

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILFORD J. OLIVER and U.S. POSTAL SERVICE,
POST OFFICE, Buffalo, NY

*Docket No. 01-2040; Submitted on the Record;
Issued October 25, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has established that he has greater than a two percent permanent impairment of his left arm for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly recomputed appellant's wage-earning capacity based on his actual earnings which indicated that he had sustained no loss of wage-earning capacity due to his employment injury.

On November 20, 1993 appellant, a 36-year-old mailhandler, filed an occupational disease claim for benefits, alleging that he developed a tendinitis condition in his left arm caused by repetitive activities at work. The Office accepted the claim on May 6, 1994 for left arm tendinitis. The Office subsequently expanded its acceptance to include a tendinitis condition in appellant's right arm. He was placed on modified, light duty. Appellant missed work for intermittent periods and the Office paid compensation for appropriate periods.

In a functional capacities evaluation dated June 23, 1994, appellant was given the following restrictions: infrequent bending and stooping, occasional squatting, occasional climbing, occasional overhead work without any weights, infrequent kneeling, infrequent balancing, pushing and pulling 50 pounds, no firm grasping and no lifting of more than 20 pounds with no overhead lifting.

On September 27, 1994 appellant filed a Form CA-7, claim for a schedule award based on the loss of use of his left arm, stemming from his accepted 1993 employment injury.

By decision dated March 28, 1995, the Office granted appellant a schedule award for a two percent permanent impairment of the left arm for the period July 26 to September 7, 1994 for a total of 6.24 weeks of compensation.

In a report dated September 16, 1999, Dr. Nancy A. Hutchison, Board-certified in physical medicine and rehabilitation and appellant's treating physician, stated that he had developed pain in his wrists, hands, neck and shoulders, which was caused by his job as a postal

worker. She noted that she had treated him for work-related cervical sprain/strain and left upper extremity tendinitis since that time, as he had experienced periodic flare-ups of the pain. Dr. Hutchison advised that, during her August 4, 1999 examination of appellant, she rewrote his permanent restrictions, which she reiterated in a September 20, 1999 report.

The Office referred appellant to Dr. Richard C. Strand, a Board-certified orthopedic surgeon, who opined in a June 4, 1999 report that appellant had no objective findings of ongoing disease or injury and was able to work at full duty without restrictions. He also noted signs of malingering.

The Office subsequently referred appellant to Dr. S. Keith Stinson, a Board-certified orthopedic surgeon, who stated in a January 3, 2000 report that he substantially agreed with Dr. Strand's findings and opinions and felt that appellant had sustained a temporary, not permanent aggravation and that he had no residuals from his work-related condition. He found that appellant had normal range of motion in his left arm and no objective findings of illness or medical conditions in his upper extremities. In a work capacity evaluation dated January 6, 2000, Dr. Stinson restricted appellant to 6 to 8 hours of sitting, walking, pushing and pulling up to 60 pounds, 8 hours of standing, 2 to 6 hours of reaching, 0 to 2 hours of reaching above the shoulder, 2 to 4 hours of twisting, 2 to 3 hours of repetitive movements of the wrist and elbows and 4 to 6 hours of lifting up to 30 pounds. Dr. Stinson recommended a phasing-in of these increased duties over a four- to six-week period.

By letter dated March 7, 2000, the Office advised the employing establishment that Dr. Stinson had recommended that appellant could return to his regular duties over a six- to eight-week period and that a written offer of limited-duty work should be made to appellant based on Dr. Hutchison's restrictions.

On March 31, 2000 the employing establishment located a suitable limited-duty job as a modified mailhandler for appellant within his physical restrictions. Appellant accepted the offer on May 30, 2000 with modified restrictions of sitting for 7 hours a day, walking for 4 hours a day, bilateral carrying from 1 to 10 pounds, no crawling, climbing, overhead lifting or overhead working of any kind and occasional flexing and rotating of the head and neck.

On February 28, 2001 appellant filed a Form CA-7, claim for an additional schedule award based on the loss of use of his arms, stemming from his accepted 1993 employment injury.

Appellant submitted an April 27, 2001 report from Dr. Andrew Will, Board-certified in internal medicine, who found that he had a 20 percent impairment of his total upper body, due in part to diminished range of motion of the cervical spine.

In a memorandum dated July 23, 2001, an Office medical adviser stated that, under the Federal Employees' Compensation Act, schedule awards cannot be based on restricted motion in the axial skeleton; therefore, he discounted Dr. Will's report.

By decision dated August 2, 2001, the Office found that appellant was not entitled to an additional award under the schedule.

By decision dated August 1, 2001, the Office found that appellant's actual wages of \$757.23 a week as a modified mailhandler fairly and reasonably represented his wage-earning capacity. The Office stated that he had worked regularly for at least 60 days and indicated that since returning to work on May 30, 2000 as a modified mailhandler, his wages included regular pay plus night differential pay. The Office, therefore, found that appellant was no longer entitled to compensation due to loss of wage-earning capacity because his actual earnings as a modified distribution clerk beginning May 30, 2000 exceeded the current pay rate for the position he held when injured on November 20, 1993.¹ Accordingly, the Office determined that appellant had demonstrated his ability to earn wages in his current job which were equal to or greater than those for the job he held on the date of injury.

The Board finds that appellant has no more than a two percent permanent impairment for loss of use of his left arm for which he received a schedule award.

The schedule award provisions of the Act² 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.³ However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) as the standard to be used for evaluating schedule losses.

In this case, the Office properly found that appellant submitted insufficient evidence to establish that he was entitled to a schedule award greater than that already awarded. In his April 27, 2001 report, Dr. Will assigned appellant a 20 percent permanent impairment of his total upper body, due in part to diminished range of motion of the cervical spine. However, no schedule award is payable for permanent loss of or loss of use of, specified anatomical members or functions or organ of the body not specified in the Act or in the implementing regulations.⁴ As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole,⁵ no claimant is entitled to such an award.⁶ Therefore, the 20 percent permanent impairment rating assigned by Dr. Will does not

¹ The Office indicated that the current pay rate for the position appellant held when injured was \$733.17 a week and that the pay rate for the modified mailhandler position was \$757.23 a week.

² 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

³ 5 U.S.C. § 8107(c)(19).

⁴ *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies only to body members that are not enumerated in the schedule provision as it read before the 1974 amendment and to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment); *see also Ted W. Dieterich*, 40 ECAB 963 (1989); *Thomas E. Stubbs*, 40 ECAB 647 (1989); *Thomas E. Montgomery*, 28 ECAB 294 (1977).

⁵ The Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19); *see also Rozella L. Skinner*, 37 ECAB 398 (1986).

⁶ *George E. Williams*, 44 ECAB 530 (1993).

provide a basis for a schedule award under the Act. Moreover, this rating does not conform with the A.M.A., *Guides*. Therefore, as Dr. Will's finding of a 20 percent whole body impairment of the upper extremities is not in conformance with the Act or the applicable tables and figures of the A.M.A., *Guides*, the Board finds that appellant has failed to submit sufficient medical evidence establishing a greater impairment than that awarded by the Office.

The Board finds that the Office medical adviser correctly applied the A.M.A., *Guides* in determining that appellant has no more than a two percent permanent impairment for loss of use of his left arm, for which he has received a schedule award from the Office. He has failed to provide sufficient medical evidence that he has greater than the two percent impairment already awarded.

The Board finds that the Office properly recomputed appellant's wage-earning capacity based on his actual earnings, which indicated he had sustained no loss of wage-earning capacity due to his employment injury.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁷

Section 8115(a) of the Act provides that 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."⁸ The Board has stated: "Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure."⁹

In reaching its determination of appellant's wage-earning capacity, the Office properly noted that appellant had received actual earnings as a modified mailhandler for more than 60 days in that he had been working in the position since May 30, 2000, when the Office issued its August 1, 2000 decision.¹⁰ In an undated handwritten work sheet, the Office calculated that appellant had earned \$36,877.00 in the year prior to his injury, adjusted for inflation as of April 15, 1999, with \$709.17 plus \$24.00 in night differential, equaling a weekly rate of \$733.17. The Office also stated that he had earned \$38,081.00 in the year following his return to work at the mailhandler job, at the weekly rate of \$732.33 plus \$24.90 in night differential, which totaled a rate of \$757.23. For these reasons, appellant's actual wages as a modified mailhandler fairly and reasonably represented his wage-earning capacity on and after May 30, 2000. These wages

⁷ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁸ 5 U.S.C. § 8115(a).

⁹ *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981).

¹⁰ 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).

exceeded the current pay rate for the position he held when injured on November 20, 1993 and, therefore, the Office properly terminated his compensation effective August 1, 2001.¹¹

The Board has carefully reviewed the Office's wage-earning capacity decisions in the context of the relevant evidence of record and notes that, in addition to making a correct finding that appellant had actual wages as a modified mailhandler, the Office also properly found that such wages fairly and reasonably represented his wage-earning capacity. The record does not contain evidence showing that the modified mailhandler position constitutes part-time, sporadic, seasonal or temporary work.¹² Moreover, the record does not reveal that the position is a make-shift position designed for appellant's particular needs.¹³ The Board has found in certain circumstances that a claimant's actual wages did not fairly and reasonably represent his or her wage-earning capacity. For example, in *Michael A. Wittman*,¹⁴ the Board found that the evidence did not support a finding that a position with the National Guard fairly and reasonably represented the claimant's wage-earning capacity based on the fact that the claimant did not appear every month as normally required and did not perform the same duties as other employees who held the same job title. In *Elizabeth E. Campbell*,¹⁵ the Board found that the evidence did not support a finding that the position of "baseball cover sorter" fairly and reasonably represented the claimant's wage-earning capacity based on the fact that the position tended to be seasonal and provided for coworker assistance in lifting duties, such that it was apparent these duties were tailored for the claimant's particular needs. The Board notes, however, that the factual circumstances of appellant's case bear no similarity to the facts in these above-mentioned cases or similar cases in which actual wages have been found to be an inadequate measure for wage-earning capacity. In this case, appellant was working at a job which was substantially similar to the one at which he was working at the time of his injury, with modifications in his work duties made, based on restrictions outlined by Drs. Hutchison and Stinson.

Accordingly, the Office properly found in its August 1, 2001 determination that appellant sustained no loss of wage-earning capacity and, therefore, his wage-earning capacity should be based on his actual wages from the modified mailhandler position, at which he commenced reemployment on May 30, 2000. The Board, therefore, finds that the Office properly computed appellant's compensation based on his actual wages on August 1, 2001.

¹¹ *Monique L. Love*, 48 ECAB 378 (1997).

¹² See *William D. Emory*, 47 ECAB 365 (1996); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (December 1993).

¹³ See *William D. Emory*, *supra* note 8.

¹⁴ 43 ECAB 800 (1992).

¹⁵ 37 ECAB 224 (1985).

The decisions of the Office of Workers' Compensation Programs dated August 2, 2001 and August 1, 2000 are hereby affirmed.

Dated, Washington, DC
October 25, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member