

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

JAMES R. WALLS, Appellant)
and) Docket No. 04-1726
U.S. POSTAL SERVICE, VEHICLE) Issued: January 4, 2005
MAINTENANCE FACILITY,)
St. Louis, MO, Employer)

)

Appearances:

Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On June 29, 2004 appellant filed a timely appeal of the April 26, 2004 nonmerit decision of the Office of Workers' Compensation Programs, which denied his request for reconsideration. Appellant also timely appealed the Office's December 1, 2003 schedule award and the November 19, 2003 wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim.

ISSUES

The issues are: (1) whether appellant's actual earnings as a modified automotive technician fairly and reasonably represent his wage-earning capacity; (2) whether appellant has more than a three percent permanent impairment of his left and right lower extremity, for which he received a schedule award; and (3) whether the Office properly denied appellant's request for a review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 9, 2000 appellant, then a 36-year-old automotive mechanic, sustained a traumatic back injury while operating a motor vehicle in the performance of duty. The Office initially accepted appellant's claim for lumbosacral sprain and later expanded the claim to include L3-4 bulging disc. On October 27, 2000 appellant underwent an L3-4 lumbar laminectomy and fusion, which the Office authorized.¹ Appellant received appropriate wage-loss compensation and the Office placed him on the periodic compensation rolls effective October 8, 2000. He returned to part-time, limited duty on January 30, 2001 and he received compensation for four hours of lost wages per workday. Appellant began to experience severe increased symptoms and based on his doctor's advice, he stopped work on April 3, 2001 and later filed a claim for recurrence of disability. The Office accepted that appellant sustained a recurrence of disability and resumed payment of compensation for total disability. The Office also authorized additional surgery, which Dr. Robert J. Bernardi, a Board-certified orthopedic surgeon, performed on October 1 and 4, 2001.

In a report dated April 16, 2002, Dr. Bernardi advised that appellant could return to full-time, limited duty beginning April 22, 2002. He imposed a lifting restriction of no more than 10 to 15 pounds. Dr. Bernardi also indicated that appellant needed to avoid activities involving repetitive bending or twisting at the waist and he should not sit or stand for more than 45 minutes to an hour without changing positions.

On April 25, 2002 appellant accepted a full-time, limited-duty assignment as a modified automotive technician with an annual salary of \$35,972.00. The assigned duties were noted to be in accordance with Dr. Bernardi's April 16, 2002 limitations. Specifically, the position description noted physical restrictions of no lifting over 10 to 15 pounds, no sitting or standing longer than 1 hour at a time, and no driving longer than 45 minutes, with at least 10- to 15-minute breaks between each period of driving.

On January 17, 2003 appellant filed a claim for a schedule award. In a March 14, 2003 report, Dr. Bernardi found that appellant had reached maximum medical improvement on October 1, 2002. He also found that appellant had a 20 percent whole person impairment related to his work injury and subsequent surgeries. The Office forwarded the record, including Dr. Bernardi's findings, to its medical adviser, who in a report dated June 23, 2003, found that appellant had a three percent impairment of the left and right lower extremity attributable to radicular pain in the distribution of the L4 nerve root.

In a decision dated November 19, 2003, the Office found that appellant's actual weekly earnings of \$722.28 as a modified automotive technician fairly and reasonably represented his wage-earning capacity. The Office further explained that the current pay rate of appellant's date-of-injury job was \$643.67 and because his actual earnings as an automotive technician exceeded \$643.67, he did not have a loss of wage-earning capacity.

¹ Dr. David B. Robson, a Board-certified orthopedic surgeon, performed the October 27, 2000 surgery.

On December 1, 2003 the Office granted a schedule award for a three percent impairment of the left and right lower extremity. The award covered a 17.2-week period January 1 to May 1, 2003.

Appellant requested reconsideration on December 10, 2003. He filed a second request for reconsideration through his Congressional representative on March 23, 2004. By decision dated April 26, 2004, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

Under section 8115(a) of the Federal Employees' Compensation 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.² 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.³ The actual earnings in the position are compared with the current wages of the date-of-injury position to determine loss of wage-earning capacity.⁴

ANALYSIS -- ISSUE 1

Appellant's limited-duty assignment as a modified automotive technician, which he began on April 25, 2002, was consistent with the April 16, 2002 restrictions identified by his treating physician, Dr. Bernardi. His performance of this position in excess of 60 days is persuasive evidence that the position represents his wage-earning capacity.⁵ Moreover, there is no evidence that the position was seasonal, temporary or make-shift work designed for appellant's particular needs.⁶ Additionally, appellant's current weekly earnings of \$722.28 as a modified automotive technician exceeded the current weekly wages of his date-of-injury position, which the Office identified as \$643.67. Therefore, he had no loss of wage-earning capacity under the *Shadrick* formula.⁷ Accordingly, the Office properly determined that appellant's actual earnings reasonably represented his wage-earning capacity. Additionally, the Office correctly found that appellant had no loss of wage-earning capacity.

² 5 U.S.C. § 8115(a); see *Loni J. Cleveland*, 52 ECAB 171, 176-77 (2000).

³ *Loni J. Cleveland*, *supra* note 2.

⁴ 20 C.F.R. § 10.403(c) (1999); *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁵ 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).

⁶ *Elbert Hicks*, 49 ECAB 283 (1998).

⁷ *Albert C. Shadrick*, *supra* note 4.

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of the Act 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.⁸ 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 implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.⁹ Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).¹⁰

ANALYSIS -- ISSUE 2

Dr. Bernardi stated that appellant had a 20 percent whole person impairment due to his back injury and surgeries. He characterized appellant's impairment as category 4, with loss of motion segment integrity, but he did not specifically assign an impairment rating for either lower extremity. As a schedule award is not payable for a permanent impairment of the back or whole body, Dr. Bernardi's March 14, 2003 report is of limited probative value in determining the extent of appellant's permanent impairment.¹¹

Based on Dr. Bernardi's recent examination findings, the Office medical adviser calculated a three percent bilateral impairment due to radicular pain in the distribution of the L4 nerve root. He rated the severity of appellant's pain as Grade 3, which represents a 26 to 60 percent deficit under Table 16-10, A.M.A., *Guides* 482. The Office medical adviser properly found that the maximum impairment based on the L4 nerve root was 5 percent according to Table 15-18, A.M.A., *Guides* 424. Under Tables 16-10 and 15-18, a Grade 3 rating (60 percent) in conjunction with a L4 nerve root sensory deficit or pain (5 percent) results in 3 percent impairment (60 percent x 5 percent = 3 percent) of the lower extremity.

Inasmuch as the Office medical adviser's June 23, 2003 calculation conforms to the A.M.A., *Guides* (5th ed. 2001), his finding constitutes the weight of the medical evidence.¹² Appellant has not submitted any credible medical evidence indicating that he has greater than a three percent impairment of the left and right lower extremity.

⁸ The Act provides that for a total, or 100 percent loss of use of a leg, an employee shall receive 288 weeks of compensation. 5 U.S.C. § 8107(c)(2).

⁹ 20 C.F.R. § 10.404 (1999).

¹⁰ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003); FECA Bulletin No. 01-05 (issued January 29, 2001).

¹¹ *Phyllis F. Cundiff*, 52 ECAB 439, 440 (2001).

¹² See *Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

LEGAL PRECEDENT -- ISSUE 3

Under section 8128(a) of the Act, the Office has the discretion to reopen a case for review on the merits.¹³ Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.¹⁴ Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁵

ANALYSIS -- ISSUE 3

Appellant's December 10, 2003 and March 23, 2004 requests for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).¹⁶ With respect to the third requirement, that the information submitted constitute relevant and pertinent new evidence not previously considered by the Office, appellant did not submit any additional information on reconsideration. Because appellant did not submit any relevant and pertinent new evidence, he is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).¹⁷ As appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Office properly denied reconsideration.

CONCLUSION

The Board finds that appellant's actual earnings as a modified automotive technician fairly and reasonably represents his wage-earning capacity. Additionally, appellant has not established that he has greater than a three percent impairment of his left and right lower extremity. The Board also finds that the Office properly denied appellant's request for reconsideration.

¹³ 5 U.S.C. § 8128(a).

¹⁴ 20 C.F.R. § 10.606(b)(2) (1999).

¹⁵ 20 C.F.R. § 10.608(b) (1999).

¹⁶ 20 C.F.R. §§ 10.606(b)(2)(i) and (ii) (1999).

¹⁷ 20 C.F.R. § 10.606(b)(2)(iii) (1999).

ORDER

IT IS HEREBY ORDERED THAT the April 26, 2004, December 1 and November 19, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 4, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member