# United States Department of Labor
# Employees' Compensation Appeals Board

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| **LEONARD D. CANFIELD, Appellant** | ) | |
| **and** | ) | |
| **DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, Winnemucca, NV, Employer** | ) | **Docket No. 04-2017**<br>**Issued: February 1, 2005** |

*Appearances:*
*Leonard D. Canfield, pro se*
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

### ***JURISDICTION***

On August 10, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated May 6, 2004 granting him a schedule award for a nine percent permanent loss of his left wrist.

### ***ISSUES***

The issues are: (1) whether appellant has more than a nine percent permanent impairment for which he received a schedule award; and (2) whether appellant has received compensation based on a correct pay rate.

### ***FACTUAL HISTORY***

On August 11, 2003 appellant, a 61-year-old driver, filed a traumatic injury claim (Form CA-1) alleging that he sustained an injury to his left hand and wrist in an automobile accident which occurred on August 10, 2003 while in the performance of duty. The Office accepted

appellant's claim for a left arm contusion, a left wrist strain and left de Quervain's tenosynovitis. Appellant, who was a temporary hire, returned to work the day after the accident.

The record contains numerous medical reports, including reports from Dr. William G. Mishler, a Board-certified orthopedic surgeon. In a report dated September 2, 2003, Dr. Mishler stated that appellant had strained his first metacarpal trapezial joint but that x-rays "were read as negative." In his radiology report following a magnetic resonance imaging scan dated October 24, 2003, Dr. Mishler diagnosed appellant as having left de Quervain's tenosynovitis. In his report dated November 7, 2003, Dr. Mishler confirmed the diagnosis of left de Quervain's tenosynovitis as well as a sensory radial nerve contusion and opined that appellant had reached maximum medical improvement. He further indicated that appellant "feels that he has 20 to 25 percent decrease in previous function."

At appellant's request, the Office authorized a second opinion examination by Dr. Phillip E. Dahan, a Board-certified plastic surgeon, which occurred on March 3, 2004. In a report dated May 24, 2004, Dr. Dahan stated that appellant suffered from a work-related left first and second dorsal compartment tenosynovitis, left thumb CMC joint degenerative arthritis with strain, left radial sensory nerve neuritis with neurapraxia and possibly entrapment neuropathy. He also indicated that appellant had evidence of left radial styloid degenerative changes but that the left thumb CMC joint osteoarthritic changes were probably not related to his work-related injury.

Appellant was referred by the Office to Dr. M.P. Reddy, a Board-certified physiatrist, for a schedule award evaluation. In a report dated March 15, 2004, Dr. Reddy stated that appellant's left wrist strain had resolved but that he had residual de Quervain's tenosynovitis of the left wrist. He further stated that his clinical examination of appellant revealed a partial sensory loss in the distribution of the left superficial radial nerve; that there was no muscle atrophy or motor weakness in the left upper extremity; and that there was no evidence of wrist instability or causalgia. Finally, he opined that appellant's work-related injury had reached maximum medical improvement and was permanent and stationary.

In a report dated March 29, 2004, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, calculated a schedule award utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairmen*t (5th ed.). Dr. Harris stated that appellant had three percent impairment for loss of wrist extension (Figure 16-28/page 467); two percent impairment for loss of wrist flexion (Figure 16-28/page 467); and one percent impairment for loss of wrist radial deviation (Figure 16-31/page 469), for a total impairment for loss of motion of six percent. Dr. Harris further opined that appellant had Grade 3 pain/decreased sensation that interferes with some activity 60 percent (Table 16-10/page 482) of the radial nerve 5 (Table 16-15/page 492), which resulted in 3 percent impairment of the left upper extremity for pain that interfered with some activity. He stated that utilizing combined values for six percent impairment for loss of motion and three percent impairment for pain which interfered with function, appellant had a nine percent impairment of the left upper extremity and that the date of maximum medical improvement was March 15, 2004, when appellant was seen by Dr. Reddy.

A memorandum to the Office's file dated April 20, 2004 reflected under the special notes section: "150 formula applied. Clmt was temporary hire, less than 11 months." The

memorandum further indicated that appellant's weekly pay rate for schedule award purposes was $296.31 and that he would be compensated at the rate of 75 percent.

By decision dated May 6, 2004, the Office granted appellant a schedule award for a nine percent permanent impairment of his left wrist. The award ran for 28.08 weeks, with a weekly pay rate of $296.31 X .75 = $222.23 weekly compensation.

On June 2, 2004 appellant filed a request for reconsideration and subsequently submitted several earnings and leave statements.[1] At the time of the filing of this appeal with the Board, the Office had taken no action on appellant's request for reconsideration.[2]

## ***LEGAL PRECEDENT -- ISSUE 1***

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulation[4] sets 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. The method used in making such a determination is a matter that rests within the sound discretion of the Office.[5] 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 A.M.A., *Guides*[6] has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[7]

## ***ANALYSIS -- ISSUE 1***

The Board finds that Dr. Harris properly determined that appellant had a nine percent impairment of his left upper extremity. Although appellant submitted medical reports from several other physicians, Dr. Harris was the only doctor who applied the proper standards of the A.M.A., *Guides* to find that appellant was entitled to a schedule award.

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[1] The Board's review is limited to the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). The Board, therefore, cannot consider any evidence submitted after May 6, 2004.

[2] It is well established that the Board and the Office may not have concurrent jurisdiction over the same case. *See Douglas E. Billings*, 41 ECAB 880, 895 (1990). On December 22, 2004 the Board contacted appellant to clarify whether he wanted to proceed with a request for reconsideration with the Office or with an appeal to the Board. Appellant stated that he intends to appeal the May 6, 2004 decision with the Board and does not want to pursue reconsideration with the Office.

[3] 5 U.S.C. §§ 8107.

[4] 20 C.F.R. § 10.404.

[5] *Linda R. Sherman*, 56 ECAB ___ (Docket No. 04-1510, issued October 14, 2004); *Danniel C. Goings*, 37 ECAB 781, 783-84 (1986).

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

[7] 20 C.F.R. § 10.404.

Dr. Mishler, appellant's treating physician, diagnosed him as having left de Quervain's tenosynovitis and a sensory nerve contusion. However, he gave no opinion as to appellant's degree of impairment and made no reference to the A.M.A., *Guides.* Rather, he stated that appellant "feels that he has 20 to 25 percent decrease in previous function." Appellant's beliefs do not satisfy the statutory requirement, and Dr. Mishler's report provides no assistance in determining the degree of appellant's impairment.

Likewise, the report of Dr. Dahan dated May 24, 2004 lacked probative value in that it did not utilize the A.M.A., *Guides* to assess appellant's impairment. Dr. Dahan stated that appellant suffered from a work-related left first and second dorsal compartment tenosynovitis, left thumb CMC joint degenerative arthritis with strain, left radial sensory nerve neuritis with neurapraxia, and possibly entrapment neuropathy. He also indicated that appellant had evidence of left radial styloid degenerative changes, but that the left thumb CMC joint osteoarthritic changes were probably not related to his work-related injury. However, he failed to rate appellant's degree of impairment according to the A.M.A., *Guides*.

In his report dated March 15, 2004, Dr. Reddy stated that appellant's left wrist strain had resolved but that he had residual de Quervain's tenosynovitis of the left wrist. He further stated that his clinical examination of appellant revealed a partial sensory loss in the distribution of the left superficial radial nerve; that there was no muscle atrophy or motor weakness in the left upper extremity; and that there was no evidence of wrist instability or causalgia. Finally, he opined that appellant's work-related injury had reached maximum medical improvements, permanent and stationary. Dr. Reddy stated that appellant's left wrist range of motion was measured with a goniometer pursuant to the A.M.A., *Guides* and attached a form to his report detailing appellant's range of motion. However, Dr. Reddy failed to rate appellant's impairment according to the A.M.A., *Guides.* Therefore, his report is of diminished probative value.

On the other hand, Dr. Harris, who reviewed the medical records at the request of the Office, applied the proper standards of the A.M.A., *Guides* (5th ed.) to find that appellant had a nine percent permanent impairment of his left upper extremity and was entitled to a schedule award due to the following impairments: a three percent impairment for loss of wrist extension (Figure 16-28/page 467); a two percent impairment for loss of wrist flexion (Figure 16-28/page 467); and a one percent impairment for loss of wrist radial deviation (Figure 16-31/page 469), for a total impairment for loss of motion of six percent. Dr. Harris further determined that appellant had Grade 3 pain/decreased sensation that interferes with some activity 60 percent (Table 16-10/page 482) of the radial nerve 5 (Table 16-15/page 492), which resulted in 3 percent impairment of the left upper extremity for pain that interfered with some activity.[8] He stated that utilizing combined values for six percent impairment for loss of motion and three percent impairment for pain which interfered with function, appellant had a nine percent impairment of the left upper extremity and that the date of maximum medical improvement was March 15,

[8] *See* A.M.A., *Guides* 480-94. Table 16-10 and its associated tables are designed to calculate ratings for sensory deficits or pain associated with peripheral nerve disorders. Because Dr. Reddy's March 15, 2004 report reflected a sensory loss in the distribution of the left superficial radial nerve, the application of these tables is appropriate.

2004, when appellant was seen by Dr. Reddy. As Dr. Harris' report provided the only evaluation which conforms with the A.M.A., *Guides*, it constitutes the weight of the medical evidence.[9]

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). For complete use of the arm, the maximum number of weeks of compensation is 312 weeks. Since appellant's permanent impairment was 9 percent, he is entitled to 9 percent of 312 weeks, or 28.08 weeks of compensation. Appellant was allocated the correct amount of time for receipt of compensation.

## ***LEGAL PRECEDENT -- ISSUE 2***

The Act provides for different methods of computation of average annual earnings depending on whether the employee worked in the employment in which he was injured substantially for the entire year immediately preceding the injury or would have been afforded employment for substantially a whole year, except for the injury.[10] Sections 8114(d)(1) and (2) of the Act provide:

"(d) Average annual earnings are determined as follows:

> (1) If the employee worked in the employment in which he was employed at the time of injury during substantially the whole year[11] 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 his daily wage for the particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he 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.
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> (2) If the employee did not work in employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the

[9] *See Linda R. Sherman*, *supra* note 5.

[10] 5 U.S.C. § 8114(d)(1)-(2). *See Billy Douglas McClellan*, 46 ECAB 208 (1994).

[11] The Federal (FECA) Procedure Manual provides that an employee who has worked at least 11 months has worked "substantially the whole year." *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900.4(a) (December 1995).

> same or similar employment by the United States in the same or neighboring place, as determined under paragraph (1) of this subsection."[12]

If sections 8114(d)(1) and (2) of the Act are not applicable, section 8114(d)(3) provides as follows:

> "(3) If either of the foregoing methods of determining 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 he 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 1 year immediately preceding his injury."[13]

## ***ANALYSIS -- ISSUE 2***

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 he 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.[14] In this case, 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 appellant should have received. The only information shedding light on this subject is the "SPECIAL NOTES/ INSTRUCTIONS" section of the Office's memorandum to the file dated April 20, 2004, which indicated that the "150 formula" was applied because appellant was a "temporary hire" for "less than 11 months." There is no evidence in the record substantiating appellant's date of hire or work status, and the Office has provided no explanation of its analysis for the Board to review.

Assuming arguendo that section 8114(d)(1) of the Act did not apply because appellant had not been an employee at the time of the injury for substantially one year, then the Office was required to look to section 8114(d)(2) to determine whether appellant's position would have afforded employment for substantially a whole year and, if so, to follow the procedures outlined

[12] 5 U.S.C. § 8114(d)(2).

[13] 5 U.S.C. § 8114(d)(3).

[14] 5 U.S.C. § 8114(d)(1)-(2).

in section 8114(d)(2). The Office failed to indicate whether or not it had made such an assessment. Instead, the Office appears to have applied the provisions of section 8114(d)(3). However, the Office's failure to elaborate on how it arrived at its decision to apply the "150 formula" prevents the Board from making a determination as to the appropriateness of the Office's conclusion.

Section 8114(d)(3) provides that if neither section 8114(d)(1) nor section 8114(d)(2) can be applied reasonably or fairly, then appellant's average annual earnings shall be determined by taking into consideration the annual earning capacity of appellant in his employment at the time of the injury, the earning capacity of other employees in a similar class and other relevant factors. The statute sets as its minimum average annual earnings 150 times the average daily wage the employee earned within the year immediately preceding his injury. There is no evidence that the Office considered appellant's annual earning capacity or that of other government workers similarly employed. Rather, it seems that the Office arbitrarily opted to apply the "150 formula." However, it is unclear whether the Office applied even the "150 formula" correctly. According to the Federal (FECA) Procedure Manual, in order to determine appellant's average annual earnings under section 8114(d)(3), the Office is required to take the highest of the employee's earnings during the prior year, the earnings of a similarly-situated employee or the pay rate determined by the "150 times" formula.[15] The Office is mandated to prepare a memorandum, which is to become part of the record, setting forth its determination and explaining the basis for it.[16] In an apparent attempt to document a pay rate calculation, the Office prepared a memorandum to the file from T. Ling dated April 20, 2004 referencing "150 formula;" "hourly rate: $12.84;"[17] "Provisional pay rate: $296.31 = (hourly rate)*(hours per day) * 150/52; compensation rate: ¾." The memorandum also noted that appellant was a temporary hire for less than 11 months. The Office, however, did not explain the basis for its determination and therefore failed to comply with its own mandate.

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 the year preceding the injury.[18] Given the circumstances of this case, the Office should obtain further information, which does not appear in the record, for the calculation of appellant's average annual earnings.

In *Princess McCullough*,[19] the Board found that the Office had complied with proper procedures in applying section 8114(d)(3) to determine appellant's pay rate for compensation. The Office considered appellant's previous earnings, the earnings of other employees in the same

[15] In most cases, this means 150 times the daily wage on the date of injury. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900.4(c)(4) and (5) (March 1996).

[16] *See id*. at Chapter 2.900.4(c)(6).

[17] The record clearly reflects that appellant was earning an hourly wage of $12.84 at the time of the injury.

[18] *See Billy Douglas McClellan, supra* note 10; *John D. Williamson*, 40 ECAB 1179 (1989); *Wendell Alan Jackson*, 37 ECAB 118 (1985); *Irwin E. Goldman*, 23 ECAB 6 (1971).

[19] 46 ECAB 936 (1995).

or similar class working in similar employment, and appellant's other employment. The record actually reflected appellant's earned income for the year prior to the injury; that the employing establishment had determined that there was no other employee of a same or similar class as appellant working in a same or similar employment for the year prior to the injury; and that appellant's prior employment consisted of volunteer work and self-employment with no evidence of income. The Office then calculated appellant's average annual earnings by taking the highest of two different computations: (1) dividing her total earnings for the year prior to the injury by 52; and (2) multiplying claimant's hourly wage times her average workday (8 hours), multiplying times 150, then dividing by 52. In affirming the Office's decision, the Board focused on the Office's adherence to proper procedure in making its calculation of appellant's average annual income.[20] In the instant case, the Office presented no record of its analysis, if indeed it performed one. Accordingly, the case must be remanded for further development.

In *Billy Douglas McClellan*,[21] the Board remanded a case in which the Office had failed to follow its own procedures in calculating appellant's average annual earnings. The record reflected that appellant had not been employed by the employing establishment in the date-of-injury position for substantially the entire year preceding the injury and that he could not have worked in the position for substantially a whole year but for the injury. However, the Board found that the Office had a burden to obtain further information, which did not appear in the record, for the calculation of appellant's average annual earnings, including information as to whether appellant was otherwise employed by the employing establishment during the year preceding the injury and his previous federal employment. The Board held that, since the record did not provide this information, it was unable to ascertain appellant's average annual earnings pursuant to the statute.[22] The principles of *McClellan* apply squarely to the instant case. Without further evidence that the Office considered appellant's previous earnings, the Board is unable to determine his average annual earnings or his correct pay rate.

## ***CONCLUSION***

The Board finds that appellant did not meet his burden of proof to establish that he has more than a nine percent permanent impairment of his left upper extremity. The Board also finds that this case is not in posture for a decision on the issue of whether the Office properly determined appellant's pay rate.

[20] *Id*. at 942-45.

[21] *See Billy Douglas McClellan*, *supra* note 10.

[22] *Id*. at 213-14.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 6, 2004 is affirmed as to its determination of nine percent permanent loss of use of appellant's left wrist. It is further ordered that the Office's decision on the issue of appellant's pay rate is set aside and the case is remanded to the Office for further proceedings consistent with this order.

Issued: February 1, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member