

**United States Department of Labor
Employees' Compensation Appeals Board**

ERICA M. RONE, Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Greensboro, NC, Employer**

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**Docket No. 04-63
Issued: April 22, 2005**

Appearances:
Erica M. Rone, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On October 9, 2003 appellant filed a timely appeal from the decision of the Office of Workers' Compensation Programs dated July 14, 2003, wherein the Office found that appellant's position as a modified mail handler represented her wage-earning capacity, and that appellant was therefore not entitled to further compensation for wage loss. On the same date, the Office issued appellant a schedule award for a 15 percent impairment of the right upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issues are: (1) whether the Office properly reduced appellant's compensation benefits to zero effective October 19, 2002 based on its determination that her position of modified mail handler represented her wage-earning capacity; and (2) whether appellant has more than a 15 percent impairment to her right upper extremity, for which she received a schedule award.

FACTUAL HISTORY

On January 11, 1997 appellant, then a 33-year-old mail handler/sacksorter, filed an occupational disease claim alleging that she sustained an injury to her shoulder joint while keying on the sack sorter. By letter dated March 18, 1997, the Office accepted appellant's claim for temporary aggravation of impingement of the right shoulder. Compensation was paid based on an annual salary of \$34,264.00. Appellant underwent surgery on her right shoulder on January 21 and September 30, 1998.

In a medical report dated September 9, 1999, Dr. W. Daniel Caffrey, appellant's treating Board-certified orthopedic surgeon, noted:

"Follow up for shoulder problem. At this point, [appellant] has significant pain in the shoulder with symptoms of subluxation despite two operations. I would note American Medical Association, *Guides to the Evaluation of Permanent Impairment*, shoulder function unit represents 60 percent of upper extremity function. [Appellant's] range of normal motion is basically normal, but she does have pain. I would note that [she] does have significant strength impairment, noting probably 50 percent loss of strength based on Table 34, page 65 of the A.M.A., *Guides*. This would give her a 20 percent impairment of the upper extremity.

"Additionally, I would note Table 23, page 60 A.M.A., *Guides* impairment for persistent subluxation includes a 20 percent impairment relative to mild, that is, can be completely reduced manually.

"I would rate her at that point as a total and permanent disability of the arm at 40 percent. I do think [appellant's] restrictions at this point will be permanent. Hopefully, we can get her back to doing light duty with her right arm, but at this point I would say she should do one handed work only and nonrepetitious work at this point. I do think she can be rated at this time as well."

Dr. Caffrey also noted that appellant continued to need medical management.

On November 18, 1999 the Office medical adviser indicated that appellant could only document a 10 percent impairment of the right upper extremity due to the excision of the outer end of her clavicle, pursuant to Table 27, page 61 of the A.M.A., *Guides*, fourth edition. He also noted her date of maximum medical improvement as February 23, 1999. On November 29, 1999 the Office medical adviser again indicated that there was no other evidence of impairment.

On May 22, 2000 Dr. Caffrey opined that appellant was "not qualified to work under any circumstances at this time" due to severe incapacitating pain in her shoulder.

Dr. Caffrey referred appellant to Dr. Albert K. Bartko, a Board-certified physiatrist. Appellant initially saw him on July 5, 2000 and he began to treat her with a program of trigger point injections and medication. In a report dated September 7, 2000, he indicated that he would keep appellant off work at the moment due to her resistance to returning to work and recommended that she continue with physical therapy and medication changes. In a report dated

September 15, 2000, Dr. Bartko opined that appellant should be able to ultimately return to work. He further indicated that he would not prescribe narcotics.

On November 20, 2000 Dr. John Giusto, a Board-certified physiatrist, began treating appellant with trigger point injections, osteopathic manipulation and acupuncture. At a January 4, 2001 appointment, she gave Dr. Giusto a copy of Dr. Caffrey's rating of 40 percent impairment of the right upper extremity and Dr. Giusto noted no reason to change this rating.

By letter dated December 20, 2000, the Office referred appellant to Dr. Andrew Bush, a Board-certified orthopedic surgeon, for a second opinion. In a January 7, 2001 report, he indicated that she can return to work in some manner from an orthopedic standpoint, but that she was in need of counseling and a work conditioning program. He opined that appellant had no right shoulder orthopedic problems. In an addendum dated February 4, 2001, Dr. Bush indicated that pursuant to the functional capacity evaluation he ordered, it would be appropriate for appellant to return to a sedentary job.

On April 6, 2001 Dr. Caffrey indicated that he agreed with Dr. Bush and referred appellant to an interdisciplinary pain program for comprehensive work conditioning and pain management.

By letter dated February 27, 2002, the Office referred appellant to Dr. Robert W. Elkins, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve a conflict in medical opinion. In a medical report dated March 12, 2002, Dr. Elkins diagnosed her as status post two surgical procedures to the right shoulder, myofascial pain syndrome in her right shoulder, probable depression and system magnification and pain accentuation. He further noted:

"I feel [that appellant] is capable of returning to light work with a 15-pound weight lifting restriction, no repetitive overhead work and this is based on her loss of range of motion of abduction and internal rotation on her objective findings. I feel [that appellant] might improve with a work hardening program and [I] feel [that] this could be done for a period of about three weeks. I feel [that] this would be the only care on a continuing basis that would be recommended. I feel that [appellant] has reached maximum medical improvement. I certainly feel she can continue at light duty."

Dr. Elkins conducted various tests including tests to determine the abduction, adduction, internal and external rotation, flexion and extension in appellant's right and left arms. He also rated her right grip and pinch, performed a Tinel's test and evaluated her right hand strength using a Jamar hand dynameters. Dr. Elkins then evaluated appellant's permanent impairment level as follows:

"All ratings are calculated using the appropriate guidelines. For Workers' Compensation cases, the appropriate state Workers' Compensation Guidelines is used, for other cases the [American Medical Association, *Guidelines to the Evaluation of Permanent Impairment*] 4th edition is used. When either guideline

is inadequate for that diagnosis, the ratings are cross checked, using other A.M.A., *Guide* [t]ables where appropriate.

“I feel [appellant] has reached maximum medical improvement and has a 15 percent physical impairment rating to the right shoulder for the 2 surgical procedures, the excision of the distal clavicle and her range of motion.”

By letter dated September 20, 2002, the employing establishment offered appellant a position as a rehabilitated mail handler. The employing establishment noted that the position would involve no lifting, pushing or pulling greater than 15 pounds and for not more than 4 hours, no repetitive reaching above the right shoulder and no operation of motorized vehicles. By letter dated September 20, 2002, the Office informed appellant that they found the position suitable and gave her 30 days from the date of the letter to either accept the position or explain the reasons for refusing it. On September 24, 2002 Dr. Caffrey indicated that he had reviewed the position description and found that the position was within appellant’s restrictions. She returned to work on October 19, 2002. In this position, appellant was paid \$37,988.00 per year.

On December 11, 2002 Dr. Guisto indicated that appellant had “[c]hronic pain syndrome with very good result with return to work.”

In a vocational rehabilitation report dated December 17, 2002, the vocational counselor, who had been evaluating appellant since April 2002, noted that she had successfully returned to work. On December 30, 2002 the Office’s rehabilitation specialist closed out appellant’s rehabilitation file, finding that she had satisfactorily performed the duties of a modified mail carrier for over 60 days earning \$37,998.00 per year, “which has resulted in a zero percent wage loss.”

On January 17, 2003 appellant filed a claim for a schedule award.

On February 26, 2003 the Office medical adviser indicated that the medical records were insufficient to show a permanent impairment of appellant’s right shoulder or that maximum medical improvement had been reached.

On March 5, 2003 the Office asked appellant to have her physician provide an impairment rating with regard to her claim for a schedule award. Dr. Caffrey responded by attaching the rating he did on September 9, 1999.

On July 14, 2003 the Office issued a schedule award for a 15 percent impairment of the right upper extremity. On the same date the Office issued a decision, finding that appellant’s employment as a “modified mail handler,” is a position she held since October 19, 2002, represented her wage-earning capacity, as she had demonstrated the ability to perform the duties of this job for two months or more. The Office also noted that her compensation for wage loss ended on the date that she was reemployed. The Office indicated that appellant was still entitled to medical benefits for treatment related to her accepted work-related injury.

LEGAL PRECEDENT -- ISSUE 1

Section 8115 of the Federal Employees' Compensation Act,¹ titled "Determination of wage-earning capacity," states in pertinent part:

"(1) In determining compensation for partial disability, ... the wage[-]earning capacity of an employee is determined by [her] earnings if [her] ... earnings fairly and reasonably represent her wage-earning...."

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.² The Office procedures indicate that a determination regarding whether actual wages fairly and reasonably represent wage-earning capacity should be made after a claimant has been working in a given position for more than 60 days.³

ANALYSIS -- ISSUE 1

In the instant case, appellant was employed as a rehabilitated mail handler, a position which she commenced on October 19, 2002. There is no evidence that this position is seasonal, temporary, less than full-time or make-shift work designed for appellant's particular needs.⁴ There is no evidence that appellant's wages in this position did not fairly and reasonably represent her wage-earning capacity. In fact, there is a great deal of evidence indicating that appellant's return to work was successful. On September 24, 2002 Dr. Caffrey indicated that he had reviewed the position description and found the position was within her restrictions. On December 11, 2002 Dr. Guisto indicated that appellant had a "very good result with return to work." She successfully held this position for more than 60 days, as required by Chapter 2.814.7(a) of the Office procedures discussed above.⁵ Appellant's vocational counselor also noted that she successfully returned to work. Her new position paid \$37,988.00 per year, which was more than the \$34,264.00 appellant was paid in the date-of-injury position. As her new position paid more than the position she held on the date of injury and as she worked in this position for more than 60 days, the Board finds that the Office properly determined that there was no loss of wage-earning capacity, and properly reduced her compensation to zero effective October 19, 2002.

¹ 5 U.S.C. § 8115.

² *Elbert Hicks*, 49 ECAB 283, 284 (1998).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997); see *Robert Litzler*, 51 ECAB 588 (2000).

⁴ *Monique L. Love*, 48 ECAB 378, 380 (1997); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-earning Capacity*, Chapter 2.814.7) (May 1997).

⁵ See *supra* note 3.

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of the Federal Employees' Compensation Act⁶ 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 Act's implementing regulations has adopted the A.M.A., *Guides*, as the appropriate standard for evaluating schedule losses.⁷

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁸ Furthermore, the Office has a responsibility to secure a supplemental report from an impartial medical specialist to correct a defect in the original report.⁹

Regarding the evaluation of schedule awards, the Office's procedure manual provides that the attending physician should make the evaluation whenever possible and be advised of the information needed to determined permanent impairment.¹⁰ After obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment.¹¹

ANALYSIS -- ISSUE 2

Dr. Caffrey, appellant's treating Board-certified orthopedic surgeon, determined that she had a 40 percent total and permanent disability of the right arm based on 20 percent impairment due to a significant strength impairment in her right shoulder and 20 percent for persistent subluxation. Dr. Giusto, her Board-certified physiatrist, agreed with Dr. Caffrey's rating, but failed to provide any explanation, so his report does not constitute rationalized medical opinion evidence supportive of appellant's claim. The Office referred her to Dr. Bush for a second opinion, who opined that appellant had no right shoulder orthopedic problems. In order to resolve the conflict between Dr. Caffrey's finding that she had continuing disability in her shoulder and Dr. Bush's report to the contrary, the Office referred appellant to Dr. Elkins for an impartial medical examination. Accordingly, his report, if sufficiently well rationalized, would represent the special weight of the medical evidence. Dr. Elkins' opinion that appellant

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Solomon Polen*, 51 ECAB 341, 343 (2000); *see also Kathryn Haggerty*, 45 ECAB 383 (1994).

⁹ *Richard O'Brien*, 53 ECAB 234 (2001).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims, Evaluation of Schedule Awards*, Chapter 2.808.6c(1)-(2) (August 2002).

¹¹ *Id.* at Chapter 2.808.6(d).

sustained a 15 percent impairment to her right shoulder is also insufficient to establish her impairment for schedule award purposes. He conducted an examination of appellant, including taking measurements of abduction, adduction, internal and external rotation and flexion-extension of the right upper extremity. Dr. Elkins concluded that pursuant to the A.M.A., *Guides* (fourth edition) appellant had a 15 percent physical impairment of the right shoulder based on the two surgical procedures, the excisions of the distal clavicle and her loss of range of motion. However, he did not refer to the specific pages and tables or charts of the A.M.A., *Guides* he utilized in making his determination. The Office's procedure manual indicates that after obtaining all necessary medical evidence the file should be forwarded to the Office medical adviser for an opinion concerning the nature and percentage of impairment.¹² Accordingly, the Board finds that the Office should have referred appellant's record to an Office medical adviser to evaluate the medical report and determine impairment pursuant to the fifth edition of the A.M.A., *Guides*. The Board will remand the case for referral to the Office medical adviser. If the Office medical adviser determines that Dr. Elkins opinion is insufficient to determine an impairment rating, the Office should ask him to provide a supplemental opinion.¹³ Following any further action as the Office deems necessary the Office shall issue a *de novo* decision on appellant's entitlement to a schedule award.

CONCLUSION

The Board finds that appellant's wage-earning capacity was properly reduced to zero based on her actual wages of a mail handler and that the Office properly terminated appellant's compensation for wage loss as of October 19, 2002. However, the Board finds that the case is not in posture for decision on the impairment of her right upper extremity for schedule award purposes.

¹² *Id.*

¹³ *See, e.g., Newton Ky Chung*, 39 ECAB 919, 926-27 (1988) (when the opinion of an impartial medical examiner requires clarification or elaboration, the Office has the responsibility to secure a supplemental report for the purpose of correcting the defect in the original report). *Harold Travis*, 30 ECAB 1071, 1078 (1979). *See also* Chapter 2.808.6b of the Office's procedure manual which provides that the attending physician should provide a report including a detailed description of the impairment which includes, where applicable, degrees of range of motion, decrease in strength or disturbance, atrophy or deformity or "other pertinent description of the impairment." *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims, Evaluation of Schedule Awards*, Chapter 2.808.6b (August 2002).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 14, 2003 terminating appellant's compensation for wage loss is affirmed. The decision on the schedule award of the right upper extremity is set aside and returned to the Office for further consideration consistent with this decision.

Issued: April 22, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member