent impairment of the whole person with respect to his cervical disc herniation, based upon the A.M.A., *Guides*. He stated that this rating was based on Table 45 at

---

<sup>1</sup> Apparently the ulnar nerve surgery was performed in December 1995 or January 1996.

page 113 of the fourth edition of the A.M.A., *Guides*<sup>2</sup> and that the nerve root involved was the C6 root bilaterally.

In a report dated February 28, 1996, an Office loss of wage-earning capacity specialist provided a job description for the position of sales clerk, a light-duty position, which included obtaining and receiving merchandise, totalling bills, accepting payment, and making change for customers in a retail store; stocking shelves, counters, or tables with merchandise; setting up advertising displays or arranging merchandise to promote sales; stamping, marking, or tagging merchandise with prices; and answering customers questions. The specialist noted that the position of sales clerk paid weekly wages of \$210.00 and was being performed in sufficient numbers so as to make it reasonably available to appellant within his commuting area. The specialist also computed appellant's loss of wage-earning capacity based upon the sales clerk position.

In a memorandum dated March 2, 1995, the district medical adviser stated that, based upon Dr. Magness' February 6, 1996 report, appellant had a 25 percent permanent impairment due to his C6 disc condition according to Table 13 at page 51 and Table 20 at page 151 of the A.M.A., *Guides*, including a 6 percent impairment due to sensory deficit and a 20 percent impairment due to motor deficit. He stated that both upper extremities were involved as appellant had a central disc herniation and therefore the 25 percent permanent impairment should be awarded as a 12.5 percent impairment of the left upper extremity and a 12.5 percent impairment of the right upper extremity.

By letter dated March 5, 1996, the Office advised appellant that it had reviewed the job search plan developed by appellant's rehabilitation counselor and had determined that the position of sales clerk was within his work restrictions as provided by Dr. Magness in his March 28, 1995 report.

By decision dated April 3, 1996, the Office granted appellant a schedule award based upon a 12.5 percent permanent impairment of the right upper extremity and a 12.5 percent permanent impairment of the left upper extremity.

By letter dated May 2, 1996, the Office provided appellant with a notice of proposed reduction of compensation benefits based upon his wage-earning capacity as a sales clerk and advised appellant to submit additional evidence or argument if he disagreed with the proposed reduction of compensation.

In a report dated May 14, 1996, Dr. Magness related that appellant had complaints of pain in his neck as well as complaints of pain in his incisions from his ulnar nerve surgery but appeared to have good strength neurologically.

By decision dated June 4, 1996, the Office reduced appellant's compensation benefits based upon his wage-earning capacity as a sales clerk.

---

<sup>2</sup> It appears that Dr. Magness meant to cite Table 75 rather than Table 45 as there is no Table 45 on page 113. Table 75 at page 113 of the A.M.A., *Guides* is the table which addresses whole person impairment due to specific spine disorders.

By letter dated June 7, 1996, appellant stated that he wished to have his medical record updated to reflect that he was permanently partially disabled. In another letter also dated June 7, 1996, appellant requested reconsideration but he did not indicate which Office decision he was appealing. He stated that he experienced pain and discomfort when lifting, reaching, bending, standing, or sitting.

In a letter dated June 24, 1996, appellant requested reconsideration concerning his “permanent partial disability.”

By decision dated July 8, 1996, the Office denied appellant’s request for review of the Office’s April 3, 1996 schedule award decision.<sup>3</sup>

The Board finds that this case is not in posture for a decision as to the issue of appellant’s schedule award.

An employee seeking compensation under the Federal Employees’ Compensation Act<sup>4</sup> has the burden of establishing the essential elements of his claim by the weight of the reliable, probative, and substantial evidence,<sup>5</sup> including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.<sup>6</sup>

Section 8107 of the Act provides that if there is permanent disability involving the loss of loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of specifies members, functions, or organs of the body.<sup>7</sup> 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 A.M.A., *Guides* as a standard for evaluating schedule losses and the Board has concurred in such adoption.<sup>8</sup>

Before the A.M.A., *Guides* may be utilized, a description of appellant’s impairment must be obtained which is in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.<sup>9</sup> In this case, the Office obtained such a description from Dr. Magness, appellant’s attending Board-certified neurosurgeon, and the Office medical adviser used the information provided in

---

<sup>3</sup> The Board notes that additional evidence was submitted to the Office subsequent to its April 3, June 4 and July 8, 1996 decisions, and therefore the Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathanial Milton*, 37 ECAB 712, 722 (1986).

<sup>6</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>7</sup> 5 U.S.C. § 8107(a).

<sup>8</sup> *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

<sup>9</sup> *Roel Santos*, 41 ECAB 1001, 1005 (1990).

Dr. Magness's February 6, 1996 report to evaluate appellant's impairment according to the A.M.A., *Guides*.<sup>10</sup> In a memorandum dated March 2, 1995, the Office medical adviser stated that appellant had a 25 percent combined permanent impairment due to a C-6 condition according to Table 13 at page 51 and Table 20 at page 151 of the A.M.A., *Guides*, including a 6 percent sensory impairment and a 20 percent motor impairment.<sup>11</sup> However, the Office medical adviser did not provide a complete explanation as to how he arrived at the percentage of impairment. He did not provide the specific grades that he selected for the degree of sensory and motor impairment in the Tables on page 151 and the Board is unable to determine how he arrived at the six percent sensory impairment and the 20 percent impairment. As this case does not contain a medical opinion as to the degree of appellant's permanent impairment which is based upon a complete and accurate application of the A.M.A., *Guides*, this case must be remanded for further development.

The Board further finds that the Office properly adjusted appellant's compensation benefits based upon his wage-earning capacity as a sales clerk.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>12</sup>

Under section 8115(a) of the Federal Employees' Compensation Act,<sup>13</sup> wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her 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.<sup>14</sup>

In this case, in accordance with its procedures, the Office selected the position of sales clerk as representing appellant's wage-earning capacity. In a letter dated March 28, 1995, Dr. Magness stated that appellant should be permanently restricted to light-duty work with no lifting over 20 pounds and no bending. In reports dated December 27 and 31, 1995, a vocational rehabilitation specialist provided an educational history and work history for appellant and noted his work restrictions as set forth by Dr. Magness. The rehabilitation specialist also provided a

---

<sup>10</sup> The Board notes that Dr. Magness opined in his February 6, 1996 report that appellant had a nine percent impairment of the whole person. However, a schedule award is not payable under section 8107 of the Act for an impairment of the whole person; *see Gordon G. McNeil*, 42 ECAB 140, 145 (1990).

<sup>11</sup> In a March 9, 1996 memorandum, the Office medical adviser indicated that the 25 percent impairment should be awarded as a 12.5 percent impairment of the left upper extremity and a 12.5 percent impairment of the right upper extremity.

<sup>12</sup> *Bettye F. Wade*, 37 ECAB 556 (1986); *Ella Garner*, 36 ECAB 238 (1984).

<sup>13</sup> 5 U.S.C. § 8115(a).

<sup>14</sup> *Pope D. Cox*, 39 ECAB 143 (1988); *see* 5 U.S.C. § 8115(a).

summary of testing results regarding appellant's aptitudes and skills. In a report dated February 28, 1996, an Office loss of wage-earning capacity specialist provided a job description for the position of sales clerk, a light-duty position, which included obtaining and receiving merchandise, totalling bills, accepting payment, and making change for customers in a retail store; stocking shelves, counters, or tables with merchandise; setting up advertising displays or arranging merchandise to promote sales; stamping, marking, or tagging merchandise with prices; and answering customers questions. The specialist noted that the position of sales clerk paid weekly wages of \$210.00 and was being performed in sufficient numbers so as to make it reasonably available to appellant within his commuting area. The specialist also computed appellant's loss of wage-earning capacity based upon the sales clerk position.

The record indicates that the selected position of sales clerk was within appellant's physical limitations and vocational ability and was reasonably available in the labor market. The Office considered the factors set forth in section 8115, in determining that appellant's wage-earning capacity was represented by the position of sales clerk and properly reduced his compensation benefits to reflect his wage-earning capacity.

The July 8 and April 3, 1996 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further action consistent with this decision of the Board. The June 4, 1996 decision is hereby affirmed.

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

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member