U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of TIFFANY A. SCHOCH-BEGG and U.S. POSTAL SERVICE, POST OFFICE, Pennington, NJ

*Docket No. 00-1299; Submitted on the Record;*
*Issued July 11, 2001*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issues are: (1) whether appellant has more than a 15 percent permanent impairment of her right lower extremity, for which she received a schedule award; and (2) whether the Office of Workers' Compensation programs used the correct pay rate in calculating appellant's schedule award.

On March 8, 1993 appellant, then a 22-year-old casual letter carrier, filed a claim alleging that on March 6, 1993 she sustained injuries to her neck and knees when she was involved in a motor vehicle accident while in the performance of duty. The Office accepted appellant's claim for a cervical sprain and bilateral knee sprains. On June 30, 1998 appellant filed a claim for a schedule award. On October 16, 1998 the Office granted appellant a schedule award for a 15 percent permanent impairment of her right lower extremity. On March 2, 1999 the Office re-released the schedule award, as there was some confusion as to whether appellant had been properly notified of the award. Appellant requested an oral hearing, which was held on September 23, 1999. At the hearing, appellant, through counsel, asserted both that she had greater than a 15 percent impairment of her right lower extremity and that the Office had used an incorrect rate of pay to calculate her schedule award. In a decision dated November 22, 1999, an Office hearing representative affirmed the Office's prior award as to percentage of impairment and rate of pay.

The Board initially finds that the Office did not properly determine appellant's level of permanent impairment for the purposes of granting her a schedule award.

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulation[2] set forth the number of weeks compensation payable to employees sustaining permanent impairment from loss, or loss use, of schedule member 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 table 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 regulation as the appropriate standard for evaluating schedule losses.

In support of her claim for a schedule award, appellant submitted a May 4, 1998 report from Dr. Nicholas P. Diamond, an osteopath from whom appellant sought a complete disability evaluation. With respect to appellant's right lower extremity, specifically her right hip, Dr. Diamond noted that appellant retained full flexion, abduction and internal and external rotation, but had decreased extension and adduction of only 10 degrees each. He also noted that manual motor strength testing of appellant's hip flexors revealed Grade 4/5 muscle weakness. Finally, Dr. Diamond noted that, while appellant's sensory examination was within normal limits, she continued to experience constant low back pain and right radicular pain intermittently, stemming from S1 radiculopathy and that this pain made it difficult to perform many of her activities of daily living. He noted that appellant rated her right leg pain as 6 to 8 on a scale of 1 to 10. Applying Table 40, page 78, of the A.M.A., *Guides* to his measurements of appellant's extension and adduction, Dr. Diamond concluded that appellant had a five percent impairment of each of these motions. In addition, he found that, pursuant to Table 39, page 77, of the A.M.A., *Guides*, appellant's Grade 4 hip flexor muscle strength equated to a 5 percent permanent impairment, for a total of 15 percent impairment in range of motion and motor strength. Finally, with respect to appellant's S1 radiculopathy, utilizing Table 11, page 48, Dr. Diamond apparently classified appellant's pain as Grade 4, decreased sensibility with or without abnormal sensation, which may prevent activity. Pursuant to Table 11 of the A.M.A., *Guides*, a Grade 4 impairment is the equivalent of a 61 to 80 percent sensory deficit. He then multiplied the 80 percent by the 5 percent maximum allowed for pain and sensory loss at the S1 level under Table 83, page 130, to find that appellant had an 4 percent impairment due to pain. Dr. Diamond then added this 4 percent to the 15 percent impairment for motor strength and range of motion deficits, to conclude that appellant had a 19 percent permanent impairment of the right lower extremity.

At the request of the Office, an Office medical adviser reviewed these findings[3] on July 8, 1998 and applied the A.M.A., *Guides.*[4] He concurred with Dr. Diamond that 10 degrees of hip extension and 10 degrees of hip adduction equated to a 5 percent impairment of the right

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404.

[3] *Lena P. Huntley*, 46 ECAB 643 (1995).

[4] A.M.A., *Guides* (4th ed. 1993).

lower extremity for each of these motions,[5] and that Grade 4 hip flexor muscle weakness equated to an additional 5 percent impairment of the right lower extremity, for a total of 15 percent impairment for range of motion and muscle weakness.[6] With respect to appellant's demonstrated S1 sensory nerve root impairment, utilizing Table 20, page 151, the Office medical adviser classified appellant's pain as Grade 2, normal sensation except for pain, or decreased sensation with or without pain, forgotten with activity. Pursuant to Table 20, page 151, a Grade 2 impairment is the equivalent of a 1 to 25 percent deficit. The Office medical adviser then multiplied the 25 percent deficit by the 5 percent maximum allowed for pain and sensory loss at the S1 level under Table 83, page 130, to find that appellant had a 1 percent impairment due to pain. As set forth in the A.M.A., *Guides*, the Office medical adviser combined this additional 1 percent with the 15 percent impairment for motor strength and range of motion deficits, to conclude that appellant had a 15 percent permanent impairment of the right lower extremity.[7] It was upon the Office medical adviser's 15 percent impairment rating that the Office based its schedule award.

The Board has reviewed the calculations of both Dr. Diamond and the Office medical adviser and finds that, while both physicians properly concluded that appellant had a total of 15 percent permanent impairment due to range of motion and motor strength deficits, neither physician properly calculated appellant's additional impairment due to pain and sensory deficit and, therefore, neither physician properly calculated appellant's total impairment pursuant to the A.M.A., *Guides.* Rather than utilizing the Combined Values Chart as specified in the A.M.A., *Guides,* however, Dr. Diamond *added* his finding of 4 percent impairment for pain to the 15 percent previously derived from strength and range of motion measurements, to arrive at a total impairment of 19 percent. On the other hand, while the Office medical adviser did utilize the Combined Values Chart, he incorrectly concluded that a 15 percent motion impairment combined with the additional 1 percent he allowed for pain, equaled a combined total impairment of 15 percent. Contrary to these calculations, when the 15 percent impairment due to loss of strength and range of motion is combined with 4 percent for pain, as found by Dr. Diamond, the result is a 18 percent combined permanent impairment. Similarly, when the 15 percent impairment due to loss of strength and range of motion is combined with 1 percent for pain, as found by the Office medical adviser, the result is a 16 percent combined permanent impairment.[8]

The Board has held that, if an examining physician does not use the A.M.A., *Guides* to calculate the degree of permanent impairment, it is proper for an Office medical adviser to review the record and apply the A.M.A., *Guides* to the examination findings reported by the examining physician.[9] In this case, however, as neither Dr. Diamond nor the Office medical

[5] A.M.A., *Guides*, page 78, Table 40.

[6] A.M.A., *Guides*, page 77, Table 39.

[7] A.M.A., *Guides*, 322.

[8] *Id.*

[9] *Lena P. Huntley, supra* note 3.

examiner's calculations are entirely correct and as the Office medical adviser's characterization of appellant's pain as Grade 2 pain, forgotten with activity, does not appear to accurately reflect the description of appellant's pain reported by Dr. Diamond, the Board finds that the combined impairment of 18 percent arrived at utilizing Dr. Diamond's assessment of appellant's pain is the more accurate and most closely reflects appellant's level of impairment. Therefore, the Board finds that appellant has established that she had an 18 percent permanent impairment of the right lower extremity.

The Board further finds, however, that this case is not in posture for a decision on the issue of whether the Office used the correct pay rate in calculating appellant's schedule award.

At the time of her March 6, 1993 motor vehicle accident, appellant had been working for the employing establishment as a temporary, casual carrier for a total of 13 days. Appellant testified that prior to being hired for her most recent position as a casual carrier, she previously worked for the employing establishment as a casual carrier for six months between November 1990 and May 1991. Appellant stated that she then worked for a mortgage company for another six months, prior to being rehired by the employing establishment in February 1993. Appellant asserted at the hearing that during her prior employment with the employing establishment she worked at least 40 hours a week and earned $7.50 per hour and that while working for the mortgage company she worked 40 hours a week and earned $8.00 per hour.

On June 28, 1993 the Office received information from the employing establishment indicating that at the time of injury, appellant generally worked six hours a day, six days a week, at a wage of $7.50 per hour. The employing establishment further confirmed that appellant's date-of-injury position would not have provided employment for substantially the whole year. The employing establishment indicated that a casual employee similarly employed for two appointments of three months duration would earn $5,500.00.

The Office calculated appellant's pay rate by multiplying the daily wage she received by 150 and then dividing by 52. The pay rate for compensation purposes was calculated to be $129.81 per week and the Office's October 16, 1998 schedule award, re-released on March 2, 1999, was based on this weekly rate. Following an oral hearing, held at appellant's request, in a decision dated November 22, 1999, an Office hearing representative affirmed the schedule award.

The Board finds that the record does not establish that the Office properly considered all of the relevant factors in determining pay rate for the job held on the date of injury. 5 U.S.C. § 8114(d) provides the means for calculating average annual earnings in determining pay rates. If an employee did not work substantially the whole year prior to the injury nor was employed in a position that would have afforded employment for substantially a whole year, as is the case here, section 8114(d)(3) provides:

> "If either of the foregoing methods of the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which she was working at the time of injury having regard to the previous earnings of the employee in federal employment and of other employees

> of the United States in the same or most similar class working in the same or most similar employment in the same or neighboring location, other previous employment of the employee, or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within one year immediately preceding his injury."

The Office calculated the average annual earnings based on the statutory minimum of 150 times the daily wage. Appellant asserted that her prior federal and private employment should have been considered in determining her average annual earnings. In the November 22, 1999 decision, the Office hearing representative considered this argument but found that, as the record contains no evidence that appellant held any employment in the year immediately preceding her injury, there was, therefore, no prior employment for the Office to consider. The Board notes, however, that the Act provides only that due consideration should be given to "the previous earnings of the employee in Federal employment" as well as "other previous employment of the employee," but does not specify that this prior federal and private employment had to take place during the year immediately preceding the injury. The Office, therefore, failed to fully consider appellant's prior employment, as set forth in 5 U.S.C. § 8114(d)(3). The purpose of section 8114(d)(3) is to determine the annual earning capacity for an employee that closely approximates her true preinjury earning capacity.[10] The Board has held that the Office must consider the factors listed in section 8114(d)(3) prior to application of the 150 statutory minimum calculation.[11]

Accordingly, the case will be remanded to the Office for determination of the pay rate at the time of injury in accordance with 5 U.S.C. § 8114(d)(3). After such further development as the Office deems necessary, it should issue an appropriate decision with regard to the issues presented.

[10] *William R. Emerson*, 31 ECAB 62 (1979); *Irwin Goldman*, 23 ECAB 6 (1971).

[11] *Robin Bogue*, 46 ECAB 488 (1995).

The November 22 and March 2, 1999 decisions of the Office of Workers' Compensation Programs are modified in part and set aside in part and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, DC
July 11, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member