United States Department of Labor
Employees' Compensation Appeals Board

J.A., Appellant	)	
and	)	**Docket No. 06-1588**
	)	**Issued: October 23, 2006**
U.S. POSTAL SERVICE, AYAWAM POST OFFICE, Ayawam, MA, 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 5, 2006 appellant filed a timely appeal from the June 6, 2006 merit decisions of the Office of Workers' Compensation Programs, reducing his wage-loss compensation to 0 based on his actual earnings and finding that he had no more than an 11 percent impairment of the left upper extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant's actual earnings as a modified letter carrier fairly and reasonably represent his wage-earning capacity as of July 11, 2005; and (2) whether appellant has more than an 11 percent impairment of the left upper extremity, for which he received a schedule award.

FACTUAL HISTORY

On March 3, 2005 appellant, then a 59-year-old letter carrier, filed an occupational disease claim alleging that on November 8, 2004 he became aware of a torn rotator cuff to the

left shoulder. On December 4, 2004 he first realized that this injury was caused by factors of his federal employment. Appellant stated that he experienced pain in his left shoulder after lifting heavy mail trays. By letter dated April 18, 2005, the Office accepted appellant's claim for left shoulder degenerative rotator cuff disease with acromioclavicular joint arthropathy. The Office authorized left shoulder arthroscopic surgery which included an assessment of the subacromial space, acromioplasty, distal clavicle excision, biceps tenotomy and rotator cuff repair. Surgery was performed on March 11, 2005 by Dr. Sumner E. Karas, an attending Board-certified orthopedic surgeon, whose postoperative diagnoses included left rotator cuff tear with degenerative acromioclavicular arthropathy and impending rupture of the long head of biceps.

Appellant received wage-loss compensation for the period April 18 to July 9, 2005 when he returned to work as a modified letter carrier effective July 11, 1005. He claimed wage-loss compensation for intermittent work absences for physical therapy from July 10 to August 22, 2005. Appellant performed the modified letter carrier duties until his retirement from the employing establishment on September 30, 2005.

The Office received Dr. Karas' March 30, 2006 medical report. On physical examination, Dr. Karas reported elevation of 175 degrees, external rotation of 75 to 80 degrees with medial rotation to around the T10 level. Appellant tolerated passive mid-range manipulations well. There was some intermittent palpable crepitus present, but when appellant initiated elevation against resistance with his arm at lower levels, he had very good strength without pain. Dr. Karas reported normal strength to resist testing of external rotation without pain. There was some retraction of the biceps in the brachium consistent with the biceps tenotomy and a good contour to all three muscle bellies of the deltoid. Dr. Karas recommended three alternatives to address appellant's left shoulder symptoms of a little bit of residual capsular irritability and some activity-related symptoms as a result of the biceps tenotomy that was performed.

Utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*), Dr. Karas determined that appellant had a 10 percent impairment of the left upper extremity as a result of the resection arthroplasty of his distal clavicle and the acromioplasty that were performed. He further determined that appellant had a three percent impairment for the release of the long head of his biceps. Dr. Karas stated that there was no additional significant impairment rating related to mobility, although appellant had a little bit of discomfort with end ranges. He concluded that appellant had a 13 percent impairment of the left upper extremity. Dr. Karas opined that he was at the end medical result, although he could be reevaluated if his lingering symptoms persisted to the point where he became anxious.

On April 25, 2006 appellant filed a claim for a schedule award.

On May 11, 2006 an Office medical adviser reviewed appellant's medical records including Dr. Karas' March 30, 2006 report. Based on the A.M.A., *Guides* 476, Figure 16-40, he determined that 175 degrees of flexion constituted a 1 percent impairment of the left upper extremity. External rotation from 75 to 80 degrees constituted no impairment based on the A.M.A., *Guides* 479, Figure 16-46. The medical adviser determined that medial rotation to the T10 level likewise did not constitute any impairment. He noted some palpable crepitus.

Utilizing the A.M.A., *Guides* 506, Table 16-27, the medical adviser found a 10 percent impairment for isolated distal clavicular arthroplasty. He stated that, while Dr. Karas assigned a three percent impairment for release of the long head of the biceps, he could not find any support for this assignment of impairment in the A.M.A., *Guides*. The medical adviser concluded that appellant had an 11 percent impairment of the left upper extremity. He stated that appellant reached maximum medical improvement on March 30, 2006.

By decision dated June 6, 2006, the Office found that appellant had no loss of wage-earning capacity based on his actual earnings in a modified letter carrier position. The Office found that his actual earnings effective July 11, 2005 were $911.46 a week, equal to the pay rate for his date-of-injury position of $911.46 a week. His compensation was reduced to zero. The Office noted that appellant's medical compensation benefits continued.

In a decision dated June 6, 2006, the Office granted appellant a schedule award for an 11 percent impairment of the left upper extremity.

LEGAL PRECEDENT -- ISSUE 1

Under section 8115(a) of the Federal Employees' Compensation Act,[1] 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.[2] The formula for determining loss of wage-earning capacity based on actual earnings, developed in the Board's decision in *Albert C. Shadrick*,[3] 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.[4] The amount of compensation paid is based on the wage-earning capacity determination and it remains undisturbed until properly modified.[5]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained left shoulder degenerative rotator cuff disease with acromioclavicular joint arthropathy. Following a period of total disability, he returned to work on July 11, 2005 in a modified letter carrier position. Appellant's weekly pay rate was $911.46, the same weekly pay rate for his date-of-injury position. He performed this

[1] 5 U.S.C. §§ 8101-8193, 8115(a).

[2] *Hayden C. Ross*, 55 ECAB ___ (Docket No. 04-136, issued April 7, 2004).

[3] 5 ECAB 376 (1953).

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

[5] *See Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

position without incident through September 30, 2005 when he retired from the employing establishment.

Appellant's performance of this position in excess of 60 days is persuasive evidence that the position represents his wage-earning capacity.[6] Moreover, there is no evidence that the position was seasonal, temporary or make-shift work designed for his particular needs.[7] The rate of pay for the modified letter carrier met the current pay rate for the grade and step of appellant's date-of-injury position. Therefore, he had no loss of wage-earning capacity under the *Shadrick* formula as of July 11, 2005, as the Office found in its June 6, 2006 decision.[8]

As there was no evidence to show that appellant's actual earnings as a modified letter carrier did not properly represent his wage-earning capacity, the Office properly accepted these earnings as the best measure of his wage-earning capacity.[9]

LEGAL PRECEDENT -- ISSUE 2

The schedule award provision of the Act[10] and its implementing regulation[11] sets 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 of loss of use.[12] However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[13]

ANALYSIS -- ISSUE 2

On appeal appellant contends that he has more than an 11 percent impairment of the left upper extremity based on Dr. Karas' March 30, 2006 report. Dr. Karas reported elevation of 175 degrees, external rotation of 75 to 80 degrees with medial rotation to around the T10 level. He

[6] 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).

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

[8] *Albert C. Shadrick, supra* note 3.

[9] *Afegalai L. Boone*, 53 ECAB 533 (2002).

[10] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[11] 20 C.F.R. § 10.404.

[12] 5 U.S.C. § 8107(c)(19).

[13] 20 C.F.R. § 10.404 (1999); *see also Tommy R. Martin*, 56 ECAB ___ (Docket No. 03-1491, issued January 21, 2005); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

found some intermittent palpable crepitus present. Utilizing the A.M.A., *Guides*, Dr. Karas determined that appellant had a 10 percent impairment of the left upper extremity as a result of the resection arthroplasty of his distal clavicle and the acromioplasty that were performed. He also determined that appellant had a three percent impairment for the release of the long head of his biceps. Dr. Karas opined that appellant had a 13 percent impairment of the left upper extremity. However, Dr. Karas did not provide an impairment rating for his loss of range of motion findings based on the A.M.A., *Guides*. Further, he did not identify which table or figure of the A.M.A., *Guides* he applied or discuss how he calculated a three percent impairment for release of appellant's long head biceps. Dr. Karas' report lacks specific information regarding how he applied the A.M.A., *Guides* to find a 13 percent impairment of the left upper extremity. Therefore, the Board finds that his impairment rating is of diminished probative value as it is not rationalized.

An Office medical adviser reviewed Dr. Karas' findings under the provisions of the A.M.A., *Guides*. The medical adviser properly applied the A.M.A., *Guides* to Dr. Karas' findings in determining that 175 degrees of flexion constituted a 1 percent impairment (A.M.A., *Guides* 476, Figure 16-40), 75 to 80 degrees of external medial rotation at the T10 level (A.M.A., *Guides* 479, Figure 16-46) constituted no impairment and distal clavicular arthroplasty constituted a 10 percent impairment (A.M.A., *Guides* 506, Table 16-27). The medical adviser explained that Dr. Karas' finding of a three percent impairment for release of the long head of the biceps was not supported by the A.M.A. *Guides*. He concluded that appellant had an 11 percent impairment of the left shoulder.[14]

The Office medical adviser provided a reasoned opinion that appellant had an 11 percent impairment based on the proper tables of the A.M.A., *Guides*. The Board finds that the weight of the medical evidence with regard to the degree of impairment to the left upper extremity is represented by the Office medical adviser's opinion.

CONCLUSION

The Board finds that the Office properly reduced appellant's wage-loss compensation to zero effective July 11, 2005 based on his actual earnings as a modified letter carrier. The Board further finds that appellant has failed to establish that he has more than an 11 percent impairment of the left shoulder, for which he received a schedule award.

[14] A.M.A., *Guides* 604, Combined Values Chart.

ORDER

IT IS HEREBY ORDERED THAT the June 6, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 23, 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