United States Department of Labor
Employees' Compensation Appeals Board

D.R., Appellant	)	
and	)	**Docket No. 05-1940**
	)	**Issued: December 14, 2006**
U.S. POSTAL SERVICE, POST OFFICE, St. Paul, MN, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 7, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' schedule award decision dated May 20, 2005 and a June 2, 2005 loss of wage-earning capacity decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these decisions.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she has more than a three percent permanent impairment of her right upper extremity for which she received a schedule award; and (2) whether the Office properly determined appellant's wage-earning capacity based on her actual earnings as a modified mail processing clerk.

FACTUAL HISTORY

On December 31, 2002 appellant, then a 49-year-old distribution clerk, filed an occupational disease claim alleging that she sustained tendinitis in both elbows and shoulders as

a result of her federal employment.[1] She stopped work on November 21, 2002 and returned on December 2, 2002.[2] The Office accepted appellant's claim for right shoulder tendinitis, right lateral epicondylitis, right carpal tunnel syndrome (CTS) and bilateral elbow tendinitis. The Office authorized physical therapy. Appellant received appropriate compensation benefits.

In an October 31, 2003 report, appellant's treating physician, Dr. Michael Rath, Board-certified in family medicine, opined that she reached maximum medical improvement on that date and provided temporary work restrictions.[3] The Office subsequently received a second report from Dr. Rath also dated October 31, 2003. Dr. Rath opined that appellant reached maximum medical improvement on October 31, 2003 and that she did not have any permanent impairment of the upper extremity due to loss of function for decreased strength, sensory deficit, pain or discomfort.[4] Appellant's treating physician, Dr. Rath, advised that she could only work five hours a day with restrictions.

By letter dated February 25, 2004, the Office referred appellant, together with a statement of accepted facts and copies of medical records, to Dr. Joel I. Gedan, a Board-certified neurologist, for a second opinion examination.

In an April 19, 2004 report, Dr. Gedan noted appellant's history of injury and treatment. He opined that appellant had reached maximum medical improvement. Dr. Gedan noted that appellant could return to full duty with restrictions by gradually returning her to work over a one-month period by increasing her work hours by an additional hour each week. He included restrictions comprised of continuing her light-duty work with varying activities such as cutting and opening bundles for two hours and flipping letters for two hours with a break in between followed by lunch. Dr. Gedan also advised that she could continue these activities at two-hour intervals with 15-minute breaks between them.

The Office found a conflict in medical opinion between Dr. Rath and Dr. Gedan as to appellant's work capacity.

By letters dated July 29 and August 2, 2004, the Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. Khalafalla Bushara, a Board-certified neurologist, for an impartial medical evaluation. The Office also requested his opinion regarding the extent of any permanent impairment. On August 5, 2004 the Office requested that Dr. Rath utilize the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* (5th ed. 2001) (hereinafter A.M.A., *Guides*).

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[1] Appellant has a separate occupational disease claim, which was accepted for C5-6 radiculopathy under No. 10-0454451. The record reflects that appellant had a family history of brain aneurysms.

[2] She stopped work on June 2, 2003 and returned in a limited-duty capacity on June 16, 2003.

[3] The employing establishment provided appellant with a modified assignment consistent with these restrictions.

[4] Dr. Rath also provided measurements which included 85 degrees for internal rotation, 90 degrees for external rotation, 170 degrees for retained forward elevation, 45 degrees of retained backward elevation, 160 degrees of retained abduction and 45 degrees of retained adduction.

In an August 30, 2004 report, Dr. Bushara noted appellant's history of injury and treatment, which included a significant neck injury in 1992 prior to her employment in 1993. He examined appellant, noting that the arms were normal and that appellant had chronic degenerative changes at C3-4, C5-6 and C6-7. Dr. Bushara indicated ranges of motion of the neck and arms were mostly normal; however, there was evidence of mild peripheral neuropathy. Appellant had mild limitation of lateral bending; otherwise, the range of motion of the neck was normal. Dr. Bushara noted that appellant had chronic spondylolysis of the cervical spine and history of trauma to the cervical spine in 1992 prior to her employment in 1993. He opined that her symptoms and diagnostic findings from 1996 to 2004 revealed chronic cervical spondylolysis with C5-6 neuroforaminal stenosis bilaterally, as well as central canal stenosis, which was unrelated to her employment. Dr. Bushara advised that there was no evidence on clinical examination of myelopathy or carpal tunnel syndrome and that no further treatment was indicated. He also noted that appellant was able to work full time with the restriction of lifting no more than 30 pounds and avoidance of repetitive neck movements. Dr. Bushara noted that these restrictions were related to her chronic cervical spondylolysis and not to any work-related injury and that she reached maximum medical improvement on October 31, 2003. He indicated that appellant did not have any permanent partial disability due to lack of objective findings and noted that his current objective examination showed no neurological deficits in the arms. Dr. Bushara opined that the cervical spondylolysis was a preexisting condition and was not due to a work-related injury from work-related repetitive movements of the neck.

On October 25, 2004 the employing establishment provided appellant with an offer of a modified assignment as a mail processing clerk. The position was comprised of working full time in the flat sorting machine area for eight hours a day and no lifting over 30 pounds and avoid repetitive neck movements. The salary was listed as $44,436.00 per year and the work hours were from 2:30 p.m. to 11:00 p.m. Appellant rejected the position on October 28 and December 17, 2004.

In an October 29, 2004 report, Dr. Rath indicated that he had reviewed the requirements of the modified position. He agreed with the position with the exception of the eight-hour shift and suggested that the employing establishment gradually return appellant to an eight-hour day, in half-hour increments. In a separate report dated December 7, 2004, Dr. Rath advised that he had arranged for his nurse to conduct an onsite visit, and that he had reviewed appellant's current duty position. He noted that the machine operation in all areas appeared to be within the work restrictions and would not exceed appellant's lifting or positioning requirements.

In a December 12, 2004 report, Dr. Jacob Salomon, an attending physician Board-certified in general surgery, examined appellant and provided range of motion measurements for her arms. He addressed appellant's pain and noted ongoing complaints regarding her carpal tunnel syndrome and her motor loss. Dr. Salomon opined that appellant's left carpal tunnel syndrome and left shoulder condition were work related. He opined that appellant was unable to work and totally disabled. Regarding the right arm, Dr. Salomon referred to Figure 16-40 at page 476 and determined that 140 degrees of flexion was equal to 3 percent and 430 degrees of extension was equal to 1 percent. He referred to Figure 16-43 at page 477 and determined that abduction was 150 degrees, which was equal to 1 percent impairment and adduction of 20 degrees was equal to 1 percent. Dr. Salomon referred to Figure 16-46 at page 479 and

determined that internal rotation of 30 degrees was equal to 4[5] percent and external rotation of 60 degrees was 0 percent. He added these numbers for a total of 10 percent impairment based on loss of range of motion. Dr. Salomon provided an impairment for muscle weakness. He referred to Table 16-35 at page 510 and determined that flexion was a 4/5 or 4 percent, internal rotation was a 4/5 or 2 percent, and internal rotation was a 4/5 or 1 percent, extension was a 4/5 or 1 percent, abduction was a 4/5 or 2 percent, adduction was a 4/5 or 1 percent, internal rotation was a 4/5 or 2 percent and internal rotation was a 3/5 or 2 percent. Dr. Salomon added these impairment values to total 11 percent for muscle weakness of the right shoulder. He utilized the Combined Values Chart at page 604 for range of motion and muscle strength to find 20 percent impairment. Dr. Salomon also provided findings for the right elbow, and appellant's right carpal tunnel syndrome and for her left arm. These findings included 14 percent for the right elbow and 25 percent for her carpal tunnel syndrome. Regarding the left arm, Dr. Salomon advised that appellant had a loss of range of motion of 6 percent and muscle strength and weakness of 10 percent and referred to the Combined Values Chart to determine that appellant had a permanent impairment of 15 percent of the left arm. He opined that appellant had a total left arm impairment of 15 percent and right arm impairment of 50 percent.

On January 1, 2005 appellant filed a claim for a schedule award.

On January 3, 2005 appellant accepted the full-time modified limited-duty assignment as a modified rehabilitation carrier. The assignment was comprised of working an eight-hour workday in the flat sorting machine area, labeling and replacing flat tubs and loading ledges. The restrictions included: no lifting over 30 pounds, no repetitive neck movements, standing and walking and minimal bending. She began the position on January 5, 2005.

In a report of work ability dated February 3, 2005, Dr. John A. Springer, a Board-certified orthopedic surgeon and treating physician, advised that appellant could return to work with restrictions of no lifting greater than 30 pounds, and no overhead or away from body lifting.

In a February 7, 2005 report, an Office medical adviser noted appellant's history of injury and treatment. He reviewed the reports of Drs. Gedan and Bushara, noting that appellant had full range of motion of the right shoulders and elbows and had a normal sensory examination with normal strength. Appellant's left-sided C5-6 herniated nucleus pulposus was not accepted as work related. The Office medical adviser referred to Table 16-15[6] and Table 16-10[7] and determined that appellant had three percent permanent impairment of the right arm for a Grade 3 pain in the distribution of the suprascapular nerve to her right shoulder and opined that she reached maximum medical improvement on October 31, 2003.

In a memorandum dated May 20, 2005, the vocational rehabilitation counselor noted that he was closing the file because appellant had successfully completed more than 60 days on her modified-duty assignment as a mail processing clerk with an annual salary of $44,435.00.

[5] He actually indicated 3 percent, but this appears to be a typographical error, as the A.M.A., *Guides* indicated that 30 degrees of internal rotation equates to 4 percent impairment of the arm.

[6] A.M.A., *Guides* 492.

[7] *Id.* at 482.

On May 20, 2005 the Office granted a schedule award for a three percent permanent impairment of the left upper extremity or 9.36 weeks of compensation.

By decision dated June 2, 2005, the Office found that appellant's actual earnings as a modified mail processing clerk fairly and reasonably represented her wage-earning capacity and did not constitute a makeshift position. The Office noted that her salary when the disability began was $41,990.00 and that her current pay was $45,061.00. Therefore, her actual earnings met or exceeded the current wages of the job held when injured.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act[8] 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.[9] 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 for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[10] The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[11]

ANALYSIS -- ISSUE 1

In support of her claim for a schedule award, appellant submitted a report from Dr. Salomon, a Board-certified general surgeon, who provided findings on physical examination, utilized the A.M.A., *Guides* and opined that she had 15 percent impairment of the left arm and a 50 percent impairment of the right arm. Dr. Salomon's findings included findings for loss of range of motion and strength. Although Dr. Salomon provided findings for both range of motion and lost strength, based on manual muscle testing, in the same joint, the A.M.A., *Guides* provide that strength deficits measured by manual muscle testing should only rarely be included in the

[8] 5 U.S.C. §§ 8101-8193.

[9] 5 U.S.C. § 8107.

[10] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[11] A.M.A., *Guides* (5th ed. 2001); 20 C.F.R. § 10.404.

calculation of upper extremity impairment.[12] As Dr. Salomon did not explain why appellant would be entitled to impairment for muscle weakness based on manual muscle testing, his impairment rating is of diminished probative value.

The Board notes that Dr. Salomon's range of motion examination found impairment. For example, he provided measurements for the right shoulder and referred to Figure 16-40 at page 476 and determined that 140 degrees of flexion was equal to 3 percent and 430 degrees of extension was equal to 1 percent. He referred to Figure 16-43 at page 477 and determined that abduction of 150 degrees was equal to 1 percent and adduction of 20 degrees was equal to 1 percent. Dr. Salomon referred to Figure 16-46 at page 479 and determined that internal rotation of 30 degrees was equal to 4[13] percent and external rotation of 60 degrees was 0 percent. He added these numbers to total 10 percent impairment of the right upper extremity. This report suggests that appellant may have more than the three percent impairment for which she received a schedule award.

On the other hand, the Office medical adviser utilized the findings of Drs. Bushara[14] and Gedan and noted that appellant had full range of motion and normal strength of the right upper extremity. However, he did not explain why he chose to utilize the reports of Drs. Bushara and Gedan, which did not find impairment for loss of range of motion or strength and ignored Dr. Salomon's report. Consequently, the Board finds that, in determining appellant's impairment, the Office medical adviser failed to completely consider all material information available in the case record or provide his rationale for selecting one medical report over another. Proceedings under the Act are not adversary in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[15]

Accordingly, the case will be remanded for further development. On remand, the Office should refer appellant, together with the case record and a statement of accepted facts, to an appropriate Board-certified specialist for an evaluation of any permanent impairment based on

[12] The A.M.A., *Guides* provides that loss of strength may be rated separately if such a deficit has not been considered adequately by other rating methods. An example of this situation would be loss of strength caused by a severe muscle tear that healed leaving a palpable muscle defect. If the rating physician determines that loss of strength should be rated separately in an extremity that presents other impairments, the impairment due to loss of strength could be combined with the other impairments, only if based on unrelated etiologic or pathomechanical causes. Otherwise, the impairment ratings based on objective anatomic findings take precedence. The A.M.A., *Guides* further provides that decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities or absence of parts that prevent effective application of maximum force. A.M.A., *Guides* 508, section 16.8a. *See Cerita J. Slusher*, 56 ECAB ___ (Docket No. 04-1584, issued May 10, 2005).

[13] He actually indicated 3 percent, but this appears to be a typographical error, as the A.M.A., *Guides* indicated that 30 degrees of internal rotation equates to 4 percent impairment of the arm.

[14] Dr. Bushara was selected to resolve a conflict on the resolution of appellant's accepted condition and her work restrictions. However, at the time he was selected there was not a conflict on the amount of appellant's impairment. But his report may still be considered for its own intrinsic value. *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

[15] *John W. Butler*, 39 ECAB 852 (1988).

correct application of the fifth edition of the A.M.A., *Guides*. After such further development as it deems necessary, the Office shall issue a *de novo* decision.

LEGAL PRECEDENT -- ISSUE 2

Under section 8115(a) of the Act,[16] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. 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.[17] The formula for determining loss of wage-earning capacity based on actual earnings, developed in the Board's decision in *Albert C. Shadrick*,[18] has been codified by regulation at 20 C.F.R. § 10.403. Office procedures provide 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.[19] The amount of any compensation paid is based on the wage-earning capacity determination and it remains undisturbed until properly modified.[20]

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[21] The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[22]

ANALYSIS -- ISSUE 2

The Office accepted appellant's claim for right shoulder tendinitis, right lateral epicondylitis, right CTS and bilateral elbow tendinitis. Appellant was offered a full-time, limited-duty assignment as a modified mail processing clerk, effective October 25, 2004.

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[16] 5 U.S.C. §§ 8101-8193, 8115(a).

[17] *Hayden C. Ross*, 55 ECAB 455 (2004).

[18] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[19] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

[20] *See Sharon C. Clement*, 55 ECAB 552 (2004).

[21] 5 U.S.C. § 8123(a); *Barry Neutuch*, 54 ECAB 313 (2003).

[22] 20 C.F.R. § 10.321.

Appellant's treating physician, Dr. Rath, advised that she could only work five hours a day with restrictions. However, Dr. Gedan, the second opinion physician, opined that appellant could return to full duty with restrictions by gradually returning her to work over a one-month period by increasing her work hours by an additional hour each week. Dr. Gedan included restrictions which were comprised of continuing her light-duty work and varying her activities and by working at 2-hour intervals with 15-minute breaks between them. The Office found a conflict in medical opinion as to appellant's capacity for employment. It referred appellant to Dr. Bushara for an impartial medical evaluation to resolve the conflict in opinion.

In an August 30, 2004 report, Dr. Bushara noted appellant's history of injury and treatment, which included preexisting degenerative conditions and a history of trauma to the cervical spine prior to her employment in 1993. He opined that appellant's symptoms and as diagnostic findings from 1996 to 2004 were related to her cervical spondylolysis, which was a preexisting condition and which was not due to a work-related injury from work-related repetitive movements of the neck. Dr. Bushara advised that there was no evidence on examination of myelopathy or carpal tunnel syndrome and opined that no further treatment would be indicated. He also noted that appellant was able to work full time with the restriction of lifting no more than 30 pounds and avoidance of repetitive neck movements. Dr. Bushara further noted that these restrictions were related to appellant's chronic cervical spondylolysis and not to any work-related injury. He opined that appellant reached maximum medical improvement on October 31, 2003 and did not have any permanent partial disability due to lack of objective findings and noted that his current objective examination showed no neurological deficits in the upper extremities. As Dr. Bushara was appointed as the impartial medical specialist, his opinion that appellant could perform her job is entitled to special weight.[23] Accordingly, the Board finds that the position of a modified mail processing clerk that appellant held commencing January 5, 2005 was a medically appropriate limited-duty job.

Moreover, this position was found to be consistent with the restrictions identified by her attending physician, Dr. Rath, Board-certified in family medicine. In an October 29, 2004 report, Dr. Rath advised that he had reviewed appellant's modified position. Although he recommended gradually returning appellant to an eight-hour workday, he did not indicate that the position was unacceptable. Dr. Rath did advise gradually increasing appellant's hours. In his December 7, 2004 report, he advised that his nurse had conducted an onsite visit and that the machine operation in all areas was within appellant's work restrictions. Appellant began her modified position on January 5, 2005 and subsequently worked in the position for over 60 days and her case was closed by the rehabilitation counselor on May 20, 2005. Her performance of this position in excess of 60 days is persuasive evidence of her physical capacity to perform the modified work duties and represents her wage-earning capacity.[24] There is no evidence that the position was seasonal, temporary or make-shift work designed for appellant's particular needs.[25]

[23] *Viola Stanko*, 56 ECAB ___ (Docket No. 05-53, issued April 12, 2005).

[24] Office procedures provide 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).

[25] *Elbert Hicks*, 49 ECAB 283 (1998).

The rate of pay for the modified mail processing clerk in the amount of $45,061.00 exceeds her date-of-injury position rate of pay, which was $41,990.00. Therefore, she had no loss of wage-earning capacity under the *Shadrick* formula as of January 5, 2005, as the Office found in its June 2, 2005 decision.[26]

The Board finds that appellant's actual earnings as a modified mail processing clerk fairly and reasonably represent her wage-earning capacity. The Office properly accepted these earnings as the best measure of her wage-earning capacity.

CONCLUSION

The Board finds that this case is not in posture on the issue of whether appellant sustained more than a three percent permanent impairment of her right upper extremity. The Board also finds that appellant's actual earnings as a modified mail processing clerk fairly and reasonably represented her wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 2, 2005 is affirmed. The decision of the Office dated May 20, 2005 is set aside and remanded for further development consistent with this decision.

Issued: December 14, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[26] *Albert C. Shadrick*, *supra* note 18.