United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 07-1165**
	)	**Issued: September 21, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Fort Worth, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On March 26, 2007 appellant filed an appeal from a February 5, 2007 merit decision of the Office of Workers' Compensation Programs finding that he had no loss of wage-earning capacity and a February 7, 2007 merit decision granting him a schedule award. 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 reduced appellant's compensation to zero effective August 7, 2006 on the grounds that his actual earnings as a mail processing clerk fairly and reasonably represented his wage-earning capacity; and (2) whether he has more than a six percent permanent impairment of the right upper extremity and a two percent permanent impairment of the left upper extremity.

FACTUAL HISTORY

On August 17, 2005 appellant, then a 49-year-old flat sorter machine (FSM) clerk, filed an occupational disease claim alleging that he sustained right shoulder pain due to working on

the FSM. He did not initially stop work. The Office accepted appellant's claim for a bilateral sprain/strain of the arm and shoulder and bilateral rotator cuff syndrome.

On March 29, 2006 Dr. Larry Kjeldgaard, an osteopath, performed a right rotator cuff repair, a right superior labrum anterior posterior lesion repair, an arthroscopic acromioplasty and an extensive debridement. The Office paid appellant compensation for temporary total disability effective March 29, 2006.

Appellant underwent a functional capacity evaluation on July 28, 2006. In a progress report dated August 1, 2006, Dr. Kjeldgaard opined that appellant could resume work performing at a medium physical level. Appellant returned to work with restrictions on August 7, 2006. In a progress report dated August 15, 2006, Dr. Karen M. Perl, an osteopath and Board-certified physiatrist, increased appellant's lifting restrictions and found that he should not operate the FSM. In an August 29, 2006 progress report, Dr. Perl listed findings of "full range of motion of the shoulders bilaterally with minimal to no pain."

In an impairment evaluation dated September 29, 2006, Dr. Perl diagnosed right and left rotator cuff tears and severe bilateral acromioclavicular joint arthritis. She measured range of motion of the right shoulder as 155 degrees flexion, 45 degrees extension, 28 degrees adduction, 131 degrees abduction, 71 degrees internal rotation and 59 degrees external rotation. For the left shoulder, Dr. Perl measured 172 degrees flexion, 50 degrees extension, 42 degrees adduction, 138 degrees abduction, 79 degrees internal rotation and 68 degrees external rotation. She applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*) to her range of motion measurements and concluded that appellant had a seven percent right upper extremity impairment and a three percent left upper extremity impairment due to loss of range of motion. Dr. Perl further found that appellant had a 25 percent bilateral impairment due to acromioclavicular joint arthritis according to Table 16-18 on page 499 of the A.M.A., *Guides*. She opined that the upper extremity impairment should be rated according to arthritis rather than loss of range of motion and concluded that he had a bilateral upper extremity impairment of 44 percent.

In a progress report dated October 23, 2006, Dr. Perl found that appellant had full range of motion of the shoulders bilaterally. On October 24, 2006 appellant filed a claim for a schedule award. An Office medical adviser reviewed Dr. Perl's report on November 21, 2006. He noted that Dr. Perl found normal range of motion in her October 23, 2006 progress report but found a loss of range of motion in her September 29, 2006 impairment evaluation. The Office medical adviser further asserted that Dr. Perl incorrectly applied the A.M.A., *Guides* in determining the extent of appellant's impairment due to arthritis. He recommended that the Office obtain the opinion of a referral physician.

On November 1, 2006 the employing establishment notified the Office that appellant's actual earnings equaled the current pay rate for his date-of-injury position.

By letter dated December 12, 2006, the Office referred appellant to Dr. John A. Sklar, a Board-certified physiatrist, for a second opinion evaluation regarding the extent of his permanent impairment. In an impairment evaluation dated January 5, 2007, Dr. Sklar reviewed the medical reports and diagnostic studies. He noted that magnetic resonance imaging scan studies showed

degenerative disease of the shoulders bilaterally. Dr. Sklar found good strength of the shoulders on examination with no tenderness. He measured range of motion but found that the results for flexion and adduction were inconsistent with the values found by Dr. Perl. Dr. Sklar also noted that appellant showed "better shoulder range of motion while taking off his shirt on the left than he did when I examined him." He stated:

> "Impairment for the claimant's other shoulder range of motion loss is provided as follows. Shoulder flexion and extension is rated under Figure 16-40 on page 476 of the [A.M.A., *Guides*]. For shoulder flexion of 150 degrees on the right there is a two [percent] upper extremity impairment. Again, shoulder flexion on the left is inconsistent and no impairment rating is given. Shoulder extension bilaterally is normal at 50 degrees. Abduction and adduction [are] rated using Figure 16-43 on page 477 of the [A.M.A., *Guides*]. For abduction of 150 degrees on the right there is a one [percent] upper extremity impairment and for adduction of 20 degrees on the right there is an additional one [percent] upper extremity impairment. On the left abduction of 130 degrees yields a two [percent] upper extremity impairment and adduction is not rated due to inconsistency. Shoulder external and internal rotation is rated using Figure 16-46 on page 479 of the [A.M.A., *Guides*]. On the right internal rotation of 60 degrees yields a two [percent] upper extremity impairment with no impairment for external rotation of 80 degrees. On the left internal rotation is not impaired at 90 degrees with external rotation not generating an impairment value at 80 degrees."

Dr. Sklar added the impairments due to loss of range of motion and concluded that appellant had a six percent right upper extremity impairment and a two percent left upper extremity impairment. He opined that appellant reached maximum medical improvement on September 29, 2006. An Office medical adviser reviewed the report of Dr. Sklar on January 12, 2007 and concurred with his impairment determination.

By decision dated February 5, 2007, the Office reduced appellant's compensation to zero based on its determination that his actual earnings effective August 7, 2006 as a mail processing clerk fairly and reasonably represented his wage-earning capacity. The Office noted that his wages equaled or exceeded those held on the date of injury. In a decision dated February 7, 2007, the Office granted appellant a schedule award for a six percent permanent impairment of the right upper extremity and a two percent permanent impairment of the left upper extremity. The period of the award ran for 24.96 weeks.

LEGAL PRECEDENT -- ISSUE 1

Section 8115(a) of the Federal Employees' Compensation Act[1] provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.[2] Generally, wages actually earned are the best measure of a wage-earning

[1] 5 U.S.C. §§ 8101-8193.

[2] 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

capacity and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.[3] The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,[4] has been codified at 20 C.F.R. § 10.403. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.[5] 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.[6]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a bilateral sprain/strain of the arm and shoulder and bilateral rotator cuff syndrome due to factors of his federal employment. Appellant stopped work on March 28, 2006 and underwent arthroscopic surgery on his right shoulder to repair a rotator cuff tear. On August 1, 2006 Dr. Kjeldgaard found that appellant could resume medium-duty employment. Appellant returned to work as a mail processing clerk on August 7, 2006. On August 15, 2006 Dr. Perl modified appellant's restrictions to reflect that he should not work on the FSM.

The Board finds that appellant's actual earnings as a mail processing clerk fairly and reasonably represent his wage-earning capacity. Appellant returned to work on August 7, 2006 and continued working in the position through February 5, 2007, the date the Office issued its loss of wage-earning capacity determination. Appellant worked in the position for more than 60 days and there is no evidence that the position was seasonal, temporary or make-shift work designed for his particular needs.[7] As there is no evidence that appellant's wages in his position did not fairly and reasonably represent his wage-earning capacity, they must be accepted as the best measure of his wage-earning capacity.[8]

As appellant's actual earnings in his position as a mail processing clerk fairly and reasonably represent his wage-earning capacity, the Board must determine whether the Office properly calculated his wage-earning capacity based on his actual earnings. The Board finds that the Office properly found that appellant had no loss of wage-earning capacity based on his actual earnings. Appellant's current weekly earnings of $1,056.54 per week equaled the current weekly

[3] *Lottie M. Williams*, 56 ECAB ___ (Docket No. 04-1001, issued February 3, 2005).

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

[5] 20 C.F.R. § 10.403(c).

[6] 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); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997).

[8] *See Loni J. Cleveland*, *supra* note 2.

wages of his position on the date of injury. Therefore, he had no loss of wage-earning capacity under the *Shadrick* formula.

LEGAL PRECEDENT -- ISSUE 2

The schedule award provision of the Act,[9] and its implementing federal regulation,[10] 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[11] Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[12]

ANALYSIS -- ISSUE 2

Appellant requested a schedule award on October 24, 2006. He submitted a September 29, 2006 impairment evaluation from Dr. Perl who determined that appellant had a seven percent right upper extremity impairment and a three percent left upper extremity impairment due to loss of range of motion. Dr. Perl found, however, that his impairment should be rated on the basis of arthritis. Applying Table 16-18 on page 499 of the A.M.A., *Guides*, Dr. Perl asserted that appellant had a 25 percent impairment due to severe arthritis of the acromioclavicular joint bilaterally. Section 16.7 of the A.M.A., *Guides*[13] provides that the severity of conditions contributing to impairments of the upper extremity, such as joint disorders and loss of strength, is rated separately according to Tables 16-19 to 16-30 and then multiplied by the relative maximum value of the unit involved as specified in Table 16-18 which provides a maximum impairment value for the acromioclavicular joint of the shoulder of 25 percent. Dr. Perl did not explain how she calculated appellant's 25 percent impairment under Table 16-18 or reference any of the cited tables which provide the impairment rating for the affected area. As Dr. Perl's report does not conform to the A.M.A., *Guides*, it is of diminished probative value.[14]

An Office medical adviser reviewed Dr. Perl's report and noted that she incorrectly applied Table 16-18 in reaching her impairment determination. He further found that the range of motion values in her September 29, 2006 impairment evaluation conflicted with her prior report, which indicated that appellant had full range of shoulder motion.

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[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404.

[11] 20 C.F.R. § 10.404(a).

[12] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[13] A.M.A., *Guides* at 498.

[14] *James R. Hill*, 57 ECAB ___ (Docket No. 05-1899, issued May 12, 2006); *Mary L. Henninger*, 52 ECAB 408 (2001).

The Office referred appellant to Dr. Sklar for an opinion on the extent of his permanent impairment. In a report dated January 5, 2007, Dr. Sklar measured range of motion of the bilateral shoulders. He found that the range of motion values for flexion and adduction of the left shoulder were inconsistent with Dr. Perl's findings and thus unreliable. For the right shoulder, Dr. Sklar found that 150 degrees flexion yielded a two percent impairment,[15] 50 degrees extension yielded no impairment,[16] 150 degrees abduction yielded a one percent impairment,[17] 20 degrees adduction yielded a one percent impairment,[18] 60 degrees internal rotation yielded a two percent impairment[19] and 80 degrees external rotation yielded no impairment. For the left shoulder, he found that 50 degrees extension yielded no impairment,[20] 130 degrees abduction yielded a two percent impairment,[21] 90 degrees internal rotation yielded no impairment[22] and 80 degrees external rotation yielded no impairment. Dr. Sklar did not rate any impairment due to adduction and flexion of the left shoulder because of inconsistent results. He concluded that appellant had a six percent right upper extremity impairment and a two percent left upper extremity impairment.

An Office medical adviser reviewed the report of Dr. Sklar and concurred with his findings. The Board finds that the probative medical evidence of record establishes that appellant has no more than a six percent impairment of the right upper extremity and a two percent impairment of the left upper extremity.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation to zero effective August 7, 2006 on the grounds that his actual earnings as a mail processing clerk fairly and reasonably represented his wage-earning capacity. The Board further finds that he has no more than a six percent permanent impairment of the right upper extremity and a two percent permanent impairment of the left upper extremity.

[15] A.M.A., *Guides* at 476, Figure 16-40.

[16] *Id*.

[17] *Id*. at 477, Figure 16-43.

[18] *Id*.

[19] *Id*. at 479, Figure 16-46.

[20] *Id*.

[21] *Id*. at 477, Figure 16-43.

[22] *Id*. at 479, Figure 16-46.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 7 and 5, 2007 are affirmed.

Issued: September 21, 2007
Washington, DC

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

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