U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAVERNA S. PUGH and DEPARTMENT OF THE AIR FORCE, SHEPPARD AIR FORCE BASE, TX

Docket No. 99-1407; Submitted on the Record;
Issued July 3, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's position as an office automation clerk represented her wage-earning capacity effective August 22, 1997, the date she resigned from federal service; (2) whether appellant has more than a two percent permanent impairment of the left lower extremity, for which she received a schedule award; and (3) whether the Office abused its discretion by refusing to reopen appellant's case for a merit review under 20 C.F.R. § 10.608.

On December 15, 1995 appellant, then a 64-year-old secretary, sustained a traumatic injury to her left knee when she stumbled down a stairway at work. The Office initially accepted appellant's claim for left knee strain and subsequently amended appellant's accepted condition to include lateral meniscus tear of the left knee. Additionally, the Office compensated appellant for intermittent periods of temporary total disability and she ultimately returned to work in a light-duty capacity on January 21, 1997. Appellant subsequently accepted a permanent, light-duty position as an office automation clerk, with no decrease in pay. She performed the duties of office automation clerk from June 22 until August 22, 1997, at which time she resigned from federal service. Shortly after resigning her position, appellant underwent arthroscopic surgery on August 29, 1997 to repair a lateral meniscal tear in her left knee. Following her surgery, Dr. Stephen D. Ruyle, a Board-certified orthopedic surgeon, released appellant to return to sedentary work on October 27, 1997. The Office authorized appellant's August 29, 1997 surgical procedure and also awarded her wage-loss compensation for the period August 29 through October 26, 1997.

By decision dated November 17, 1997, the Office advised appellant that a determination had been made that the position of office automation clerk, with a weekly salary of $445.50, fairly and reasonably represented her wage-earning capacity. The Office further advised appellant that compensation had been terminated inasmuch as her actual wages as an office

automation clerk met or exceed the wages of the job she held when injured and, therefore, no loss of wages had occurred.[1]

Appellant subsequently filed a claim for a schedule award on February 10, 1998. On February 20, 1998 she requested reconsideration of the Office's November 17, 1997 determination regarding her wage-earning capacity. The Office subsequently denied modification in a merit decision dated March 20, 1998. On September 8, 1998 the Office granted appellant a schedule award for a two percent permanent impairment of the left lower extremity. The award covered a period of 6.24 weeks.

Appellant filed a request for reconsideration on September 19, 1998 challenging both the September 8, 1998 schedule award and the Office's denial of modification of the November 17, 1997 wage-earning capacity determination. In a merit decision dated September 28, 1998, the Office denied modification of both the schedule award and the wage-earning capacity determination. The Office explained that the medical evidence did not justify modification of the prior schedule award. With respect to the prior determination regarding appellant's wage-earning capacity, the Office noted, *inter alia*, that the current medical evidence from appellant's treating physician indicated that she was capable of performing sedentary work, which was consistent with the requirements of her former position of office automation clerk. Consequently, the Office concluded that appellant failed to establish a basis for modifying the prior determination regarding her wage-earning capacity.

On October 24, 1998 appellant filed another request for reconsideration, which the Office denied on February 11, 1999 without reaching the merits of appellant's claim. Appellant filed a timely appeal with the Board on March 2, 1999.[2]

The Board finds that the position of office automation clerk represents appellant's wage-earning capacity.

Section 8115(a) of the Federal Employees' Compensation Act provides that in determining compensation for 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…."[3] Generally, wages actually earned are the best measure of 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.[4]

---

[1] In her date of injury position, appellant was compensated at an annual rate of $20,620.00. As an office automation clerk, appellant's annual compensation rate was $23,166.00.

[2] Appellant submitted additional medical evidence on appeal. Inasmuch as the Board's review is limited to the evidence of record, which was before the Office at the time of its final decision, the Board cannot consider appellant's newly submitted evidence. 20 C.F.R. § 501.2(c).

[3] *George E. Williams*, 44 ECAB 530, 533 (1993).

[4] 5 U.S.C. § 8115(a).

As previously noted, appellant returned to work in a light-duty capacity on January 21, 1997 and on May 30, 1997 she accepted a permanent, light-duty position as an office automation clerk with no decrease in pay. Appellant performed the duties of office automation clerk from June 22 through August 22, 1997. Her performance of this position in excess of 60 days is persuasive evidence that the position represents her wage-earning capacity.[5] Moreover, there is no evidence that the position of office automation clerk was seasonal, temporary, less than full time, or make-shift work designed for appellant's particular needs.[6] Additionally, appellant's compensation as an office automation clerk exceeded her date of injury salary.[7] Following her arthroscopic surgery, Dr. Ruyle advised that effective October 27, 1997 appellant could return to work in a sedentary position, such as answering telephones. Inasmuch as the position of office automation clerk was sedentary in nature, the Office reasonably concluded that appellant was physically capable of resuming her former duties. Although appellant did not resume her former duties as an office automation clerk following her August 1997 surgery, this was due to her voluntary resignation and not the result of residuals due to her December 15, 1995 employment injury or her subsequent surgery. There is no probative medical evidence of record that appellant was physically incapacitated from resuming her duties as an office automation clerk.[8] Accordingly, the Office properly determined that the position of office automation clerk fairly and reasonably represented appellant's wage-earning capacity effective August 22, 1997; the date she voluntarily resigned from federal service. The Office also correctly determined that appellant had no loss of wage-earning capacity.[9]

The Board further finds that the Office erred in determining the extent of appellant's permanent impairment of her left lower extremity.

Section 8107 of the Act[10] sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The Office has adopted the American Medical Association, (A.M.A.) *Guides to the Evaluation of*

[5] Office procedure provides that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining wage-earning capacity*, chapter 2.814.7(c) (December 1993).

[6] *Elbert Hicks*, 49 ECAB ___ (Docket No. 95-1448, issued January 20, 1998).

[7] *See supra* note 1.

[8] Disability is defined as "the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury." 20 C.F.R. § 10.5(f) (1999).

[9] *Monique L. Love*, 48 ECAB 378 (1997).

[10] 5 U.S.C. § 8107.

Permanent Impairment (fourth edition 1993) as an appropriate standard for evaluating schedule losses and the Board has concurred in such adoption.[11]

In the instant case, the Office based its September 8, 1998 schedule award on the September 1, 1998 opinion of its medical adviser who found that appellant had a two percent permanent impairment of her left lower extremity as a result of her August 29, 1997 partial lateral meniscectomy. This 2 percent rating properly corresponds with the diagnosis based estimates provided at Table 64 at page 85 of the A.M.A., *Guides* (fourth edition 1993). Additionally, the Office medical adviser noted that appellant was not entitled to an additional impairment rating for arthritis because her x-rays of the left knee revealed "no … loss of cartilage interval."

Table 62 at page 83 of the *Guides* (fourth edition 1993) provides ratings for arthritis impairments based on roentgenographically determined cartilage intervals.[12] However, x-ray evidence of joint space narrowing is not required in all instances before a rating for arthritis may be assigned. With respect to impairments of the patellofemoral joint, Table 62 provides:

> "In a patient with a history of direct *trauma*, a complaint of patellofemoral pain and crepitation on physical examination but without joint space narrowing on roentgenograms, a … five [percent] lower-extremity impairment is given."[13]

The Office medical adviser did not address whether the traumatic nature of appellant's accepted left knee injury warranted an increased rating for arthritis, notwithstanding the presence of normal x-ray evidence.

Dr. John A. Sklar, Board-certified in physical medicine and rehabilitation, whose findings the Office medical adviser reviewed in determining the extent of appellant's permanent impairment, noted in his April 8, 1998 report that, appellant complained of "considerable ongoing pain in and around the left knee" and that on physical examination she had "moderate to severe patellofemoral crepitation in the left knee." While appellant's x-rays do not reveal joint space narrowing, her history of trauma to the left knee combined with Dr. Sklar's physical finding of moderate to severe patellofemoral crepitation and his notation of ongoing left knee pain are evidence in support of an additional five percent impairment rating for arthritis.[14]

When combined with the previously awarded 2 percent impairment for a partial lateral meniscectomy, appellant's 5 percent impairment for arthritis represents a total impairment of

---

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

[12] The Office's procedural manual clarifies that Table 62, Arthritis Impairments based on x-ray, is not incompatible with Table 64, Diagnosis-based impairment estimates. Federal (FECA) Procedural Manual, Part 3 -- Medical, *Schedule Award*, Chapter 3.700 (October 1995).

[13] A.M.A., *Guides* 83, Table 62.

[14] Although Dr. Sklar also declined to assign an additional impairment rating for arthritis because on appellant's normal x-rays, he too was apparently unaware that the A.M.A.,*Guides* permitted such a rating despite the absence of x-ray evidence of joint space narrowing.

seven percent in accordance with the combined values chart at page 322 of the A.M.A., *Guides*. Appellant has failed to provide any probative medical evidence that she has greater than a seven percent impairment.[15] Accordingly, the Office's decision will be modified to reflect a seven percent impairment rating of the left lower extremity.[16]

The Board also finds that the Office properly exercised its discretion in refusing to reopen appellant's case for a merit review under 20 C.F.R. §10.608.

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either:

> (1) showing that the Office erroneously applied or interpreted a specific point of law;
>
> (2) advancing a relevant legal argument not previously considered by the Office; or
>
> (3) submitting relevant and pertinent new evidence not previously considered by the Office.[17]

Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[18]

Appellant's October 24, 1998 request for reconsideration, neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based

---

[15] While the record includes a December 2, 1997 report from appellant's surgeon, Dr. Ruyle, wherein he noted that appellant had a 20 percent impairment of the left lower extremity, this rating was prepared in accordance with the third edition of the A.M.A., *Guides*. The Office subsequently requested on two occasions that Dr. Ruyle provide an impairment rating using the fourth edition of the *Guides*, however, the doctor declined. The record also includes a June 9, 1998 report from Dr. Bartel in which he noted that appellant had a 12 percent impairment. This report, however, does not reference the *Guides* (fourth edition 1993). Inasmuch as neither Drs. Ruyle or Bartel provided an impairment rating utilizing the A.M.A., *Guides* (fourth edition 1993), their respective opinions are of little probative value in determining the extent of appellant's permanent impairment; *see Paul R. Evens Jr.*, 44 ECAB 646, 651 (1993).

[16] The Act provides that for a total, or 100 percent loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2). In the instant case, appellant does not have a total, or 100 percent loss of use of her left leg, but rather a 7 percent loss. As such, appellant is entitled to 7 percent of the 288 weeks of compensation, which is 20.16 weeks. Appellant has already received 6.24 weeks' compensation, therefore, she is entitled to an additional 13.92 weeks' compensation. The Office's prior award of 6.24 weeks' compensation appears to have been mistakenly based on the number of weeks' compensation an employee would be entitled for total loss of use of an arm (312 weeks); *see* 5 U.S.C. § 8107(c)(1).

[17] 20 C.F.R. § 10.606(b)(2) (1999).

[18] 20 C.F.R. § 10.608(b) (1999).

on the first and second above-noted requirements under section 10.606(b)(2). With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, the Board notes that the vast majority of evidence that accompanied appellant's request for reconsideration consisted of previously submitted information. While appellant added her own handwritten annotations to much of this evidence, this does not change the substance of the information contained therein. Appellant's extensive annotations have been taken into consideration in reviewing her request for reconsideration, however, the repetitive nature of the underlying documentation renders it insufficient to warrant reopening of appellant's claim.[19]

While most of the evidence submitted on reconsideration was already part of the record, appellant also submitted some evidence that was not previously of record. With respect to her schedule award, appellant submitted a November 2, 1998 report from Dr. Bartel wherein he indicated that appellant was entitled to an additional four percent rating for partial weakness of the leg due to a sciatic nerve injury that occurred when appellant hurt her knee. However, Dr. Bartel's November 2, 1998 report is merely a reiteration of an earlier report he provided on June 9, 1998, which the Office previously deemed insufficient.[20] As Dr. Bartel's most recent report is repetitive, this evidence does not warrant reopening appellant's claim for a merit review.[21]

Presumably relevant to the issue of her wage-earning capacity, appellant also submitted an August 31, 1997 report from Dr. Wendell I. Wyatt, an internist, who noted that appellant had some volatility in her blood pressure, possibly related to stress. He indicated that due to appellant's blood pressure, she should not work under extremely stressful conditions. Another report, dated June 29, 1998 from Dr. Samuel C. Waters, a cardiologist, noted that appellant has hypertension and symptomatic hiatal hernia. As previously noted, appellant's claim was accepted for a left knee injury and subsequent surgery to repair a torn meniscus. There is no indication that appellant's hypertension or her hiatal hernia are in any way related to her accepted employment injury of December 15, 1995. Furthermore, the reports of Drs. Wyatt and Waters do not address the issue of whether appellant is physically capable of performing the position of office automation clerk. Thus, although newly submitted, the reports of Drs. Wyatt and Waters are neither relevant nor pertinent to the issues on reconsideration. As such, this evidence does not warrant reopening the claim for a merit review.[22] Lastly, appellant submitted

[19] Evidence that is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening the claim. *James A. England*, 47 ECAB 115, 119 (1995); *Saundra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Power*, 45 ECAB 877 (1994).

[20] In its September 28, 1998 merit decision, the Office noted that Dr. Bartel's June 9, 1998 report lacked probative value inasmuch as the doctor did not provide a basis for his 12 percent impairment rating and he failed to indicate whether the rating was in accordance with the A.M.A., *Guides*. The Office also noted that the diagnosed condition of sciatica had not been accepted as being medically connected to appellant's December 15, 1995 employment injury. Although Dr. Bartel noted in his November 2, 1998 report that the impairment rating was consistent with the 2nd and 4th editions of the A.M.A., *Guides*, he did not otherwise explain the basis for his rating.

[21] *James A. England, supra* note 19.

[22] Evidence that does not address the particular issue involved does not constitute a basis for reopening the claim. *Richard L. Ballard*, 44 ECAB 146, 150 (1992).

a July 16, 1998 upper abdominal sonogram, which revealed she had gallstones. This report is also irrelevant to the issues on reconsideration.

While appellant may suffer from stress-related hypertension, gallstones and a hiatal hernia, there is no indication that her various maladies are causally related to her employment injury of December 15, 1995. Moreover, the newly submitted evidence on reconsideration does not address the question of whether appellant's accepted left knee condition has materially changed to the extent that she is no longer capable of performing the duties of an office automation clerk. Consequently, appellant is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2). As appellant is not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office did not abuse its discretion in denying appellant's October 24, 1998 request for reconsideration.

The decision of the Office of Workers' Compensation Programs dated February 11, 1999 is affirmed and the Office's September 28, 1998 decision is, hereby, modified to reflect an award for a seven percent impairment of appellant's left lower extremity.

Dated, Washington, D.C.
July 3, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member