United States Department of Labor
Employees' Compensation Appeals Board

VIRGINIA E. NELSON, Appellant	)	
and	)	**Docket No. 05-261**
	)	**Issued: September 30, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Milwaukee, WI, Employer	)	

Appearances:
Virginia E. Nelson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 8, 2004 appellant filed a timely appeal from a July 2, 2004 merit decision of the Office of Workers' Compensation Programs which found that her actual earnings represented her wage-earning capacity. Appellant also appealed a July 2, 2004 decision granting her a schedule award for 51 percent permanent impairment of the right lower extremity. Finally, appellant appealed a September 2, 2004 decision denying her request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUES

The issues on appeal are: (1) whether the Office properly made a retroactive determination that appellant's light-duty position from January 13, 1999 to May 16, 2000 represented her wage-earning capacity; (2) whether appellant has more than a 51 percent permanent impairment of the right lower extremity, for which she received a schedule award for the period beginning December 9, 1998; and (3) whether the Office properly denied appellant's request for a hearing.

FACTUAL HISTORY

On June 7, 1995 appellant, then a 53-year-old rural carrier, filed a claim alleging that on May 13, 1995 she twisted her right knee when casing mail. The Office accepted that she sustained internal derangement of the right knee and expanded this to include right medial meniscus tear and sacroiliac strain and authorized arthroscopic surgery on July 17, 1995. Appellant resumed full duty on October 14, 1995 and worked intermittently thereafter. On December 10, 1998 she accepted a light-duty position, five hours per day and stopped work the same day due to a recurrence of disability. On January 15, 1999 she accepted a light-duty position and worked continuously until May 16, 2000. On January 17, 2002 appellant returned to work light duty four hours per day and retired on June 18, 2002. Her salary on the date of injury was $38,911.00 per year.

Appellant came under the treatment of Dr. H.L. Ericson, a Board-certified orthopedic surgeon, who noted the history of appellant's work-related injury and performed a right knee arthroscopy on July 17, 1995. He diagnosed internal derangement of the right knee.

On December 8, 1998 the employing establishment offered appellant a limited-duty position from 6:00 a.m. to 2:00 p.m. The position included nonstanding jobs as assigned. The position was in compliance with the restrictions Dr. Ericson set forth in his report of November 12, 1998, which noted that appellant could work five hours per day and limited casing mail to one hour. Appellant accepted the position and returned to work on December 10, 1998.

On December 10, 1998 appellant filed a Form CA-2a, notice of recurrence of disability, attributing her right knee after returning to work to her accepted work injury. In a decision dated February 2, 1999, the Office accepted appellant's claim for recurrence of disability.

On January 13, 1999 the employing establishment offered appellant a limited-duty position from 6:00 a.m. to 11:00 a.m. The position duties included casing mail, nixie in the mornings, answer telephones, filing, organizing post office boxes and miscellaneous office duties. The position was in compliance with the medical restrictions set forth by Dr. Ericson on December 9, 1998 of light work, five hours per day with no prolonged standing. Appellant accepted the position on January 15, 1999.

Appellant submitted treatment notes from Dr. Ericson dated January 28 and March 24, 1999, who diagnosed tear of the medial meniscus and chronic sacroiliac strain aggravated by activity causally related to the May 13, 1995 injury. His note of March 24, 1999 indicated that appellant continued to work limited duty.

On February 4, 1999 appellant was referred to a nurse for medical management services. In a nurse closure report dated May 26, 1999, the nurse advised that appellant continued to work five hours per day.

On April 26, 1999 the Office referred appellant to Dr. Gary N. Guten, a Board-certified orthopedic surgeon, for a second opinion evaluation. The Office inquired as to whether appellant had any residual right knee conditions caused by her May 13, 1995 work injury and whether she had reached maximum medical improvement. In a report dated May 25, 1999, Dr. Guten discussed appellant's history of work injury and the medical record. He diagnosed traumatic

osteoarthritis of the right knee, post meniscectomy and chondroplasty and nonwork-related primary osteoarthritis of the left knee and right hip. Dr. Guten noted that a bone scan revealed inflammation of the medial compartment of the right knee. He opined that the current work restrictions of five hours per day of light work was appropriate and advised that in six months appellant might be able to work additional hours. He noted with regard to maximum medical improvement that "in my opinion, within another [six] months she will be at a stable plateau and at maximum healing." Dr. Guten opined that it was possible within the next six months there may be some additional healing and therefore appellant might be able to increase her work hours.

In reports dated February 23 to March 7, 2000, Dr. Ericson noted that appellant underwent injections of the knees to relieve pain.

The record reflects that appellant stopped working on May 16, 2000 and thereafter filed claims for compensation for temporary total disability for the period May 20, 2000 to January 16, 2002. She submitted a report from Dr. Ericson dated May 16, 2000, who noted that appellant could not stand or walk and was off work until her disability retirement was granted. In a work capacity evaluation dated June 12, 2000, Dr. Ericson returned appellant to work for 5 hours per day with additional medical restrictions of sitting for 3 hours per day, walking no more than 1/2 hour per day, standing no more than 2 hours per day, pushing and pulling limited to 10 pounds, lifting and squatting limited to 25 pounds, no kneeling and climbing limited to 1/2 hour per day. He concurred with the functional capacity evaluation dated June 20, 2000. However, in a report dated June 21, 2000, he advised that appellant was totally disabled commencing May 16, 2000 due to her work-related injury. His reports from August 1 to November 9, 2000, indicated that appellant had persistent pain in walking and standing. In an attending physician's report of November 9, 2000, Dr. Ericson noted with a checkmark "yes" that appellant's condition was caused or aggravated by an employment activity and noted that she was totally disabled from May 16, 2000. On December 18, 2001 Dr. Ericson returned appellant to part time, four hours per day, sedentary work. He advised that appellant was disabled from prolonged standing or walking and diagnosed degenerative arthritis of the knee bilaterally.

Appellant returned to work on January 17, 2002 and worked intermittently until stopping on June 14, 2002. She retired on June 18, 2002.[1]

In a report dated July 2, 2004, an Office medical adviser determined that, in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (4th ed. 1993)[2] appellant sustained a 51 percent permanent impairment of the right lower extremity. The medical adviser reviewed the record and determined that appellant reached maximum medical improvement on December 9, 1998 the day she began to work her limited light-duty position for five hours per day. The medical adviser noted normal range of

[1] In reports dated May 15 to October 4, 2002, Dr. Ericson advised that appellant was attempting to obtain acceptance of her left knee condition as work related on the premise that due to her work injury she favored her right knee causing the left knee to deteriorate. The record reflects that the Office did not issue a decision with regard to appellant's left knee condition and there is no evidence in the record suggesting that this was an accepted condition.

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

motion, no ligamentous laxity, no atrophy and motor function was normal. He noted that a radiograph of the knee dated November 19, 1998[3] revealed medial joint space narrowing to 0 millimeters (mm) or bone on bone which warranted a 50 percent impairment[4] and a partial medial meniscectomy which reflected a 2 percent impairment.[5] The medical adviser applied the Combined Values Chart to find a 51 percent permanent impairment of the right lower extremity.[6] The medical adviser noted that "regarding the date of maximum medical improvement, the medical records indicate[d] that [appellant] plateaued at limited light[-]duty work status, which began on December 9, 1998. Thus, I recommend that the claimant's MMI [maximum medical improvement] be accepted at December 9, 1998."

In a decision dated July 2, 2004, the Office granted appellant a schedule award for 51 percent permanent impairment of the right lower extremity. The period of the schedule award was from December 9, 1998 to October 2, 2001 in the amount of $88,817.39. The Office noted that the award was offset by compensation already issued in the amount of $31,805.43 and she was issued a check in the amount of $57,011.96. The Office advised that appellant could not receive compensation for disability and schedule award monies for concurrent date ranges under case number 100445574.

By decision dated July 2, 2004, the Office found that appellant had been employed in a part-time limited-duty position, five hours per day, effective December 10, 1998 until May 16, 2000, which was over 60 days and that the pay in that position of $45,927.00 per year was equivalent to the pay rate for the position she held at the time of her injury. The Office concluded that her actual earnings as a part-time carrier fairly and reasonably represented appellant's wage-earning capacity.

By letter dated August 1, 2004 and postmarked August 3, 2004, appellant requested an oral hearing before an Office hearing representative of the dated July 2, 2004 decision.

By decision dated September 2, 2004, the Office denied appellant's request for an oral hearing. The Office found that the request was not timely filed. Appellant was informed that her case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district Office and submitting evidence not previously considered.

[3] Although the medical adviser did not specifically note the date of the x-ray of the right knee that he utilized for this calculation, he specifically stated that he reviewed all of Dr. Ericson's reports and x-rays and the record reveals that the x-ray closest in time to appellant's date of maximum medical improvement of December 9, 1998 was an x-ray of the right knee dated November 9, 1998.

[4] *See* Table 62, page 83, (4th ed. 1993); *see also* Table 17-31, page 544 A.M.A., *Guides* (5th ed. 2001).

[5] *See* Table 64, page 85, (4th ed. 1993); *see also* Table 17-33, page 546 A.M.A., *Guides* (5th ed. 2001).

[6] *See* Combined Values Chart page 322, (4th ed. 1993); *see also* Combined Values Chart page 604 A.M.A., *Guides* (5th ed. 2001).

LEGAL PRECEDENT -- ISSUE 1

Section 8115(a) of the Federal Employees' Compensation Act provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonably represent her wage-earning capacity.[7] 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.[8] In addition, the Federal (FECA) Procedure Manual provides that the Office can make a retroactive wage-earning capacity determination if appellant worked in the position for at least 60 days, the position fairly and reasonably represented his wage-earning capacity and "the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work."[9] The procedures further indicate that an assessment of suitability need not be made since the employee's performance of the duties is considered the best evidence of whether the job is within the employee's physical limitations.[10] The Board has concurred that the Office may perform a retroactive wage-earning capacity determination in accordance with its procedures.[11]

As noted above, under Office procedures a retroactive wage-earning capacity determination may be performed if the employment fairly and reasonably represents wage-earning capacity. The Office's procedure manual provides that factors to be considered in determining whether the claimant's work fairly and reasonably represents his wage-earning capacity include the kind of appointment, that is, whether the position is temporary, seasonal or permanent and the tour of duty, that is, whether it is part time or full time.[12] Further, a makeshift[13] or odd lot position designed for a claimant's particular needs will not be considered suitable.[14] The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Shadrick*[15] decision, has been codified by regulation at 20 C.F.R. § 10.403.

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[7] 5 U.S.C. § 8115(a); *Clarence D. Ross*, 42 ECAB 556 (1991).

[8] *Hubert Myatt*, 32 ECAB 1994 (1981).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

[10] *Id.*

[11] *See Tamra McCauley*, 51 ECAB 375 (2000); *Elbert Hicks*, 49 ECAB 283 (1998).

[12] *Supra* note 9.

[13] A makeshift position is a position that is specifically tailored to an employee's particular needs, and generally lacks a position description with specific duties, physical requirements and work schedule. *See William D. Emory*, 47 ECAB 365 (1996); *James D. Champlain*, 44 ECAB 438 (1993).

[14] *See, e.g., Michael A. Wittman*, 43 ECAB 800 (1992); *Elizabeth E. Campbell*, 37 ECAB 224 (1985).

[15] *Albert C. Shadrick*, 5 ECAB 376 (1953).

ANALYSIS -- ISSUE 1

There are situations, when a retroactive wage-earning capacity determination may be appropriate. The Office's procedure manual provides that a retroactive determination may be made where the claimant worked in the position for at least 60 days, the employment fairly and reasonably represents wage-earning capacity and the work stoppage did not occur because of any change in the claimant's injury-related condition affecting her ability to work.[16] In this case, appellant has filed several claims for compensation as of the date she stopped working and is alleging that she was totally disabled from May 16, 2000 as a result of an employment-related condition. She is therefore alleging that the work stoppage did occur as a result of a change in her employment-related condition. As the Board indicated in *William M. Bailey*,[17] it is inappropriate to issue a retroactive wage-earning capacity determination, when there is a pending claim for compensation from the time of the work stoppage.[18] The Board notes that the procedure manual directs the claims examiner to request information from the claimant regarding the work stoppage and develop the record appropriately.[19] In the present case, the Office should have adjudicated the claim for compensation as of May 16, 2000 based on the relevant medical evidence, rather than issue a retroactive wage-earning capacity determination.

The record reflects that appellant remained employed as a limited-duty carrier position continuously from January 15, 1999 until May 16, 2000, subject to restrictions set forth from Dr. Ericson on December 9, 1998 of light work, five hours per day with no prolonged standing. On May 16, 2000 appellant stopped work alleging that she was unable to stand and walk due to her knee condition. The most contemporaneous medical evidence of record included reports from Dr. Ericson dated May 16, 2000, who noted that appellant could not stand or walk and was totally disabled. In a work capacity evaluation dated June 12, 2000, Dr. Ericson released appellant to work for 5 hours per day subject to additional work restrictions than those previously established on December 9, 1998 of sitting for 3 hours per day, walking no more than 1/2 hour per day, standing no more than 2 hours per day, pushing and pulling limited to 10 pounds, lifting and squatting limited to 25 pounds, no kneeling and climbing limited to 1/2 hour per day. However, on June 21, 2000 he noted that appellant was totally disabled from work starting May 16, 2000 due to her accepted condition. The Office should have adjudicated the claim for compensation as of May 16, 2000, rather than issue a retroactive wage-earning capacity determination.

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[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (July 1997); *see also Elbert Hicks*, *supra* note 11.

[17] 51 ECAB 197 (1999).

[18] *Id.*

[19] If the reasons for the work stoppage constitute an argument for a recurrence of disability, appropriate development and evaluation of the medical evidence will be undertaken. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.9(b) (May 1997); *see also Juan A. DeJesus*, (Docket No. 03-1307) (2003) (where the Board determined that it was inappropriate to issue a retroactive wage-earning capacity determination when the work stoppage is alleged to have occurred due to a change in an employment-related condition and there is a claim for compensation from the time of the work stoppage).

Consequently, the Office did not meet its burden of proof in determining appellant's wage-earning capacity as the Office did not first determine whether appellant established that she was totally disabled from May 16, 2000 causally related to her accepted May 13, 1995 employment injury.

LEGAL PRECEDENT -- ISSUE 2

The schedule award provision of the Act[20] and its implementing regulation[21] 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. 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* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

It is a well-established principle that a claimant is not entitled to dual workers' compensation benefits for the same injury.[22] With respect to benefits under the Act,[23] the Board has held that "an employee cannot [con]currently receive compensation under a schedule award and compensation for disability for work."[24] It is also well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury.[25] The issue of maximum medical improvement was extensively treated by the Board in its two decisions in *Marie J. Born*.[26] In that decision, the Board reviewed the well-settled rule that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement and explained that maximum medical improvement "means that the physical condition of the injured member of the body has stabilized and will not improve further."[27] The Board also noted a reluctance to find a date of maximum medical improvement, which is retroactive to the award, as retroactive awards often result in payment of less compensation benefits. The Board therefore required persuasive proof of maximum medical improvement for selection of a retroactive date of maximum medical improvement.[28]

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[20] 5 U.S.C. § 8107.

[21] 20 C.F.R. § 10.404 (1999).

[22] *Benjamin Swain*, 39 ECAB 448 (1988).

[23] 5 U.S.C. §§ 8101-8193.

[24] *Andrew B. Poe*, 27 ECAB 510 (1976).

[25] *Yolandra Librera*, 37 ECAB 388 (1986).

[26] *Marie J. Born*, 27 ECAB 623 (1976), *petition for recon., denied,* 28 ECAB 89 (1976).

[27] *Id*., *see also James E. Earle,* 51 ECAB 567 (2000).

[28] *Id*.

ANALYSIS -- ISSUE 2

The Board notes that the Office medical adviser calculated appellant's schedule award based on the fourth edition of the A.M.A., *Guides*. However, use of the fifth edition of the A.M.A., *Guides* became effective February 1, 2001.[29] However, this error is harmless as both the fourth and fifth editions of the A.M.A., *Guides* reveals that there is no difference in the amount of the impairment rating in appellant's case.

The medical adviser's report of May 28, 2000 noted that a radiograph of the knee dated November 19, 1998 revealed medial joint space narrowing to 0 mm or bone on bone, which represented a 50 percent impairment.[30] The partial medial meniscectomy represented a 2 percent impairment of the knee.[31] The medical adviser used the Combined Values Chart to find a 51 percent impairment of the right lower extremity.[32] The medical adviser properly applied the A.M.A., *Guides* to medical evidence. This evaluation conforms to the A.M.A., *Guides* and establishes that appellant has no more than a 51 percent impairment of the right lower extremity. The Board therefore finds that the medical evidence establishes that appellant has no more than a 51 percent impairment of the right lower extremity, for which she received a schedule award.

Regarding the December 9, 1998 date of maximum medical improvement, the date was based on the Office medical adviser's report of May 28, 2000. The medical adviser stated that "the medical records indicate that [appellant] plateaued at limited light[-]duty work status, which began on December 9, 1998. Thus, I recommend that the claimant's [maximum medical improvement] be accepted at December 9, 1998." However, a review of the record reveals that Dr. Ericson, released appellant to light-duty work five-hour per day on December 9, 1998, but did not indicate that appellant reached maximum medical improvement on this date. Moreover, the Office referred appellant to a second opinion physician on April 26, 1999 and in a report dated May 25, 1999, Dr. Guten specifically indicated that with regard to maximum medical improvement "in my opinion, within another [six] months she will be at a stable plateau and at maximum healing." This evidence reflects that Dr. Guten did not find that appellant had yet reached maximum medical improvement. The medical adviser did not adequately explain why maximum medical improvement had been reached by December 9, 1998. The Board has required persuasive proof of maximum medical improvement for selection of a retroactive date of maximum medical improvement. In this case, it cannot be said that there is persuasive medical evidence of record. For this reason, the Board finds that the Office must further develop the evidence with regard to the date of maximum medical improvement.

[29] *See* FECA Bulletin No. 01-05 (issued January 31, 2001).

[30] *See* Table 62, page 83, (4th ed. 1993); *see also* Table 17-31, page 544 A.M.A., *Guides* (5th ed. 2001).

[31] *See* Table 64, page 85, (4th ed. 1993); *see also* Table 17-33, page 546 A.M.A., *Guides* (5th ed. 2001).

[32] *See* Combined Values Chart page 322, (4th ed. 1993); *see also* Combined Values Chart page 604 A.M.A., *Guides* (5th ed. 2001).

LEGAL PRECEDENT -- ISSUE 3

Section 8124(b)(1) of the Act provides that "a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[33] Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[34] Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.[35] The Office's procedures concerning untimely requests for hearings and review of the written record are found in the Federal (FECA) Procedure Manual, which provides:

> "If the claimant is not entitled to a hearing or review (*i.e.*, the request was untimely, the claim was previously reconsidered, etc.), H&R will determine whether a discretionary hearing or review should be granted and, if not, will so advise the claimant, explaining the reasons.[36]

ANALYSIS -- ISSUE 3

In the present case, appellant requested a hearing in a letter dated August 1, 2004 and postmarked August 3, 2004. Section 10.616 of the federal regulations provides: "The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."[37] The postmark date of the request was 31 days after issuance of the July 2, 2004 decision. As this was more than 30 days following the July 2, 2004 decision, appellant's request for a review of the written record was untimely filed.

The Office notified appellant that it had considered the matter in relation to the issue involved and indicated that additional argument and evidence could be submitted with a request for reconsideration. The Office has broad administrative discretion in choosing means to achieve its general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.[38] There is no

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[33] 5 U.S.C. § 8124(b)(1).

[34] 20 C.F.R. §§ 10.616, 10.617.

[35] *Delmont L. Thompson*, 51 ECAB 155 (1999); *Eddie Franklin*, 51 ECAB 223 (1999).

[36] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

[37] 20 C.F.R. § 10.616.

[38] *Samuel R. Johnson*, 51 ECAB 612 (2000).

indication that the Office abused its discretion in this case in finding that appellant could further pursue the matter through the reconsideration process.

CONCLUSION

The Board finds that the Office improperly determined that appellant's light-duty position fairly and reasonably represented her wage-earning capacity. The Board also finds that appellant has not established that she has greater than a 51 percent impairment of the right lower extremity, for which she received a schedule award. However, further development is required regarding the date of maximum medical improvement. Finally, the Board finds that the Office properly denied appellant's request for a hearing as untimely.[39]

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated September 2, 2004 is affirmed, the schedule award decision of July 2, 2004 is affirmed as to the percentage of appellant's impairment of her right lower extremity and the case is remanded for further development regarding her date of maximum medical improvement and the loss of wage-earning capacity determination dated July 2, 2004 is reversed.

Issued: September 30, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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

[39] With her request for an appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).