United States Department of Labor
Employees' Compensation Appeals Board

M.H., Appellant	)	
and	)	**Docket No. 07-825**
	)	**Issued: September 14, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Leaf River, IL, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
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 February 5, 2007 appellant, through counsel, filed a timely appeal from a January 24, 2007 merit decision of the Office of Workers' Compensation Programs' regarding her schedule award and pay rate. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award case.

ISSUES

The issues are: (1) whether appellant has more than a four percent impairment of the left upper extremity, for which she received a schedule award; (2) whether the Office correctly determined the pay rate in issuing appellant's schedule award payment.

FACTUAL HISTORY

On July 3, 2003 appellant, then a 35-year-old rural carrier associate, filed a traumatic injury claim alleging that on July 2, 2003 she sustained a swollen left foot, cervical strain and head whiplash due to an automobile accident. The employing establishment noted that appellant worked from 8:00 a.m. to 3:00 p.m. every other Thursday. Appellant stopped work on July 2,

2003 and returned on October 4, 2003. The Office accepted the claim for a cervical strain and authorized physical therapy for the period July 2 to December 31, 2003.

In a July 24, 2006 report, Dr. Anatoly M. Rozman, an examining Board-certified physiatrist, provided an impairment rating based on the chapter on spinal impairments. Using Table 13-16, he concluded that appellant had a one to three percent whole person impairment due to loss of strength in her left arm. With respect to appellant's impairment resulting from her cervical spine, Dr. Rozman stated:

> "Her flexion from neutral position is decreased to 20 degrees, which is causing 3 percent of impairment of the whole person and extension is decreased to 45 percent, which is 2 percent of the whole person impairment according to the tables from American Medical Association, (sic) *Guides to the Evaluation of Permanent Impairment* (sic) (5th ed. [2001]) Table 15-12. She cannot reach her chest by chin. Lateral rotation to the right from neutral position is decreased to 20 degrees from left (4 percent from whole person impairment (sic) and to the right to 40 degrees (2 percent from whole person impairment). (Table 15-14) Lateral flexion from the left to right decreased to 25 degrees, which is just 1.5 percent impairment of the whole person and the right to left decreased to 15 degrees which is causing 2 percent of impairment of the whole person. Left upper extremity, the patient has full active range of motion up to 150 degrees of forward flexion and near full abduction. There is preserved extension of the left shoulder. "Internal and external rotation is grossly preserved. Grip on the left side is 4+/5 with decreased left arm sensation to the area of distribution of C5-6, which is causing additional impairment that is [two] percent to [three] percent of the whole person. (Table 15-15)."

Using Table 15-15, Dr. Rozman concluded that appellant had 30 to 40 percent impairment due to decrease sensation at C5-6. He opined that appellant had a 28 to 30 percent whole person impairment due to cervical spine decreased range of motion and spinal nerve root impairment and that she had an additional 3 to 5 percent whole person impairment due to moderate pain using Chapter 18.

On October 17, 2006 appellant filed a claim for a schedule award. The employing establishment noted that her base pay as of July 2, 2003 was $15.04 per hour, postmaster relief hourly pay of $8.65 and office help pay of $15.04 per hour. It also noted that every other Thursday was her only scheduled workday.

In an undated lost-wage statement, the employing establishment noted that appellant earned $8.65 per hour for regular hours and an illegible dollar amount per hour for overtime hours. The employing establishment noted that these wages were for the period July 24 to August 25th when she worked as a postmaster relief. It noted that appellant worked 0 hours of overtime and missed 52 hours of regular employment during this period.

In a January 29, 2004 lost-wage statement the employing establishment noted that appellant earned $15.04 per hour for regular hours earned as a rural carrier associate. It noted

that these wages were for the period July 3 to October 4, 2003 and that appellant missed 229.2 hours of regular employment and had 0 hours of overtime during this period.

On November 17, 2006 the Office medical adviser noted a magnetic resonance imaging scan showed a left C5-6 disc herniation encroaching on the C6 nerve root. He listed July 2, 2004 as the date of maximum medical improvement and stated that appellant had a four percent permanent impairment of the left upper extremity and zero percent permanent impairment of the right upper extremity. In reaching this determination, the Office medical adviser used Tables 15-15, 15-16 and 15-17, page 424, to determine that appellant had a one percent permanent impairment for a Grade 4 sensory loss in the C6 nerve root distribution and a three percent permanent impairment for a Grade 4 motor deficit in the C6 nerve root distribution. Using the Combined Values Chart he determined that appellant had a four percent permanent impairment of the left upper extremity. As to the right upper extremity, the Office medical adviser determined that appellant had a zero percent permanent impairment for a Grade 5 sensory loss in the C6 nerve root distribution and a zero percent permanent impairment for a Grade 5 motor deficit in the C6 nerve root distribution.

In January 19, 2007 CA-110 notes, the Office noted that appellant worked as a rural carrier associate, performed office help type work and postmaster relief. It stated that as of the time of appellant's injury she was earning $15.04 per hour as a rural carrier, $8.65 per hour as postmaster relief and $15.04 per hour doing office help work. The Office stated that it appeared that appellant's schedule fluctuated and she worked multiple positions. The employing establishment was requested to provide additional information on appellant's fluctuating schedule. The Office noted at the end of the page that appellant's base salary for one year prior to her injury was $348.00 per week and that her schedule did not fluctuate.

On January 27, 2007 the employing establishment reported, on an updated second page of appellant's claim for a schedule award (Form CA-7) that appellant had average earnings of $348.00 for one year prior to her injury.

By decision dated January 24, 2007, the Office granted a schedule award for a four percent permanent impairment to the left upper extremity. The period of the award was 12.48 weeks commencing July 2, 2004. The pay rate for compensation purposes was $348.00 per week which was then multiplied by the compensation rate of 75 percent to arrive at a weekly compensation rate of $261.00.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing federal regulation,[2] 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

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404

claimants, the Office has adopted the A.M.A.., *Guides* (5th ed. 2001) as the uniform standard applicable to all claimants.[3] Effective February 1, 2001, the fifth edition of the A.M.A., *Guide*s is used to calculate schedule awards.[4]

Although the A.M.A., *Guides* include guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under the Act for injury to the back or spine.[5] In 1960, amendments to the Act modified the schedule award provisions 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 originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[6] An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized.[7]

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for cervical strain. On January 24, 2007 she received a schedule award for four percent permanent impairment of her left upper extremity due to sensory and motor deficits caused by the C6 nerve root.

Appellant submitted a report from Dr. Rozman finding that appellant had a 28 to 30 percent whole person impairment based upon her decreased cervical range of motion and spinal root impairment. The Board notes that Dr. Rozman's opinion is of diminished probative value as he rated impairment based on her spine. Neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the spine.[8] Furthermore, a schedule award is not payable for an impairment of the whole person.[9] While Dr. Rozman utilized Table 15-15 to determine that appellant had a 30 to 40 percent impairment due to decreased sensation at the C5-6 nerve root, he did not identify the grade of sensory loss or otherwise explain how he arrived at this determination. He also referred to an additional three to

[3] 20 C.F.R. § 10.404(a).

[4] *Id*.; *see Thomas P. Lavin*, 57 ECAB ___ (Docket No. 05-1229, issued February 3, 2006); *Jesse Mendoza*, 54 ECAB 802 (2003).

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

[6] *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*, (5th ed. 2001) at 423.

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

[8] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[9] *D.H.*, 58 ECAB ___ (Docket No. 06-2160, issued February 12, 2007).

five percent for pain based upon Chapter 18. However, Chapter 18 notes that examiners are not to use this section to rate pain for impairment that can be rated in the other Chapters of the A.M.A., *Guides.* By allowing a rating for pain under Chapter 18, Dr. Rozman departed from the protocols of the A.M.A., *Guides*. Consequently, his impairment rating is of diminished probative value.

The Office medical adviser reviewed the medical evidence and correlated the findings from Dr. Rozman's examination to specific provisions of the A.M.A., *Guides*. Using Tables 15-15, 15-16 and 15-17, the Office medical adviser determined that appellant had Grade 4 motor and sensory deficits of the C6 nerve root distribution which resulted in a one percent impairment for sensory deficit[10] and a three percent impairment for motor deficit.[11] He used the Combined Values Chart to determine that appellant had a total four percent permanent impairment of the left upper extremity. The Office medical adviser properly applied the A.M.A., *Guides* to the evidence of record to find a four percent permanent impairment of the left upper extremity. There is no other medical evidence which establishes greater impairment conforming to the A.M.A., *Guides*.

Based on the probative medical evidence of record, the Office properly concluded that appellant had a four percent impairment of the left upper extremity.

The Board notes that the number of weeks of compensation for a schedule award is determined by the compensation schedule at 5 U.S.C. § 8107(c). The maximum number of weeks of compensation for the loss of use of the arm is 312 weeks; therefore, appellant received four percent of 312 weeks or 12.48 weeks of compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8114(d) of the Act[12] provides that average annual earnings are determined: (1) if the employee worked in the employment in which the employee was employed at the time of injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay -- (A) was fixed, the average annual earnings are the rate of pay; or (B) was not fixed, the average annual earnings are the product obtained by multiplying the daily wage for the particular employment or the average thereof if the daily wage has fluctuated, by 300 if the employee was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5 1/2-day week and 260 if employed on the basis of a 5-day week.[13] Office procedures state that the pay rate of part-time flexible employees whose earnings fluctuate

[10] It appears that the Office medical adviser graded appellant at 20 percent for sensory loss and multiplied by a 5 percent impairment at C6, for a total impairment of 1 percent.

[11] It appears that the Office medical adviser graded appellant at 10 percent for motor deficit and multiplied by a 30 percent impairment at C6, for a total impairment of 3 percent.

[12] 5 U.S.C. §§ 8101-8193.

[13] *Vincent Holmes*, 53 ECAB 468 (2002).

from week to week would be computed under section 8114(d)(1)(B).[14] This section, however, is limited to employees working at least five days per week.[15]

ANALYSIS -- ISSUE 2

Appellant's pay rate for compensation purposes is the rate of pay she was receiving on the date of injury, July 2, 2003. The record does not show that she had a fixed annual salary on July 2, 2003, but was paid at a rate of $15.04 per hour as a rural carrier, $8.65 per hour as postmaster relief and $15.04 per hour doing office help work. The Office based its pay rate determination upon information received from the employing establishment. The employing establishment informed the Office that appellant had average earnings of $348.00 for one year prior to her injury.

The Board finds that this case is not in posture for a decision on the issue of whether the Office properly determined appellant's pay rate.

The Act provides for different methods of computation of average annual earnings depending on whether the employee worked in the job in which she was injured for substantially the entire year immediately preceding the injury or would have been afforded the opportunity for employment for substantially a whole year but for the injury.[16] The Board is unable to ascertain from the evidence of record appellant's average annual earnings at the time of the injury and is, therefore, unable to determine the rate of compensation she should have received. The only information shedding light on this subject is two lost-wage statements submitted by the employing establishment for the periods July 24 to August 25th, which does not indicate the year, and July 2 to October 3, 2003 and a January 27, 2007 page 2 of the CA-7 form. The CA-7 form noted that appellant had annual earnings of $348.00 for the year prior to her injury. On an undated lost-wage statement, the employing establishment stated that appellant worked as postmaster relief at an hourly rate of $8.65 for the period July 24 to August 25th, worked 0 hours of overtime and missed 52 hours of regular employment during this period. In a January 29, 2004 lost-wage statement, the employing establishment noted that appellant earned $15.04 per hour for regular hours earned as a rural carrier associate for the period July 3 to October 4, 2003 and that appellant missed 229.2 hours of regular employment and 0 hours of overtime during this period. There is no evidence in the record substantiating appellant's work status. On January 19, 2007 the Office requested the employing establishment to provide additional information as the record showed that appellant's schedule fluctuated and she worked multiple positions. The employing establishment did not provide the documentation requested by the Office, but merely informed the Office of its determination of appellant's average salary.

The Board has long recognized in interpreting the statute for pay rate purposes that the objective is to arrive at as fair an estimate as possible of the claimant's future earning capacity and that this can best be accomplished by considering appellant's employment activities during

[14] 5 U.S.C. § 8114(d).

[15] *See Janet A. Condon*, 55 ECAB 591 (2004).

[16] 5 U.S.C. § 8114(d)(1)-(2).

the year preceding the injury.[17] The record is devoid of any evidence showing the number of hours appellant worked in the year prior to her injury or the hours worked in the multiple positions she held. Given the circumstances of this case, the Office should obtain further information to properly calculate appellant's average annual earnings.

CONCLUSION

The probative medical evidence of record does not establish more than a four percent left upper extremity impairment. The case is remanded, however, as to further development of appellant's pay rate.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 24, 2007 be affirmed as to finding a four percent permanent impairment of the left upper extremity. The decision is set aside on the issue of appellant's pay rate and the case remanded to the Office for further proceedings consistent with this order.

Issued: September 14, 2007
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

[17] *See Billy Douglas McClellan*, 46 ECAB 208 (1994); *John D. Williamson*, 40 ECAB 1179 (1989); *Wendell Alan Jackson*, 37 ECAB 118 (1985); *Irwin E. Goldman*, 23 ECAB 6 (1971).