

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ERMA J. ROIG and DEPARTMENT OF VETERANS AFFAIRS,  
MEDICAL CENTER, Oklahoma City, OK

*Docket No. 98-2194; Submitted on the Record;  
Issued March 1, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether Office of Workers' Compensation Programs properly determined that appellant had no loss of wage-earning capacity; (2) whether appellant has more than five percent permanent impairment of the right upper extremity for which she received a schedule award; and (3) whether the Office properly denied appellant's request for reconsideration.

On November 25, 1996 appellant, then a 45-year-old temporary automation clerk, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that on November 23, 1996 she first realized that her carpal tunnel syndrome and ganglion cyst were due to her federal employment. The Office accepted the claim for carpal tunnel syndrome in the right hand on January 29, 1997. Appellant stopped work on October 30, 1996 due to the expiration of her temporary appointment. The Office paid compensation benefits from November 23, 1996 to April 27, 1997. Appellant returned to a light-duty temporary position on April 28, 1997. On August 7, 1997 appellant had surgery, returned to work on August 14, 1997 and stopped work on September 24, 1997 due to the expiration of her temporary appointment.<sup>1</sup>

In a recovery and work status report dated March 31, 1997, Dr. Houshang Seradge<sup>2</sup> opined that appellant could return to work on March 31, 1997 with the restriction that she wear a splint.

On April 15, 1997 the employing establishment offered appellant the temporary position of clerk at a yearly salary of \$18,286.00 and that the appointment was not to exceed 700 hours. The employing establishment noted that the duties of the position were within the restrictions

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<sup>1</sup> On February 6 and May 17, 1998 appellant filed claims for a recurrence of disability due to her accepted November 23, 1996 employment injury.

<sup>2</sup> A physician Board-certified in hand surgery and orthopedic surgery.

noted by Dr. Seradge. Appellant accepted the position and returned to work effective April 28, 1997. She stopped work on August 7, 1997 due to surgery and returned to work on August 14, 1997.

On May 1, 1997 appellant filed a claim for a schedule award.

In an amended recovery and work status report dated August 12, 1997, Dr. Seradge released appellant to work following her surgical treatment on August 7, 1997 with the restrictions that she not use vibrating tools with her right hand and no lifting over ten pounds with her right hand.

In a report dated October 20, 1997, Dr. Seradge opined, based upon his September 24, 1997 evaluation, that appellant had a four percent permanent impairment to her right hand.

In a November 17, 1997 memorandum, an Office medical adviser reviewed Dr. Seradge's findings and, applying the standards outlined in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition), determined that appellant had a total five percent impairment in her right upper extremity. In arriving at this estimate, the Office medical adviser, noted that appellant's loss of motion in her right wrist was 5 percent pursuant to pages 36 and 38, Tables 26 and 29 of the A.M.A., *Guides*.

On November 24, 1997 the Office granted appellant a schedule award for a 5 percent permanent impairment of the right upper extremity for the period October 20, 1997 to February 6, 1998, for a total of 15.60 weeks of compensation.

By letter dated March 20, 1998,<sup>3</sup> appellant requested reconsideration of the November 24, 1997 decision.

On April 1, 1998 the Office denied appellant's request for reconsideration of her schedule award as she failed to provide any new evidence or raise any legal question.

In a June 12, 1998 decision, the Office found that appellant had the wage-earning capacity of a clerk. In a memorandum to file, the Office determined that appellant's weekly salary in her position as a clerk effective April 28, 1997 was \$351.65 and that her date-of-injury weekly wages were \$341.51. The Office noted that appellant had returned to work in the position on April 28, 1997 with no loss of wages since her date-of-injury wages and that she was employed in the position for a period of over 60 days. The Office found that the position conformed with appellant's physical limitations as set forth by Dr. Seradge that she not use any vibrating tools. The Office found that appellant had no current entitlement to wage-loss compensation but that she was still entitled to medical benefits as a result of her November 23, 1993 employment injury.

The Board finds that the Office properly determined appellant's wage-earning capacity.

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<sup>3</sup> The letter indicated the year as "1997" which appears to be a typographical error.

It is well established that once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>4</sup> After it has determined that an employee has disability causally related to his or her federal employment, the Office may not reduce compensation without establishing that the disability has ceased or that it is no longer related to the employment.

In the present case, the record establishes that appellant was hired on or about April 28, 1996 as a temporary automation clerk. She filed an occupational disease claim alleging that her carpal tunnel and ganglion cyst were due to her federal employment. The Office accepted the claim for carpal tunnel syndrome and she received compensation for the period November 23, 1996 to April 27, 1997. Appellant returned to limited duty on April 28, 1997 under physical limitations as set forth by Dr. Seradge. She worked in this position and had actual earnings until September 24, 1997, when her temporary appointment expired.

Section 8115(a) of the Federal Employees' Compensation Act provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings if such actual earnings fairly and reasonably represent the employee's wage-earning capacity.<sup>5</sup> 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.<sup>6</sup> The evidence reflects that appellant returned to work with a weekly salary of \$351.65 an hour, which was more than her date-of-injury salary of \$341.51 per week.

The Office's procedure manual sets forth the procedures for determining entitlement to compensation after reemployment and for determining wage-earning capacity. It is generally recognized that in the preliminary assessment of the position to which an employee returns, a temporary job will be considered unsuitable unless the claimant was a temporary employee when injured and the temporary position reasonably represents the claimant's wage-earning capacity.<sup>7</sup> The record establishes that appellant was hired as a temporary automation clerk under a term with the employing establishment which expired October 31, 1996. With regard to the termination of employment, the Office's procedures note that a reemployed employee may face removal from

employment due to the termination of temporary employment.<sup>8</sup> Such an occurrence is not considered a recurrence of disability and the claims examiner is directed to take action on a wage-earning capacity determination. If a loss of wage-earning capacity determination has not

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<sup>4</sup> See *Lawrence D. Price*, 47 ECAB 120 (1995); *Charles E. Minniss*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

<sup>5</sup> 5 U.S.C. § 8115(a); see *Dennis E. Maddy*, 47 ECAB 259 (1995).

<sup>6</sup> *Gregory A. Compton*, 45 ECAB 154 (1993); *Hubert F. Myatt*, 32 ECAB 1994 (1981).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(3) (December 1993).

<sup>8</sup> *Id.* at Chapter 2.814.12.

been made and the claimant has worked in the position for at least 60 days, the claims examiner is directed to consider a retroactive loss of wage-earning capacity determination, “even if the claimant is a federal employee, since general availability of the job need not be considered for a position actually held.”<sup>9</sup>

In this case, as appellant’s term of employment expired on September 24, 1997, the Office proceeded with a retroactive wage-earning capacity determination as she had worked in the limited-duty position for a period in excess of 60 days. Appellant’s claim for wage loss following September 24, 1997 does not constitute a recurrence of disability as she did not stop work due to any change in the nature or extent of her employment-related conditions. Rather, the evidence establishes that her work stoppage was due to the expiration of her temporary employment. For this reason, appellant is not entitled to further wage-loss compensation but remains entitled to compensation for medical benefits for treatment of her accepted employment-related conditions.

Next, the Board finds that appellant has no more than a five percent permanent impairment for loss of use of her right upper extremity, for which she has received a schedule award.

The schedule award provision of the Act<sup>10</sup> and its implementing regulation<sup>11</sup> set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.<sup>12</sup> However, neither the Act nor its regulations specify the manner, in which the percentage of loss of use of a member is to be determined. For consistent results and to insure equal justice under the law to all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants seeking schedule awards. The A.M.A., *Guides* (fourth edition) have been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.<sup>13</sup>

In the instant case, the Office determined that appellant had a five percent permanent impairment of her right upper extremity by adopting the findings of the Office medical adviser, who calculated appellant’s impairment by utilizing the findings of Dr. Seradge. Based on Dr. Seradge’s findings, the Office medical adviser determined the precise impairment rating by calculating the total impairment of the right upper extremity due to appellant’s loss of motion in her right wrist to be five percent.

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<sup>9</sup> *Id.* at Chapter 2.814.12(b).

<sup>10</sup> 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

<sup>11</sup> 20 C.F.R. § 10.304.

<sup>12</sup> 5 U.S.C. § 8107(c)(19).

<sup>13</sup> *Thomas D. Gunthier*, 34 ECAB 1060 (1983).

The Board concludes that the Office medical adviser correctly applied the A.M.A., *Guides* in determining that appellant has no more than a five percent permanent impairment for loss of use of the right upper extremity, for which she has received a schedule award from the Office and that appellant has failed to provide probative, supportable medical evidence that he has greater than the five percent impairment already awarded.

The Board also finds that the Office properly denied appellant's request for reconsideration.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.<sup>14</sup> Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three criteria, the Office will deny the application for review without<sup>15</sup> reviewing the merits of the claim.

With her March 20, 1998 request for reconsideration, appellant did not attempt to show that the Office erroneously applied or interpreted a point of law. She did not attempt to advance a point of law or a fact not previously considered by the Office. Appellant did not submit relevant and pertinent evidence not previously considered by the Office. Because her request does not meet one of the three criteria for obtaining a merit review of her claim, the Board finds that the Office properly denied her request on April 1, 1998.

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<sup>14</sup> 20 C.F.R. § 10.138(b)(1).

<sup>15</sup> *Id.* at § 10.138(b)(2).

The decisions of the Office of Workers' Compensation Programs dated June 12 and April 1, 1998 and November 24, 1997 are hereby affirmed.

Dated, Washington, D.C.  
March 1, 2000

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member