U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH K. APPLEGATE and U.S. POSTAL SERVICE,
BLYTHE POST OFFICE, Fresno, Calif.

Docket No. 97-2316; Submitted on the Record;
Issued May 3, 1999

DECISION and ORDER

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

The issues are whether appellant established her entitlement to more than the 4 and 14 percent schedule awards she received for permanent partial impairment of her left and right legs and whether the Office of Workers' Compensation Programs properly determined that appellant had a 0 percent loss of wage-earning capacity.

The Board has carefully reviewed the case record and finds that appellant has failed to meet her burden of proof in establishing entitlement to greater schedule awards and that the Office met its burden of proof in reducing appellant's compensation to zero, based on her wage-earning capacity.

Under section 8107 of the Federal Employees' Compensation Act[1] and section 10.304 of the implementing federal regulations,[2] schedule awards are payable for the permanent impairment of specified bodily members, functions and organs. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[3]

However, no schedule award is payable for a member, function or organ of the body not specified in the Act or in the regulations.[4] This principle applies to body members that are not

---

[1] 5 U.S.C. § 8101 *et seq.*; 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.304.

[3] 5 U.S.C. § 8107(c)(19).

[4] *William Edwin Muir*, 27 ECAB 579, 581 (1976); *see Terry E. Mills*, 47 ECAB 309, 312 (1996) (listing the members and organs of the body for which the loss or loss of use is compensable under the schedule award provisions).

enumerated in the schedule award provision before the 1974 amendment[5] as well as to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment.[6] Thus, because spinal injuries are not listed in the compensation schedule, no award may be issued for permanent impairment of the back.

In 1960 amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Thus, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.[7]

However, neither the Act nor the regulations specify the method by which the percentage of impairment shall be determined.[8] The method used in making such determinations rests in the sound discretion of the Office.[9] For consistent results and to ensure equal justice for all claimants, the Office has adopted, and the Board has approved, the use of the appropriate edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) as the uniform standard applicable to all claimants for determining the percentage of permanent impairment.[10]

Once the Office has accepted a claim and paid compensation benefits, it has the burden of proof to establish that an employee's disability has ceased or lessened, thus justifying termination or modification of those benefits.[11] An injured employee who is unable to return to the position held at the time of injury or to earn equivalent wages but who is not totally disabled for all gainful employment is entitled to compensation computed on the loss of wage-earning capacity.[12]

Wage-earning capacity is the measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[13] Section 8106(a)[14] of the Act provides for compensation for the loss of wage-earning capacity during an employee's disability by paying

---

[5] The Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

[6] *John F. Critz*, 44 ECAB 788, 792-93 (1993) (brain disorder); *Ted W. Dietderich*, 40 ECAB 963, 965 (1989) (gallbladder); *Thomas E. Stubbs*, 40 ECAB 647, 649 (1989) (spleen).

[7] *Rozella L. Skinner*, 37 ECAB 398, 402 (1986).

[8] *A. George Lampo*, 45 ECAB 441, 443 (1994).

[9] *George E. Williams*, 44 ECAB 530, 532 (1993).

[10] *James J. Hjort*, 45 ECAB 595, 599 (1994).

[11] *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157, 170 (1992).

[12] 20 C.F.R. § 10.303(a); *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

[13] *Dennis D. Owen*, 44 ECAB 475, 479 (1993); *Hattie Drummond*, 39 ECAB 904, 907 (1988).

[14] 5 U.S.C. § 8106(a).

the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability.[15] Section 8115 provides that the wage-earning capacity of an employee is determined by his actual earnings if these fairly and reasonably represent his or her wage-earning capacity.[16]

In this case, the Office accepted appellant's notice of traumatic injury filed on January 25, 1995 after she was rear ended while driving a mail delivery vehicle, for cervical and lumbar strains, chest wall contusion, and concussion and postsyndrome concussion. Appellant returned to part-time light duty and later full time with restrictions.

On October 29, 1996 appellant accepted a modified job offer from the employing establishment, which Dr. Jeryl J. Wiens, her treating physician, had approved as within her physical restrictions. On April 3, 1997 the Office determined that the modified rural carrier position fairly and reasonably represented appellant's wage-earning capacity and thus she was not entitled to further wage-loss compensation.

Subsequently, appellant applied for a schedule award. The Office referred the medical record to the Office medical adviser and, based on his review, issued schedule awards for 4 and 14 percent loss of use of appellant's left and right legs, respectively. The $21,748.56 total award ran from December 22, 1995 to December 18, 1996.

The Board finds that the medical evidence supports the impairment ratings determined by the Office medical adviser. He reviewed all the reports of Dr. Wiens, Board-certified in physical medicine and rehabilitation, from June 1995 through April 24, 1997 and the diagnostic studies, including x-rays, a bone scan and nerve conduction tests. He related that physical examination found no loss of motion of the lower extremities, for zero percent impairment and no atrophy or weakness or nerve root impingement.

Thus, the Office medical adviser used the sciatic nerve as the basis of appellant's pain, based on Dr. Wiens' diagnosis of lumbosacral and sacroiliac dysfunction, and applied Table 68, page 89 of the 4th edition of the A.M.A., *Guides* to find a maximal 17 percent impairment for sensory deficit. Based on appellant's complaints of severe pain into her right leg, the Office medical adviser found a maximal grade IV impairment or 80 percent, representing pain that prevented certain activities, which calculated out to a 13.6 percent rating for pain factors, rounded up to 14 percent.

Because appellant complained only of "some numbness" in her left thigh, the Office medical adviser found a grade II impairment or 25 percent of a maximal 17 percent for the sciatic nerve, which calculated to a 4 percent rating. Noting the lack of documentation for any

[15] An employee's wage-earning capacity in terms of percentage is obtained by dividing the pay rate of the selected position by the current pay rate for the date-of-injury job; the wage-earning capacity in terms of dollars is computed by multiplying the pay rate for compensation purposes, as defined at 20 C.F.R. § 10.5(a)(20), by the percentage of wage-earning capacity and subtracting the result from the pay rate for compensation purposes to obtain the employee's loss of wage-earning capacity. 20 C.F.R. § 10.303(b).

[16] 5 U.S.C. § 8115(a); *Lawrence D. Price*, 47 ECAB 120 (1995).

loss of motion or atrophy, the Office medical adviser agreed with Dr. Wiens' date of maximum medical improvement of December 21, 1995 and added that both awards represented the permanent partial impairment of both legs due to appellant's back condition and did not constitute a whole person or back award.

Appellant argues on appeal that she was never examined by a physician to obtain an impairment rating and that Dr. Wiens found a 50 percent loss of use of her back. However, a separate physical examination to determine a schedule award is not necessary when there is medical evidence in the case record upon which to base a rating.[17]

Moreover, the Act does not provide schedule awards for impairment of the back itself but only for impairment of the upper or lower extremities, which may be caused by lumbar or cervical conditions.[18] Therefore, the Board finds that the Office medical adviser properly determined impairment ratings for appellant's lower extremities.[19]

The Board also finds that the Office properly calculated appellant's wage-earning capacity. Dr. Wiens found appellant's condition to be permanent and stationary on December 21, 1995 and suggested a permanent impairment evaluation. Dr. Donald L. Hager, a Board-certified orthopedic surgeon, to whom the Office referred appellant, imposed a repetitive lifting restriction of 20 pounds and stated that appellant could not return to the "strenuous" duties of a rural mail carrier.

The employing establishment prepared a modified job offer in line with Dr. Wiens' reports -- appellant could work 8 hours a day, sit, stand and walk up to 4 hours, lift up to 10 pounds intermittently, drive a vehicle, reach above the shoulder, and push and pull, twist, bend and knee up to 2 hours. Dr. Wiens approved the job offer and appellant accepted it on October 29, 1996.

Appellant had returned to work full time in this position on February 22, 1966, earning $19.84 an hour. On the date of injury, appellant was a casual/temporary rural carrier, and the current rate for that position is $15.11 an hour. Inasmuch as appellant's wages upon her return to work were higher than the current date-of-injury hourly rate and she had been working more than 60 days in the modified position, the Office properly found no loss of wage-earning capacity.[20]

---

[17] *See John L. McClenic*, 48 ECAB ___ (Docket No. 95-2274, issued June 26, 1977) (finding that because appellant's attending physician failed to refer to the A.M.A., *Guides* in discussing the impairment of appellant's eye, the Office medical adviser properly applied the appropriate tables to the findings reported by the physician on examination).

[18] *Pamela J. Darling*, 49 ECAB ___ (Docket No. 96-274, issued January 21, 1998).

[19] *See Lena P. Huntley*, 46 ECAB 643, 646 (1995) (finding that the Office medical adviser's proper application of the A.M.A., *Guides* constituted the weight of the medical evidence).

[20] *See Monique L. Love*, 48 ECAB ___ (Docket No. 95-188, issued February 28, 1997) (finding that the Office properly found that appellant had no loss of wage-earning capacity based on her actual earnings because the position was neither temporary nor makeshift and she had worked for more than 60 days as a modified distribution

The June 18 and April 3, 1997 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
May 3, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

clerk).