United States Department of Labor
Employees' Compensation Appeals Board

W.B., Appellant	)	
and	)	**Docket No. 08-1977**
	)	**Issued: March 19, 2009**
DEPARTMENT OF THE NAVY, MILITARY SEALIFT COMMAND, Virginia Beach, VA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On July 9, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated June 27, 2008 granting a schedule award and determining his wage-earning capacity. 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 selected position of security guard fairly and reasonably represents appellant's wage-earning capacity; and (2) whether appellant has more than 27 percent impairment of his right upper extremity for which he received a schedule award.

FACTUAL HISTORY

On November 16, 2002 appellant, then a 42-year-old boatswain, filed a traumatic injury claim alleging that he crushed his right arm with a forklift. The Office accepted his claim for crush injury to the right arm and corrective surgery. Appellant returned to light-duty work on

September 13, 2003. He filed a recurrence of disability claim on March 11, 2004 alleging that on February 29, 2004 he developed pain, loss of grip strength and decreased pinch strength. The Office accepted that appellant sustained a recurrence of disability on March 1, 2004.

Dr. Jon Pembrook Kelly, a Board-certified orthopedic surgeon and appellant's attending physician, stated that on August 27, 2003 appellant had reached maximum medical improvement, but that continued improvement was expected over the coming year. He provided loss of range of motion figures for appellant's right thumb as well as noting appellant's loss of strength and atrophy. On July 2, 2004 Dr. Kelly examined appellant for schedule award purposes and found notable atrophy in the distal aspect of the forearm as well as a 15 percent limitation in motion of the right thumb. He stated that appellant's grip strength was diminished by 38 percent compared to the left side, which represented an estimated 48 percent of grip strength loss and that pinch strength was 63 percent of the opposite, nondominant side, which represented a 37 percent diminishment as compared to the left side, and a 47 percent diminishment compared to normal.

The Office medical adviser reviewed Dr. Kelly's reports on July 23, 2004 and found that in the August 27, 2003 report[1] appellant demonstrated an interval loss of opposition of the thumb by one centimeter with extension improved to just less than 10 degrees compared to the opposite side. He noted in the July 2, 2004 report that Dr. Kelly found an overall 48 percent diminished right hand strength and 47 percent diminished pinch strength. The Office medical adviser found 3 percent impairment of the thumb, or 1 percent impairment of the upper extremity as well as loss of index finger extension a 34 percent impairment of the index finger 8 percent impairment of the upper extremity. He further noted that appellant's medical records indicated significant muscle atrophy with approximately 50 percent loss of grip or pinch strength, and 20 percent upper extremity impairment. The Office medical adviser concluded that appellant had 27 percent impairment of the upper extremity or arm.

On November 15, 2005 Dr. Joseph M. Mann, III, a Board-certified orthopedic surgeon, performed a surgical decompression of the median nerve in the proximal right forearm and a right carpal tunnel release. Appellant underwent a surgical evacuation of a hematoma on December 6, 2005.

Dr. Mann found that appellant could return to light-duty work on August 30, 2006. In a report dated November 9, 2006, he calculated appellant's permanent impairment for schedule award purposes and determined that he had 20 percent impairment due to loss of grip strength and 20 percent impairment due to loss of pinch strength.

The Office referred appellant for vocational rehabilitation counseling on March 20, 2007. The vocational rehabilitation counselor determined that the positions of security guard and cashier were reasonably available and that appellant was vocationally capable of performing the duties of these positions. On August 26, 2007 Dr. Mann reviewed the selected position of security guard, unarmed and cashier/customer service and opined that appellant was capable of

[1] Dr. Kelly reported permanent and stationary findings on August 27, 2003 as well as February 3, 2004 and then noted on February 16, 2004 that appellant experienced a worsening of his conditions. He found that appellant reached maximum medical improvement on July 2, 2004.

performing the duties of either position. Appellant was hired as a security guard and worked from October 19 to 22, 2007. He requested leave and the request was denied, but he did not work as required. Appellant's employment was terminated.

In a letter dated May 20, 2008, the Office proposed to reduce appellant's compensation based on his capacity to earn wages as a security guard. Appellant responded on June 2 and 6, 2008 and disagreed with the Office's determination that he could safely perform the duties of a security guard. He submitted a June 26, 2008 note from Dr. Mann who stated that appellant could perform no lifting on the right. In a report dated June 9, 2008, Dr. Mann recommended repeated electrodiagnostic studies.

By decision dated June 27, 2008, the Office found that the selected position of security guard fairly and reasonably represented appellant's wage-earning capacity and reduced his compensation benefits effective July 6, 2008 based on his capacity to earn the wages of this position.[2]

In a separate decision dated June 27, 2008, the Office granted appellant a schedule award for 27 percent impairment of his right upper extremity.

LEGAL PRECEDENT -- ISSUE 1

Under section 8115(a) of the Federal Employees' Compensation Act,[3] in determining compensation for partial disability, the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonable represent the 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.[4] If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disability condition.[5]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a

[2] The Branch of Hearings & Review issued a decision on January 23, 2009 reviewing appellant's wage-earning capacity determination. As this decision was issued after appellant filed his appeal with the Board on July 9, 2008, it is null and void. *See Douglas E. Billings*, 41 ECAB 880 (1990); *Oren E. Beck*, 33 ECAB 1551 (1982).

[3] 5 U.S.C. §§ 8101-8193, § 8115(a).

[4] *Selden H. Swartz*, 55 ECAB 272 (2004).

[5] *Harley Sims, Jr.*, 56 ECAB 320, 323 (2005).

determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*,[6] and codified section 10.403(d) of the Office regulations[7] will result in the percentage of employee's loss of wage-earning capacity.

ANALYSIS -- ISSUE 1

The Office adjusted appellant's compensation effective July 6, 2008 on the grounds that he was capable of performing the selected position of security guard. Appellant's attending physician, Dr. Mann, a Board-certified orthopedic surgeon, provided a report on August 26, 2007 which stated that appellant could perform the duties of the selected position.

Appellant's vocational rehabilitation counselor determined that appellant was able to perform the position of security guard and that state employment services showed the position available in sufficient numbers so as to make it reasonably available within his commuting area. The Office considered the appropriate factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the security guard position represented his wage-earning capacity. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the security guard position and that such a position was reasonably available within the general labor market of his commuting area. The Office, therefore, properly based appellant's wage-earning capacity effective July 6, 2008 on the security guard position.

LEGAL PRECEDENT -- ISSUE 2

The schedule award provision of the Act[8] and its implementing regulations[9] 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[10] Effective February 1, 2001, the Office adopted the fifth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.[11]

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[6] 5 ECAB 376 (1953).

[7] 20 C.F.R. § 10.403(d).

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404 (1999).

[10] *Id.*

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (August 2002).

The Board has defined maximum medical improvement as meaning "that the physical condition of the injured member of the body has stabilized and will not improve further." The determination of whether maximum medical improvement has been reached is based on the probative medical evidence of record and is usually considered to be the date of the evaluation by the attending physician which is accepted as definitive by the Office.[12]

Before the A.M.A., *Guides* can be utilized, a description of appellant's impairment must be obtained from appellant's physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.[13]

ANALYSIS -- ISSUE 2

The Office accepted appellant's claim for crush injury of the right upper extremity and right carpal tunnel syndrome. In this case, appellant's attending physician, Dr. Kelly, a Board-certified orthopedic surgeon, completed reports beginning in 2003 finding that appellant's condition was permanent and stationary and that he had reached maximum medical improvement. However he also noted that appellant's condition could be expected to improve until his July 2, 2004 report. Dr. Kelly provided appellant's impairment rating in terms of loss of strength and did not correlate his findings with the A.M.A., *Guides*. The Office medical adviser reviewed Dr. Kelly's findings on July 23, 2004 and found that appellant had 27 percent impairment of the right upper extremity due to loss of strength and range of motion relying in part on reports that predated the July 2, 2004 finding of maximum medical improvement. The Board notes that the A.M.A., *Guides* provide that decreased strength cannot be rated in the presence of decreased motion that prevents the effective application of maximal force in the region being evaluated.[14]

Appellant underwent additional surgery in 2005 including carpal tunnel release and submitted an additional report from Dr. Mann, a Board-certified orthopedic surgeon, regarding his permanent impairment on November 9, 2006. Dr. Mann found that appellant had 40 percent impairment due to both loss of pinch strength and loss of grip strength. There is no evidence that the Office considered this medical evidence in determining appellant's impairment. The 2008 schedule award was apparently based on medical evidence from 2004 which did not conform to the A.M.A., *Guides* and did not consider any impairment resulting from his 2005 surgery. The case is not in posture for a decision on this issue. On remand, the Office should refer appellant and a statement of accepted facts to an appropriate second opinion physician, to determine the extent of his permanent impairment for schedule award purposes.

[12] *Mark A. Holloway*, 55 ECAB 321, 325 (2004).

[13] *Robert B. Rozelle*, 44 ECAB 616, 618 (1993).

[14] A.M.A., *Guides*, 508, 16.8a Principles.

CONCLUSION

The Board finds that the Office met its burden of proof to reduce appellant's compensation benefits based on his ability to earn wages as a security guard. The Board further finds that the case is not in posture for a decision regarding the extent of appellant's permanent impairment for schedule award purposes.

ORDER

IT IS HEREBY ORDERED THAT the two June 27, 2008 decisions of the Office of Workers' Compensation Programs are respectively affirmed with regard to the decision finding appellant's earnings capacity and set aside with regard to the decision awarding a schedule award.

Issued: March 19, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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