

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY D. BOSWELL and DEPARTMENT OF THE TREASURY,
BUREAU OF ENGRAVING & PRINTING, Fort Worth, TX

*Docket No. 98-1389; Submitted on the Record;
Issued April 20, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has established greater than an 11 percent permanent impairment of his left lower extremity for which he received a schedule award; (2) whether appellant has established any permanent impairment of his right lower extremity for which he is entitled to a schedule award; and (3) whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity effective October 14, 1997 based on his actual earnings as a modified plate printer.

On November 5, 1996 appellant, then a 53-year-old plate printer, filed a notice of traumatic injury and claim, alleging that he injured his left lower back while picking up a cart board. He stopped work. The Office accepted appellant's claim for lumbar strain and began payment of compensation for temporary total disability. Appellant returned to work as a modified plate printer on October 14, 1997. However, he stopped work on October 31, 1997 and filed for retirement which became effective December 21, 1997. On December 3, 1997 appellant filed a claim for a schedule award.

In a decision dated January 5, 1998, the Office granted appellant a schedule award for an 11 percent impairment of the left lower extremity for the period November 18, 1997 to June 27, 1998 for a total of 31.68 weeks of compensation. By decision dated February 12, 1998, the Office determined that appellant was reemployed effective October 14, 1997 and that his actual earnings as a modified plate printer fairly and reasonably represented his wage-earning capacity. The Office reduced appellant's compensation benefits accordingly.

The Board has reviewed the case record on appeal and finds that appellant has not established greater than an 11 percent permanent impairment of the left lower extremity for which he received a schedule award.

Section 8107 of the Federal Employees' Compensation Act¹ and its implementing regulation² set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of specified members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition 1995) have been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating losses.³

In the present case, appellant's treating physician, Dr. James D. Cable, a Board-certified family practitioner, provided an impairment rating report dated November 25, 1997. In accordance with Table 83 of the A.M.A., *Guides*, Dr. Cable found that appellant had a 50 percent L5 sensory deficit in the left lower extremity and a 30 percent L5 sensory deficit in the right lower extremity. He noted that, since the A.M.A., *Guides* provided a maximum allowable sensory deficit at the L5 of 5 percent, that appellant had a 2.5 percent (50 percent of 5 percent) L5 sensory deficit in the left lower extremity and a 1.25 percent (30 percent of 5 percent) L5 sensory deficit in the right lower extremity. Dr. Cable noted that the A.M.A., *Guides* also had a 5 percent maximum allowable impairment for S1 sensory deficit. He found a 25 percent deficit on the left lower extremity which equaled a 1.25 percent impairment and a 10 percent deficit on the right lower extremity which equaled a .5 percent impairment. Dr. Cable then applied Tables 11 and 12 and noted that the maximum allowable impairment for motor deficit involving the L5 nerve root was 37 percent. He found a 20 percent impairment for a total of a 7.4 impairment of the left lower extremity for motor deficit. After combining the values, Dr. Cable concluded that appellant had a 4 percent impairment of the left lower extremity due to sensory deficit which was added to the 7.4 motor deficit for a combined value of 11 percent in the left lower extremity. He also found a sensory deficit impairment rating of three percent for the right lower extremity.

The Office medical adviser properly applied the A.M.A., *Guides* to the November 25, 1997 report by Dr. Cable. In accordance with the protocols of the A.M.A., *Guides* and the Office procedure manual, the Office medical adviser rounded off the measurements provided by Dr. Cable.⁴ The Office medical adviser found a rounded impairment rating of 3 percent for L5 sensory deficit, a rounded impairment rating of 1 percent for S1 sensory deficit and a 7 percent rounded impairment rating for motor deficit for a total impairment rating of 11 percent for the left lower extremity. For the right lower extremity, he found a rounded impairment rating of 2 percent for the L5 sensory deficit⁵ and a 1 percent rounded impairment rating for the S1 sensory deficit. Thus, the Office found an 11 percent permanent impairment for the left lower

¹ 5 U.S.C. § 8107(c).

² 20 C.F.R. § 10.304.

³ *Quincy E. Malone*, 31 ECAB 846 (1980).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Medical, *Schedule Awards*, Chapter 3.700(b)(2)(b) (September 1994).

⁵ Contrary to Dr. Cable's calculation, 30 percent of 5 percent is 1.66 percent, not 1.25.

extremity and a 3 percent permanent impairment for the right lower extremity. Consequently, appellant has not established greater than an 11 percent permanent impairment of the left lower extremity.

The Board also finds that appellant has established a permanent impairment of the right lower extremity for which he is entitled to a schedule award.

As discussed above, Dr. Cable found a three percent impairment of the right lower extremity based on sensory deficits at the L5 and S1 levels. His report was reviewed by an Office medical adviser who concurred with his conclusions. Therefore, the Board finds that appellant has a three percent permanent impairment of the right lower extremity for which he is entitled to a schedule award.

The Board further finds that the Office improperly determined appellant's loss of wage-earning capacity based on actual wages as a modified plate printer.

Section 8115(a) of the Act,⁶ 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 actual earnings fairly and reasonably represent his wage-earning capacity." 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.⁷

In this case, appellant returned to work at the employing establishment as a modified plate printer on October 14, 1997. Appellant stopped working on or about October 31, 1997 to retire. By decision dated February 12, 1998, the Office found that the position of modified plate printer fairly and reasonably represented appellant's wage-earning capacity. The Office stated that appellant worked in this position successfully for at least 60 days.

The Board notes that the Office's procedures require that a claimant must work at least 60 days before a loss of wage-earning capacity determination is appropriate.⁸ In this case, appellant worked the position for less than 20 days. As the Office did not follow its procedures as outlined above in determining appellant's loss of wage-earning capacity, the Board finds that the Office improperly determined appellant's wage-earning capacity on February 12, 1998 based on his actual earnings as a modified plate printer.

⁶ 5 U.S.C. § 8115(a).

⁷ *Elbert Hicks*, 49 ECAB ____ (Docket No. 95-1448, issued January 20, 1998).

⁸ Federal (FECA) Procedural Manual, Part 2 – Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

The decision of the Office of Workers' Compensation Programs dated February 12, 1998 is hereby reversed. The decision of the Office dated January 9, 1998 is affirmed in part and modified to find that appellant had a three percent permanent impairment of his right lower extremity.

Dated, Washington, D.C.
April 20, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member