

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGENE L. PEECHER and U.S. POSTAL SERVICE,
POST OFFICE, Eden Prairie, MN

*Docket No. 03-1472; Submitted on the Record;
Issued December 2, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant had no loss in wage-earning capacity effective May 15, 2002 based on her actual earnings; and (2) whether appellant is entitled to more than an eight percent permanent impairment to her upper right extremity for which she received a schedule award.

The Office accepted appellant's claim for right lateral epicondylitis, right medial epicondylitis and right carpal tunnel syndrome. The Office authorized surgery consisting of a right lateral epicondylectomy and right carpal tunnel release. Appellant stopped work on January 8, 2002 following the surgery. On March 9, 2002 she returned to restricted work. On April 17, 2002 appellant underwent a functional capacity evaluation and, on September 23 and May 15, 2002, her treating physician, Dr. Mark A. Urban, a Board-certified orthopedic surgeon with a specialty in hand surgery, issued work restrictions for appellant. Dr. Urban found that appellant could work 8 hours a day, but only occasionally pushing and pulling up to 35 pounds, occasionally carrying up to 25 pounds and occasionally lifting up to 20 pounds. Dr. Urban stated that appellant should avoid grasping and repetitive firm pinching with her right hand. On May 15, 2002 the employing establishment offered appellant the job of modified letter carrier, which had physical requirements of occasional pushing and pulling up to 35 pounds, occasional carrying up to 25 pounds and occasional lifting up to 20 pounds. The job required no firm grasping and no repetitive firm pinching. Appellant accepted the job offer on May 15, 2002 and worked there over 60 days.

By decision dated March 13, 2003, the Office found that the position of modified letter carrier fairly and reasonably represented her wage-earning capacity and that she had no loss in wage-earning capacity effective May 15, 2002, because the wages of the modified carrier exceeded the wages of her date-of-injury job as a letter carrier. The Office, therefore, terminated appellant's compensation payments as of May 15, 2002.

On November 13, 2002 appellant filed a claim for a schedule award.

On December 5, 2002 Dr. Urban used the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* to report range of motion of appellant's right wrist: radial deviation was 18 degrees and the ulnar deviation was 23 degrees, resulting in a 1 percent impairment, dorsiflexion was 51 degrees and the palmar-flexion was 77 degrees, resulting in a 2 percent impairment. Regarding the elbow, Dr. Urban found that appellant had extension of -10 degrees and flexion of 138 degrees, which yielded a 1 percent impairment. He found that appellant had an additional impairment to the arm due to weakness of 20 percent based on the right grip strength of 42 pounds and the left grip strength of 167 pounds, which yielded a 37 percent strength loss. Dr. Urban concluded that appellant had a total of 24 percent impairment to the upper right extremity, *i.e.*, 1 percent +2 percent +1 percent +20 percent.

In a report dated February 17, 2003, the district medical adviser stated that he reviewed Dr. Urban's notes. He stated that using the A.M.A., *Guides* (5th ed. 2001), Tables 16-10, page 482 and 16-15, page 492, appellant had ongoing discomfort in the lateral aspect of her right elbow "awarding 1 percent upper extremity permanent impairment for Grade 4 pain in the distribution of the musculocutaneous nerve (lateral antebrachial cutaneous nerve)." He stated based on Tables 16-31 and 16-34, page 509, appellant's grip strength measured 19.1 kilograms in the left hand awarding 6 percent for the right upper extremity. Regarding appellant's elbow, using Figure 16-34, page 472, the district medical adviser found that appellant's flexion of 138 degrees was 0 percent and the extension of 10 degrees was 1 percent, yielding a total 1 percent impairment to the elbow. He concluded that appellant had a total of eight percent impairment to the right upper extremity.

By decision dated March 19, 2003, the Office issued appellant an award for an eight percent permanent impairment to her upper right extremity.

The Board finds that the Office properly found that appellant had no loss of wage-earning capacity effective May 15, 2002.

Section 8115(a) of the Federal Employees' Compensation Act¹ provides that 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." 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."²

The evidence in this case establishes that appellant's actual earnings as a modified letter carrier fairly and reasonably represent her wage-earning capacity. Appellant's physical requirements identified by Dr. Urban on May 15 and September 23, 2002 matched the physical requirements of the job of modified letter carrier. She had been working at the job for over 60

¹ 5 U.S.C. § 8115(a).

² *Bette L. Kvetensky*, 51 ECAB 346, 347 (2000).

days. The evidence does not show that the position was makeshift or was seasonal part time or temporary.³

Regulations construing the Act provide that the Office “may adjust compensation to reflect the injured worker’s wage-earning capacity” and may terminate compensation benefits if the employee is only partially disabled or has returned to work.⁴ Where, as here, the Office properly determined that appellant returned to work at a higher salary than in her date-of-injury position, the Office properly determined that she had no loss of wage-earning capacity.⁵

Regarding the issue of appellant’s schedule award, the Board finds that the case is not in posture for a decision.

The schedule award provisions of the Act⁶ and its implementing regulation⁷ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled 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 A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁸

In this case, Dr. Urban and the district medical adviser agreed that appellant had a 1 percent impairment to her elbow based on an extension of negative 10 degrees and flexion of 138 degrees, using Figure 16-34, page 472. This finding is consistent with the A.M.A., *Guides* (5th ed. 2001). Dr. Urban and the district medical adviser also determined appellant’s grip strength but had different results. Dr. Urbana determined that appellant had a 37 percent loss of grip strength resulting in a 20 percent impairment due to weakness in the arm, and using Tables 16-31 and 16-34, the district medical adviser determined that appellant’s grip strength resulted in a 6 percent impairment to the right upper extremity. However, according to section 16.8 of the A.M.A., *Guides* (5th ed. 2001), page 508, impairment due to loss of grip strength is only to be determined in a rare case when loss of strength cannot be considered adequately by other methods in the A.M.A., *Guides*. The A.M.A., *Guides* state that decreased strength cannot be rated in the presence of decreased motion that prevent effective application of maximal force in the region being evaluated. Neither Dr. Urban nor the district medical adviser’s opinions conform to section 16.8 as they determined appellant’s impairment due to loss of grip strength without explaining why loss of grip strength could not adequately be considered by other methods of the A.M.A., *Guides*.

³ *Id.*

⁴ 20 C.F.R. §§ 10.503(c) and (d), 10.520.

⁵ *Bette L. Kvetensky, supra* note 2 at 348; *Gregory A. Compton*, 45 ECAB 154, 156-57 (1993).

⁶ 5 U.S.C. § 8107 *et seq.*

⁷ 20 C.F.R. § 10.404.

⁸ *See id.*; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

Moreover, it is unclear how Dr. Urban estimated a one percent impairment of appellant's dorsiflexion and palmar flexion of the wrist. It is also unclear how the district medical adviser, despite his reference to Tables 16-10, page 482, and Tables 16-15, page 492, obtained his conclusion that appellant had a 1 percent impairment due to pain in the musculocutaneous nerve.

Due to the deficiencies in the medical evidence the case will be remanded for further development. On remand, the Office should obtain clarification from Dr. Urban by requesting him to cite specific references to table and pages in the A.M.A., *Guides* (5th ed. 2001) for each percentage of impairment he calculates and to explain any calculation of loss of strength consistent with the A.M.A., *Guides*. Upon review of Dr. Urban's opinion, the district medical adviser should also clearly explain how appellant's impairment was determined.

The March 13, 2003 decision of the Office of Workers' Compensation Programs is affirmed. The Office's March 19, 2003 decision is set aside and remanded for further action consistent with this decision.

Dated, Washington, DC
December 2, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member