United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 06-750**
	)	**Issued: June 5, 2007**
DEPARTMENT OF THE NAVY, NAVAL MEDICAL COMMAND, Norfolk, VA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 10, 2006 appellant, through counsel, filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated February 2, 2006 denying modification of a December 23, 1997 loss of wage-earning capacity decision, a December 15, 2005 merit decision by an Office hearing representative affirming a June 7, 2005 schedule award decision for the right upper extremity and a November 21, 2005 schedule award decision for loss of use of the larynx. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the June 7, November 21 and December 15, 2005 schedule award decisions and the February 2, 2006 loss of wage-earning capacity determination.

ISSUES

The issues are: (1) whether the Office properly denied modification of a December 23, 1997 loss of wage-earning capacity decision; (2) whether appellant has more than a three percent impairment of her right upper extremity, for which she received a schedule award; and (3) whether she has more than a 10 percent impairment for loss of use of the larynx, for which she received a schedule award.

FACTUAL HISTORY

On April 28, 1992 appellant, a 44-year-old diagnostic radiologic technician, filed a traumatic injury claim alleging that on that date she was struck on the left shoulder and humerus by items falling from the top of a metal cabinet.[1] The Office accepted the claim for a herniated disc at C5-6, C6 radiculopathy, left shoulder soft tissue trauma, authorized C5-6 nerve root decompression surgery which was performed on July 20, 1993 and anterior cervical microdiscectomy interbody fusion which was performed on November 25, 1992.

On July 7, 1997 appellant accepted the position of office automation clerk offered by the employing establishment. She started working full time on September 15, 1997.

On December 23, 1997 the Office issued a loss of wage-earning decision finding that the wages she earned as an office automation clerk represented her wage-earning capacity and reduced her compensation benefits accordingly.

On February 27, 1998 appellant filed a claim for wage loss for the period January 25 to February 27, 1998.[2]

By decision dated December 15, 1998, the Office denied appellant's request for additional wage-loss compensation for time lost over and above the compensation payments for loss of wage-earning capacity.

In a decision dated January 28, 1999, the Office denied appellant's request for modification of the December 15, 1998 decision.

By decision dated August 2, 2000, the Office denied appellant's claim for a recurrence of disability beginning April 10, 1998.

In a report dated April 29, 2005, Dr. Michael J. Platto, an examining Board-certified physiatrist, diagnosed C5-6, disc herniation and radiculopathy, laryngeal cord paralysis and status post cervical discectomy. He advised that, using Table 16-10, page 482, under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[3] appellant had Grade 3 or 60 percent deficit based upon her C5 sensory deficits. He then noted that according to Table 16-13, page 489 appellant had a 5 percent upper extremity impairment and 5 percent x 60 percent resulted in a 3 percent upper extremity impairment. With regard to appellant's paralyzed larynx, Dr. Platto stated that appellant had a Class II impairment or 15 percent impairment using Table 11-8, page 265. In support of this determination, Dr. Platto reported that appellant was capable of producing speech for everyday

[1] Appellant resigned from her position effective July 15, 1994.

[2] On June 19, 1998 the Office received a request for personnel action based on appellant's request for resignation effective April 10, 1998. Appellant filed an election form opting to receive compensation benefits under Federal Employees' Compensation Act on June 24, 2004.

[3] A.M.A., *Guides* (5th ed. 2001).

use, but "she does have difficulty being heard in noisy places" and that "her speech will sometimes cut out on her with prolonged usage.

In a report dated May 26, 2005, an Office medical adviser reviewed the medical evidence and concluded that appellant had a three percent impairment of the upper extremity. Using Tables 15-17, page 424 the Office medical adviser concluded that appellant had a five percent impairment for sensory impairment at C5. He noted that according to Table 15-15, page 424 he multiplied 60 percent by 5 percent to find a 3 percent impairment of the right upper extremity.

On June 1, 2005 appellant filed a claim for a recurrence of disability beginning April 10, 1998.

In a decision dated June 7, 2005, the Office issued appellant a schedule award for a three percent impairment of the right upper extremity. The award ran from June 12 to August 16, 2005.

In a letter dated June 20, 2005, appellant, through counsel, requested a review of the written record by an Office hearing representative.

In a letter dated August 8, 2005, appellant, through counsel, requested reconsideration of the June 7, 2005 decision and submitted a May 3, 2005 report by Harry A. Doyle, a Board-certified psychiatrist, in support of her request. Dr. Doyle, based upon a psychiatric evaluation and review of the psychological and diagnostic test results and the record, diagnosed major depressive disorder, pain disorder associated with medical condition and psychological factors. He attributed appellant's depression and pain disorder to her accepted employment injury. Based upon a review of the medical records, Dr. Doyle opined that appellant "experienced postoperative cervical and right upper extremity pain, aggravated by work duties." He noted that the records showed that appellant "suffered a collapse of the bone graft and underwent a refusion and plating in July 1993, complicated by nerve injury and vocal cord paralysis." Dr. Doyle noted that appellant "is experiencing serious symptoms and impairment in social and occupational functioning as a result of [m]ajor [d]epressive [d]isorder and [p]ain [d]isorder and she has been totally disabled from performing the duties of her former job or any other gainful employment." He opined that appellant had been totally disabled due to her depression and chronic pain "from July 1994 until she returned to work with restrictions in September 1997, that appellant became totally disabled again in April 1998 and that she has remained totally disabled since that time."

In a report dated October 12, 2005, the Office medical adviser concluded that appellant had a 10 percent impairment of the larynx based on Table 11-8 at page 265. He indicated that she was capable of producing speech for everyday needs, but sometimes it "may require effort and occasionally may be beyond an individual's capacity." With reference to the A.M.A., *Guides*, the Office medical adviser noted that appellant stated that she had "persistent voice problems aggravated by prolonged talking and singing and occasional difficulty swallowing." He then indicated the total impairment rating as 10 percent and the date of maximum medical improvement as May 3, 2005.

On November 21, 2005 the Office issued a schedule award for a 10 percent impairment for loss of use of the larynx.[4]

In a December 15, 2005 decision, an Office hearing representative affirmed the June 7, 2005 schedule award decision. The hearing representative found the medical evidence of record was insufficient to establish that appellant had a greater than three percent permanent impairment of the right upper extremity.

By decision dated February 2, 2006, the Office denied appellant's request for modification of the 1997 loss of wage-earning capacity, but expanded her claim to include the conditions of major depressive disorder and pain disorder. The Office found that while Dr. Doyle's opinion was sufficient to establish consequential injuries of major depressive disorder and pain disorder it was insufficient to warranted modification of the loss of wage-earning capacity decision. In support of this conclusion, the Office noted that Dr. Doyle saw appellant once, which was seven years after she had stopped work.

LEGAL PRECEDENT -- ISSUE 1

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.[5] Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[6]

The Office procedure manual provides that, if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss.[7] The procedure manual further indicates that, under these circumstances, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity decision.[8]

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally

[4] The Board notes that on December 8, 2005 the Office received a June 21, 2005 memorandum from the Office medical adviser, who determined that appellant had a 34 percent voice/speech impairment based upon Tables 11-8, page 265 and Table 11-9. In support of this conclusion, the Office medical adviser noted that he "would accept the last two impairments of this table that indicates classification of voice and impairment."

[5] *See* 20 C.F.R. §§ 10.403, 10.520.

[6] *Id.*; *see Katherine T. Kreger*, 55 ECAB 633 (2004).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). *See Mary E. Marshall*, 56 ECAB ___ (Docket No. 04-1048, issued March 25, 2005).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). *See Harley Sims, Jr.*, 56 ECAB ___ (Docket No. 04-1916, issued February 8, 2005).

rehabilitated or the original determination was, in fact, erroneous.[9] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[10]

ANALYSIS -- ISSUE 1

On December 23, 1997 the Office issued a wage-earning capacity determination finding that appellant's wages in the office automation clerk position to which she returned on September 15, 1997 fairly and reasonably represented her wage-earning capacity. The Office denied modification of the rating while at the same time finding that appellant sustained a consequential injury of major depressive disorder. While the Office found Dr. Doyle's report supportive of a consequential injury of major depressive disorder, it found the report insufficient to support modification of the wage-earning capacity decision beginning April 10, 1998.

The evidence submitted by appellant to support modification of her September 15, 1997 loss of wage-earning capacity decision included a May 3, 2005 report by Dr. Doyle, which the Office hearing representative found sufficient to warrant acceptance of consequential injuries of major depressive disorder and pain disorder. Dr. Doyle reported that appellant experienced "serious symptoms and impairment in social and occupational functioning as a result of major depressive disorder and pain disorder and she has been totally disabled from performing the duties of her former job or any other gainful employment." He opined that appellant had been totally disabled due to her depression and chronic pain "from July 1994 until she returned to work with restrictions in September 1997, that she became totally disabled again in April 1998 and that she has remained totally disabled since that time." For a physician's opinion to be relevant on the issue of modification of a wage-earning capacity decision, the physician must address the duties of the selected position.[11] However, medical evidence submitted by appellant after the loss of wage-earning capacity determination did not specifically address whether the position of automation clerk was unsuitable. Dr. Doyle did not address the relevant issue of whether appellant's accepted employment injury of herniated disc at C5-6, C6 radiculopathy, left shoulder soft tissue trauma had worsened or explain how appellant's back and shoulder conditions prevented her from performing the position of office automation clerk. He also failed to provide any explanation as to how appellant's depression disorder and pain disorder precluded appellant from performing the position of office automation clerk. Dr. Doyle merely noted that appellant was totally disabled from working with no supporting rationale or discussion of the duties of the position of office automation clerk. Furthermore, Dr. Doyle examined appellant once seven years after she had stopped working. As he did not address the relevant issue in this case, his report is of diminished probative value.

Appellant has the burden of proof to show a modification of her wage-earning capacity. She has not submitted sufficient medical evidence to establish a material change in the nature and extent of her injury-related conditions. Dr. Doyle did not explain how appellant's accepted conditions would cause her to be totally disabled for work as an office automation clerk.

[9] *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000).

[10] *Harley Sims, Jr., supra* note 8; *Stanley B. Plotkin, supra* note 9.

[11] *Phillip S. Deering*, 47 ECAB 692 (1996).

Appellant, consequently, has not shown that the Office's determination of her loss of wage-earning capacity should be modified.[12]

LEGAL PRECEDENT -- ISSUE 2

The schedule award provision of the Act[13] and its implementing regulation[14] 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 regulations as the appropriate standard for evaluating schedule losses.[15] Effective February 1, 2001, the fifth edition of the A.M.A., *Guide*s is used to calculate schedule awards.[16]

Although the A.M.A., *Guides* include guidelines for estimating impairment due to disorders of the spine, under the Act a schedule award is not payable for injury to the spine.[17] In the 1960 amendments to the Act, the schedule award provision was modified to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originates in a scheduled or nonscheduled member. Therefore, as the schedule award provision of the Act includes the extremities, a claimant may be entitled to a schedule award for permanent impairment to an arm or leg even though the cause of the impairment originates in the spine.[18] An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized.[19]

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[12] *See Elbert Hicks*, 55 ECAB 151 (2003).

[13] 5 U.S.C. §§ 8101-8193.

[14] 5 U.S.C. § 8107.

[15] 20 C.F.R. § 10.404.

[16] FECA Bulletin No. 01-05 (issued January 29, 2001); *see Jesse Mendoza*, 54 ECAB 802 (2003).

[17] *Pamela J. Darling*, 49 ECAB 286 (1998).

[18] *Thomas J. Engelhart*, 50 ECAB 319 (1999). Section 15.12 of the fifth edition of the A.M.A., *Guides* describes the method to be used for evaluation of impairment due to sensory and motor loss of the extremities as follows. The nerves involved are to be first identified. Then, under Tables 15-15 and 15-16, the extent of any sensory and/or motor loss due to nerve impairment is to be determined, to be followed by determination of maximum impairment due to nerve dysfunction in Table 15-17 for the upper extremity and Table 15-18 for the lower extremity. The severity of the sensory or motor deficit is to be multiplied by the maximum value of the relevant nerve. A.M.A., *Guides*, *supra* note 3 at 423.

[19] *Patricia J. Penney-Guzman* 55 ECAB 757 (2004).

Office procedures provide that, after obtaining all necessary medical evidence, the file should be reviewed by an Office medical adviser for an opinion concerning the nature and percentage of any impairment.[20]

ANALYSIS -- ISSUE 2

In a report dated April 29, 2005, Dr. Platto, using Table 16-10, page 82, determined that appellant had Grade 3 or 60 percent deficit based upon her C5 sensory deficits. Using Table 16-14, page 689 he concluded that appellant had a 5 percent upper extremity impairment and 5 percent x 60 percent result in a 3 percent upper extremity impairment.[21]

In a May 26, 2005 report, the Office medical adviser determined that appellant had a three percent impairment of the right upper extremity. He applied the appropriate tables and pages of the A.M.A., *Guides* to Dr. Platto's findings in reaching his conclusion. The Office medical adviser determined that appellant's 60 percent sensory nerve deficit constituted a Grade 3 impairment of the upper extremity based on the A.M.A., *Guides* 424, Table 15-15. He further determined, that maximum impairment for sensory deficit of a C5 nerve root constituted a five percent impairment based on the A.M.A., *Guides* 424, Table 15-17. The Office medical adviser multiplied 60 percent impairment for a Grade 3 sensory deficit by a maximum impairment of 5 percent for sensory deficit of the C5 nerve root and properly concluded that appellant had a 3 percent impairment of the right upper extremity. There is no medical evidence in conformance with the A.M.A., *Guides* which supports that appellant has more than three percent impairment of her right upper extremity.

Consequently, appellant has not established that she is entitled to a schedule award for greater impairment of her right upper extremity than that for which she has received.

LEGAL PRECEDENT -- ISSUE 3

The schedule award provision of the Act[22] and its implementing regulation[23] 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

[20] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Evaluation of Schedule Awards*, Chapter 2.808.6(d) (August 2002).

[21] Although Dr. Platto reference tables in Chapter 6, The Upper Extremities, the tables referenced and procedures used to calculate impairment are essentially the same as contained in Chapter 15, The Spine. Compare Tables 16-10 at 482 and 16-13 at 489, with Tables 15-17 and 15-17 at 424.

[22] 5 U.S.C. §§ 8101-8193.

[23] 5 U.S.C. § 8107.

appropriate standard for evaluating schedule losses.[24] Effective February 1, 2001, the fifth edition of the A.M.A., *Guide*s is used to calculate schedule awards.[25]

The larynx is a scheduled member of the body for which an award is payable for 160 weeks for a total impairment.[26] Under the A.M.A., *Guides*, impairment to the larynx is determined by impairment of a claimant's ability to speak.[27] Speech impairment is evaluated as to audibility (ability to speak at a level sufficient to be heard), intelligibility (ability to articulate and to link the phonetic units of speech with sufficient accuracy to be understood), and functional efficiency (ability to produce a serviceably fast rate of speech output and to sustain this output over a useful period of time). The degree of impairment is equivalent to the greatest percentage of impairment recorded in any one of these components of speech function.

ANALYSIS -- ISSUE 3

The Office awarded appellant a schedule award for a 10 percent impairment of the larynx, based on the Office medical adviser's assessment of the medical evidence. The Board, however, finds that this case is not in posture as to the extent of impairment of appellant's larynx impairment.

In an April 29, 2006 report, Dr. Platto utilized the fifth edition of the A.M.A., *Guides* to determine appellant's laryngeal impairment. He diagnosed laryngeal cord paralysis. Dr. Platto reported that appellant was capable of producing speech for everyday use, but noted "she does have difficult being heard in noisy places" and that "her speech will sometimes cut out on her with prolonged usage." He opined that, based upon these findings, she fell into a Class II impairment for voice and speech which correlated to a 15 percent impairment under Table 11-8, page 265.

In a report dated October 12, 2005, the Office medical adviser concluded that appellant had a 10 percent impairment of the larynx based upon Table 11-8 at page 265. He indicated that appellant was capable of producing speech for everyday needs, but sometimes it "may require effort and occasionally may be beyond an individual's capacity." With reference to the A.M.A., *Guides*, he noted that appellant stated that she had "persistent voice problems aggravated by prolonged talking and singing and occasional difficulty swallowing." The Office medical adviser concluded that appellant had a total impairment rating of 10 percent and the date of maximum medical improvement was May 3, 2005. The Office medical adviser failed to provide any rationale to explain how he arrived at the 10 percent impairment rating. The Office medical adviser did not provide any correlation between the physical findings made by Dr. Platto regarding appellant's larynx and the classification of voice/speech impairment found in Table 11-8. Accordingly, the case will be remanded for further development.

[24] 20 C.F.R. § 10.404.

[25] FECA Bulletin No. 01-05 (issued January 29, 2001); *see Jesse Mendoza*, *supra* note 16.

[26] 20 C.F.R. § 10.404(a); 5 U.S.C. § 8107(c)(22).

[27] A.M.A., *Guides*, 180-83 (5th ed., 2001). *See also A. George Lamp*, 45 ECAB 441 (1994); *Martin J. Epp*, 38 ECAB 858-59 (1987).

On remand, the Office should refer appellant, together with the case record and statement of accepted facts, to an appropriate Board-certified specialist for an evaluation and calculation of her work-related impairment of her larynx based on 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.

CONCLUSION

The Board finds that the Office properly denied modification of appellant's loss of wage-earning capacity. The Board further finds that appellant has not met her burden of proof to establish that she sustained more than a three percent impairment of her right upper extremity for which she received a schedule award. The Board also finds that the case is not in posture for decision on the issue of appellant's impairment to her larynx.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 2, 2006 and December 15 and June 7, 2005 are affirmed and the decision dated November 21, 2005 is set aside and the case is remanded for further action consistent with the above opinion.

Issued: June 5, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board