United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
	)	**Docket No. 09-51**
and	)	**Issued: July 13, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Miami, FL, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 6, 2008 appellant filed a timely appeal from a February 26, 2008 schedule award decision of the Office of Workers' Compensation Programs and a July 15, 2008 wage-earning capacity decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether appellant has more than 34 percent permanent impairment of the right upper extremity; and (2) whether the Office properly determined that her actual earnings fairly and reasonably represented her wage-earning capacity.

FACTUAL HISTORY

On September 16, 2004 appellant, then a 45-year-old labor custodian, sustained injury to her right shoulder and neck when she lifted up a wet rug. The Office accepted her claim for right shoulder and cervical strains with cervical and lumbar displacement. It authorized spinal disc surgery and fusion, which occurred on April 3, 2006.

In an August 31, 2006 report, Dr. Basil M. Yates, an attending Board-certified neurologist, released appellant to return to limited-duty work for six hours a day. Appellant's restrictions included lifting no more than 30 pounds eight times an hour.

On September 6, 2006 the employing establishment offered appellant a limited-duty position as a custodian working six hours a day at a yearly salary of $40,484.00. The offer was based on Dr. Yates' August 31, 2006 work restrictions. The tour of duty was 9:30 a.m. to 3:30 p.m. with Sunday and Monday as days off. Physical requirements of the position included three to four hours of lifting and carrying nor more than 30 pounds; four to six hours of standing and walking; three to four hours of pushing and pulling; and one to two hours of reaching above the shoulder. The duties of the position included sweeping floors, removing trash from the work area and cleaning the bathrooms. Appellant accepted the position on September 8, 2006 and began working a six-hour schedule.

On March 8, 2007 Dr. Yates found that appellant was capable of working eight hours a day with the noted physical restrictions. On May 1, 2007 the employing establishment offered appellant limited duty as a custodian for eight hours earning $41,835.00 a year. The hours of the position were 08:50 to 17:00 effective March 28, 2007. Physical requirements of the position included three to four hours of lifting and carrying nor more than 30 pounds; four to six hours of standing and walking; three to four hours of pushing and pulling; up to one hour of simple grasping; and one to two hours of reaching above the shoulder. The duties of the position included cleaning carrier cases and sweeping floors, removing trash from the work area, cleaning the break room area and bathrooms and picking up papers and trash from the grounds. Appellant accepted the position on May 1, 2007.

On May 22, 2007 appellant filed a claim for a schedule award.

On November 21, 2007 Dr. Yates advised that appellant had 34 percent impairment to her right upper extremity due to motor and sensory deficit involving the C5 and C6 nerve roots. Under Table 15-17, he noted that the maximum impairment for sensory deficit involving the C5 nerve root was five percent and for the C6 nerve root was eight percent. Dr. Yates utilized Table 15-15 to grade the extent of sensory loss as Grade 3 or 50 percent. This resulted in sensory impairment of 2.5 percent, rounded to 3 percent for the C5 nerve root and 4 percent for the C6 nerve root. Combining these nerve root impairments resulted in a total of seven percent impairment for sensory loss or pain. Dr. Yates noted that for loss of strength Table 15-17 provided maximum impairment of 30 percent for the C5 nerve root and 35 percent for the C6 nerve root. Utilizing Table 15-16 to grade the extent of loss of power, he advised that appellant had Grade 3 or 50 percent loss. This resulted in strength loss of 15 percent for the C5 nerve root and 17 percent for the C6 nerve root.[1] Utilizing the Combined Values Chart, Dr. Yates stated that this resulted in total loss of strength of 32 percent. He then combined the 7 percent sensory loss with the 32 percent loss of strength to find total impairment of 34 percent. Dr. Yates noted that pain was factored in under the sensory deficit loss.

In a January 4, 2008 report, the Office medical adviser agreed with the impairment rating of Dr. Yates.

[1] The Board notes that 17.5 should be rounded up to 18 percent under Office protocols.

In a decision dated February 26, 2008, the Office issued a schedule award for a 34 percent right arm permanent impairment. The period of the award was 106.08 weeks of compensation from June 11, 2007 to June 22, 2009.

By decision dated July 15, 2008, the Office determined that appellant's actual earnings in the full-time modified-duty position fairly and reasonably represented her wage-earning capacity. It reduced her wage-loss compensation to zero as her actual earnings exceeded the current wages of her date-of-injury position.

LEGAL PRECEDENT -- ISSUE 1

Pursuant to section 8107 of the Federal Employees' Compensation Act[2] and section 10.404 of the implementing federal regulations,[3] schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001).[4] Has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[5]

Section 15.12 of the fifth edition of the A.M.A., *Guides* describes a method to be used for rating impairment to the upper extremities due to sensory and motor loss from unilateral spinal nerve root impairment.[6] The affected nerves are first identified and then the maximum percentages of impairment allowed for each nerve root is derived from Table 15-17. Thereafter, Tables 15-15 and 15-16 are used to grade the extent of deficit based on sensory or motor loss. The severity of the sensory or motor impairment is derived by multiplying the maximum impairment value of the affected nerve by the grade classification of the sensory or motor loss.[7] If there is both sensory and motor loss to a nerve root, the impairment percentages are then combined.

ANALYSIS -- ISSUE 1

The Office granted appellant a schedule award for 34 percent impairment of her right arm based on the rating provided by Dr. Yates, who identified impairment affecting the C5 and C6 nerve roots for both sensory loss (pain) and loss of strength. Under the protocols of the A.M.A.,

[2] 5 U.S.C. § 8107(c).

[3] 20 C.F.R. § 10.404.

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

[5] *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[6] Chapter 16 provides alternative tables for rating impairment to the upper extremities.

[7] A.M.A., *Guides* 423; *see also B.C.*, 58 ECAB ___ (Docket No. 06-925, issued October 13, 2006).

Guides, the total impairment is derived by first assessing the sensory loss to the affected nerves and combining that with the strength deficit. Under Table 15-17, Dr. Yates identified the maximum sensory impairment for the C5 nerve root as five percent and eight percent for the C6 nerve root. He advised that the extent of sensory deficit on examination was 50 percent or Grade 3 as classified under Table 15-15. Multiplying 5 percent by 50 percent totals 2.5 percent, which is rounded to 3 percent for the C5 nerve root. Multiplying 8 percent by 50 percent totals 4 percent for the C6 nerve root. The total sensory impairment is derived by combining these values, which is 7 percent. For loss of strength, Dr. Yates noted that 30 percent was the maximum impairment for the C5 nerve root and 35 percent for the C6 nerve root under Table 15-17. He utilized Table 15-16 to grade the extent of motor deficit as 50 percent or Grade 3. Multiplying 30 percent by 50 percent totals 15 percent for the C5 nerve root. Multiplying 35 percent by 50 percent totals 17.5 percent for the C6 nerve root. The Board notes that Dr. Yates rounded the C6 nerve root strength impairment down to 17 percent; however, it should have been rounded up to 18 percent.[8] Combining the 15 percent C5 impairment with 18percent C6 impairment totals 30 percent impairment due to loss of strength. As noted, to find the total impairment to the right upper extremity the Combined Values Chart is used to combine the 7 percent sensory loss with the 30 percent loss of strength, which totals 35 percent.

The Board finds that the medical evidence of record establishes that appellant has 35 percent impairment to her the right upper extremity. The Office's schedule award will be modified to reflect this impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 8115(a) of the Act[9] provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee's actual earnings if the actual earnings fairly and reasonably represent the employee's wage-earning capacity.[10] Generally, wages actually earned are the best measure of a wage-earning 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.[11] The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,[12] 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.[13] Office procedures provide that the Office can make a retroactive wage-earning capacity determination if the claimant worked in the position

[8] *See Laura Heyen*, 57 ECAB 435 (2006); *Johnnie B. Causey*, 57 ECAB 359 (2006). As the Office's procedure manual explains, using hearing loss as an example, the number is rounded up from .50 and down from .49. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(b)(2) (September 1994).

[9] 5 U.S.C. § 8115(a).

[10] *Loni J. Cleveland*, 52 ECAB 171 (2000).

[11] *Lottie M. Williams*, 56 ECAB 302 (2005).

[12] 5 ECAB 376 (1953).

[13] 20 C.F.R. § 10.403(c).

for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work.[14]

ANALYSIS -- ISSUE 2

The Office accepted that appellant sustained right shoulder and cervical strains with cervical and lumbar displacement. Appellant initially returned to modified-duty work for six hours a day on September 7, 2006. On May 1, 2007 she accepted a job offer as a modified city carrier for eight hours a day. The record indicates that appellant began working this schedule on March 28, 2007. On July 15, 2008 the Office confirmed that she continued to work in that position at a pay rate of $41,835.00 per year.

The Board finds that appellant's actual earnings as a modified custodian fairly and reasonably represent her wage-earning capacity. Appellant worked in the position since March 28, 2007 or more than 60 days and there is no evidence that the position was seasonal, temporary or makeshift work. She has submitted no medical evidence to show that she could not work eight hours a day.[15] The Office compared appellant's earnings in the full-time modified position with current earnings for her date-of-injury job. There is no evidence of record to establish that her wages in this position do not fairly and reasonably represent her wage-earning capacity. Appellant's actual earnings must be accepted as the best measure of her wage-earning capacity.[16]

The Board finds that the Office properly determined that appellant had no loss of wage-earning capacity based on her actual earnings. The current weekly earnings of $804.52 per week as a modified custodian was the same as the current weekly wages of the date-of-injury position as a custodian. Appellant therefore had no loss of wage-earning capacity under the *Shadrick* formula.[17]

CONCLUSION

The Board finds that appellant has 35 percent impairment to her right arm. The Board further finds that her actual earnings as a modified custodian fairly and reasonably represented her wage-earning capacity.

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997); *Selden H. Swartz*, 55 ECAB 272 (2004).

[15] *J.C.*, 58 ECAB ____ (Docket No. 07-1165, issued September 21, 2007).

[16] *Loni J. Cleveland*, *supra* note 10.

[17] *Albert C. Shadrick*, *supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the February 26, 2008 schedule award decision of the Office of Workers' Compensation Programs is affirmed, as modified and the July 15, 2008 wage-earning capacity decision is affirmed.

Issued: July 13, 2009
Washington, DC

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

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

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