

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES D. THOMPSON and DEPARTMENT OF JUSTICE,
DRUG ENFORCEMENT AGENCY, Washington, DC

*Docket No. 00-2551; Oral Argument Held September 20, 2001;
Issued November 26, 2001*

Appearances: *Charles D. Thompson, pro se; Julia Mankata, Esq.,
for the Director, Office of Workers' Compensation Programs.*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant had the wage-earning capacity of a personnel clerk; and (2) whether appellant is entitled to greater than a 30 percent loss of use of the left upper extremity for which he received a schedule award.

This is the seventh appeal before the Board and the fifth appeal regarding the issue of appellant's wage-earning capacity.¹ By order dated January 20, 1983, the Board remanded the case to the Office for consideration of new evidence and a *de novo* decision on the issue of appellant's loss of wage-earning capacity.² By decision dated October 23, 1983, the Board affirmed a decision finalized on May 24, 1983, in which the Office determined that appellant had the wage-earning capacity of a personnel worker, which represented a 32 percent loss of wage-earning capacity.³ Appellant requested reconsideration and by decision dated August 2, 1984, the Office denied his request. He timely appealed to the Board and in a November 30, 1984 decision, the Board affirmed the August 2, 1984 decision of the Office.⁴

On February 21, 1987 appellant requested reconsideration of the wage-earning capacity finding and submitted additional evidence. By decision dated March 16, 1987, the Office denied

¹ The Board notes that appellant has a separate appeal before the Board, Docket No. 00-2299, regarding a claim filed for a foot condition. A decision on that case will be issued separately.

² Docket No. 83-312.

³ Docket No. 83-1384.

⁴ Docket No. 84-2066.

modification of the prior decision. On June 10, 1997 he filed a claim for a schedule award. On August 8, 1997 appellant again requested reconsideration and submitted additional evidence. In an August 11, 1997 decision, the Office denied modification, finding the evidence of record insufficient to establish a material change in his medical condition. On September 3, 1997 he filed an appeal with the Board. On September 23, 1997 he underwent transposition of the left ulnar nerve and was returned to total disability compensation.

By decision dated August 5, 1998, the Office granted appellant a schedule award for a 30 percent loss of use of the left upper extremity for a total 46.8 weeks, to run from July 19, 1998 to June 11, 1999.⁵ On August 8, 1998 appellant requested a hearing before the Office regarding the schedule award. This was held on January 26, 1999.

By decision dated March 3, 1999 and finalized March 4, 1999, an Office hearing representative affirmed the schedule award. At the conclusion of the schedule award, appellant was returned to the compensation rolls at the full compensation rate. On August 19, 1999 the Office proposed to reduce his compensation to reflect his wage-earning capacity as a personnel clerk. Appellant disagreed with the proposed reduction and submitted additional evidence.

On October 21, 1999 Kari S. Cole, a rehabilitation counselor, completed a labor market survey and determined that the position of personnel clerk, based on the Department of Labor's *Dictionary of Occupational Titles*, fit appellant's capabilities. In a November 8, 1999 decision, the Office finalized the wage-earning capacity determination and reduced appellant's compensation. On November 10, 1999 appellant requested a hearing and submitted additional evidence.

On January 3, 2000 the Board affirmed the August 11, 1997 Office wage-earning capacity decision.⁶ The law and facts as set forth in the previous decision and orders are incorporated herein by reference. On January 5, 2000 the Board issued an order, remanding appellant's schedule award claim to the Office because the record before the Board did not contain the August 5, 1998 Office decision and the March 3, 1999 decision of the Office hearing representative. On remand, the Office was to reassemble the case record and reissue a *de novo* decision.⁷

On February 9, 2000 the Office issued a schedule award, finding that appellant had a 30 percent impairment of the left upper extremity. The Office noted that he had been paid in this regard.

A hearing was held on March 2, 2000, at which time appellant testified regarding both the wage-earning capacity finding and his schedule award claim. By decision dated July 26, 2000, an Office hearing representative affirmed the November 8, 1999 decision regarding appellant's wage-earning capacity. The hearing representative stated that, as the Office had not

⁵ This award was in addition to 15 percent previously paid.

⁶ Docket No. 97-2683.

⁷ Docket No. 99-1274.

issued a new decision regarding appellant's schedule award, he would not address appellant's impairment rating. The instant appeal follows.

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

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.⁸

Pursuant to section 8115(a) of the Act, 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 if the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision shall determine the percentage of the employee's loss of wage-earning capacity.⁹

The relevant evidence includes a June 13, 1997 attending physician's report, in which Dr. J. Hightower noted the history of injury, diagnosed ulnar neuritis v. ulnar neuropathy and degenerative changes of the left elbow secondary to trauma. In treatment notes dated August 21, 22 and September 25, 1997, Dr. Glynn Garland, who is Board-certified in orthopedic surgery, noted findings on examination and diagnosed tardy ulnar paresis of the left elbow. On September 23, 1997 Dr. Garland performed anterior transposition of the left ulnar nerve.

Dr. Michael F. Charles, who is a Board-certified orthopedic surgeon and performed a second opinion evaluation for the Office, provided a report dated June 25, 1998, in which Dr. Charles advised that he had reviewed the medical record and examined appellant on June 12, 1998.¹⁰ He diagnosed fractured left elbow with post-traumatic arthritis and left ulnar nerve palsy/irritation, status post transposition. By report dated August 31, 1998, Dr. Charles advised that appellant could perform the duties of personnel clerk. In an attached work capacity

⁸ See generally 5 U.S.C. § 8115(a).

⁹ *Dennis D. Owen*, 44 ECAB 475 (1993).

¹⁰ Dr. Charles had previously examined appellant on May 5 and September 15, 1997.

evaluation, he provided restrictions to appellant's physical activities. Appellant submitted a July 24, 1998 report from Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, who reviewed the record and determined that appellant could not perform the position of personnel clerk due to left upper extremity problems. In an September 28, 1998 report, Dr. Robert Westafer, who is Board-certified in family practice and emergency medicine, noted findings on examination of the left shoulder and elbow. In an October 23, 1998 report, Dr. Westafer advised that x-ray of the left elbow showed chronic degenerative changes. Dr. Timothy Yeh, who is Board-certified in family practice, provided an attending physician's report dated September 12, 1999, in which he diagnosed degenerative arthritis of the left elbow with decreased range of motion and degenerative second metatarsophalangeal joint of the right foot.

In a letter dated November 23, 1999, David J. Pauluk, a veterans career counselor, advised that appellant, "with his current abilities, experience and training" did not meet the qualifications as outlined in the *Dictionary of Occupational Titles*. He further alleged that his name was used by the Office without his consent. In a December 20, 1999 report, an Office vocational counselor advised that Mr. Pauluk was contacted anonymously regarding the labor market verification.

On September 7, 1999 Dr. Charles advised that he had considered appellant's foot problems and high blood pressure in determining that he could perform the duties of personnel clerk, a sedentary position.

By report dated November 29, 1999, Dr. Carlos Meza, a Board-certified internist, advised that any estimation of disability would have to be provided by an orthopedic surgeon or podiatrist.

The Board finds that the weight of the medical opinion evidence regarding appellant's ability to perform the duties of personnel clerk rests with Dr. Charles who performed second-opinion evaluations for the Office. In his most recent report dated September 7, 1999, Dr. Charles advised that, taking appellant's various medical complaints into consideration, he could carry out the duties of personnel clerk. Dr. Harris did not examine appellant; his opinion is, therefore, of diminished probative value. Drs. Hightower, Garland, Yeh and Meza did not comment on appellant's ability to perform the duties of personnel clerk. Thus, none of the medical reports provided by appellant indicate that he cannot perform these duties. The Board also finds that the Office properly determined that the position of personnel clerk fit appellant's capacity for work. Finally, the Office's rehabilitation specialist properly determined that the position was reasonably available within appellant's commuting area.

The Board further finds that this case is not in posture for decision regarding appellant's entitlement to a schedule award.

By decision dated August 5, 1998, the Office granted appellant a schedule award for a 30 percent loss of use of the left upper extremity.¹¹ This was affirmed by the Office hearing representative in a decision dated March 3, 1999 and finalized March 4, 1999. Appellant then

¹¹ This award was in addition to 15 percent previously paid.

filed an appeal with the Board. On January 5, 2000 the Board issued an order, remanding appellant's schedule award claim to the Office because the record before the Board did not contain the August 5, 1998 Office decision and the March 3, 1999 decision of the Office hearing representative. On remand, the Office was to reassemble the case record and reissue a *de novo* decision.¹² On February 9, 2000 the Office issued a schedule award, finding that appellant had a 30 percent impairment of the left upper extremity and noted that he had been fully paid in this regard. Appellant filed the instant appeal. At oral argument, the Director requested that, inasmuch as following remand by the Board, the issue of the schedule award had not been decided by a hearing representative, the case should be remanded to the Branch of Hearings and Review for issuance of a final determination on this matter. The Board grants the Director's request and remands the case to the Office for resolution of the issue of appellant's entitlement to an increased schedule award.

The July 26, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed. The decision dated February 9, 2000 is vacated and the case is remanded to the Office for proceedings consistent with this opinion of the Board.

Dated, Washington, DC
November 26, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹² Docket No. 99-1274.