

# **Proving Partial Loss of Earning Capacity**

## **A Common Sense Aid**

Proving partial loss of earning capacity can be vexing. It is particularly troublesome when the injured person has a permanent partial medical disability yet earns more money after the incident than before. A suggested solution follows.

The U.S. Department of Veterans Affairs (VA) has adopted the ratings schedule in 38 C.F.R. §4 as a way to determine the extent of an injured veteran's impairment of earning capacity in civil occupations. Although the schedule is intended to help the VA evaluate veterans' disabilities, it is also effective to prove damages for loss of earning capacity in a civil personal injury action.

The schedule translates specific injuries into a reduction in earning capacity. Once the medical expert provides the proper medical foundation, the economic expert can use the schedule to project the client's future economic losses.

The Schedule for Rating Disabilities is a complicated schedule containing detailed anatomical data and other criteria. Section 4.1 describes its purpose:

"This rating schedule is primarily a guide in the evaluation of disability resulting from all types of diseases and injuries. ... The percentage ratings represent as far as can practicably be determined the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations... For the application of this schedule, accurate and fully descriptive medical examinations are required, with emphasis upon the limitation of activity imposed by the disabling condition."

The schedule was adopted in 1919 under what is now 38 U.S.C. §1155. Over the past 75 years, hundreds of thousands of veterans have received compensation for lost earning capacity based on the disability ratings in the schedule.

The schedule is a significantly better tool for measuring loss of earning capacity than the American Medical Association's Guides to the Evaluation of Permanent Impairment, commonly used by doctors. The VA ratings are based on the demand for a certain ability in the workplace; the AMA ratings are not.

The first chapter of the AMA guide explains that the physician's job is only to evaluate the health status of the patient. "The physician does not determine industrial loss of use, economic loss, or any other type of loss giving rise to disability payments." (2)

Therefore, the AMA guide evaluates only a person's physical capabilities and does not put a value on any physical limitation as it relates to loss of earning capacity~ The VA rating schedule was created to do this and is the best tool for proving loss of civilian workplace earning capacity.

The suitability of the schedule for this use makes it relevant evidence. Federal Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The Ninth Circuit explained this language to mean that evidence is relevant if "a reasonable man might believe the probability of the truth of a consequential fact to be different if he knew of the proffered evidence."

Rule 402 states that "all relevant evidence is admissible, except as otherwise provided. . . ." Neither federal regulations nor any other authority expressly prohibits the use of the rating schedule by a person or entity other than the VA. On the contrary, many states provide that federal laws and regulations must be judicially noticed in appropriate cases.

However, the schedule would rarely, if ever, be admitted as independent proof of lost earning capacity but would have to be accompanied by expert testimony from an economist or vocational expert. Also, the schedule should be treated as one of several factors the expert would rely on in reaching an opinion. Treating the schedule this way improves its prospects for admission at trial.

It is also crucial that the proper medical foundation be established. The groundwork must be laid by a physician, using the language in the schedule.

#### Case Example

In *Elias v. Ford Motor Co.*, James Elias was driving his 1972 Ford Mustang when his car was struck in the rear by another vehicle (4 ) After the impact, Elias's Mustang erupted in flames. Although he was able to escape from the car, he was engulfed in fire from his waist up. Elias suffered severe burns on both hands, which damaged his skin, nerve ends, tendons, and muscles. He brought a products liability action against Ford.

At trial, experts testified as to the severity of his injuries and his future employability. His examining and treating physicians explained how the injury had impaired the use of his hands. A psychiatrist testified that he was unemployable.

Based on the VA's Schedule for Rating Disabilities, a medical economist testified that Elias had permanently lost 60 percent of his earning capacity. The economist said that if Elias had suffered a total loss of earning capacity, the dollar value of the loss would have been \$1 million. A 60 percent loss could then be found by the jury to have a value of \$600,000. The jury awarded general damages without specifying how much was for pain and suffering, medical expenses, or loss of earning capacity.

Ford appealed, alleging that the trial court erred in allowing the economist to testify as to the 60 percent loss of earning capacity because he had relied on the VA schedule. The First Circuit found that because the expert had compared the language of Elias's medical records with the language in the schedule to calculate the percentage of lost earning capacity, "it was not error for the court to allow this testimony, as [plaintiff's expert] used

the ratings in a way generally accepted. . . ." (5) The court added that even if it had been erroneous for the lower court to have allowed the economist's testimony, it would have been harmless error and "would not have affected a substantial right of defendant. (6)

## Back to Work

Damages for lost earning capacity are more difficult to prove when the plaintiff has returned to work by the time of trial. This is especially true if the person is earning a higher wage than he or she was earning when the injury occurred. Jurors may believe that the plaintiff will not suffer any loss of future earning capacity.

To counter this perception, counsel must show that although an injured person may return to work, a loss of function can still cause lost future earnings. For example, in the years following an injury, a worker may not get promoted as quickly or to the same level as he or she would have without a loss of function. The VA rating schedule can help prove the extent of the future damages despite the fact that an injured person returned to work, maybe even at an increased rate of pay.

The schedule would have been helpful-although it was not used-in Griffin v. General Motors Corp., (7) a case in which the plaintiff had returned to work after a serious injury. Defense counsel objected to a jury instruction that stated that the plaintiff-who suffered second- and third-degree burns on her face, hands, and upper torso-was entitled to damages resulting from her future impaired earning capacity. The defense argued that since the plaintiff had returned to work as a legal secretary at a higher salary, there was no evidence of any loss of future earning capacity.

The Massachusetts Supreme Judicial Court held that the instruction was appropriate. (8) Although the plaintiff was employed at the time of trial, she had been unable to work for some time after the injury and there was evidence of permanent disability and loss of function. The court noted that "the evidence warranted an inference that the plaintiff's loss of function would increase in the future, and that her earning capacity would be diminished." (9) The court also noted that due to the plaintiff's permanent loss of function, her future employment opportunities would be limited and her earning capacity reduced. (10)

The court also stated that "the assessment of damages for impairment of earning capacity rests largely on the common knowledge of the jury, sometimes with little aid from evidence." (11) In cases like this, the VA rating schedule, presented with expert testimony, can serve as evidence to a jury concerning the amount of damages that a plaintiff is entitled to for loss of future earning capacity.

## Calculating the Loss

The following example shows how the VA schedule can be applied to the facts of a case. In this case, the schedule was used during arbitration to negotiate a substantial settlement with Amtrak. (12)

A 27-year-old woman was injured in December 1990 when an Amtrak train collided with the local commuter train she was riding. The Amtrak train was entering a Boston station at about 76 miles per hour when it derailed and struck the commuter train. The woman was on her way to work at a bank where she was employed as an account executive.

The woman was taken to the hospital immediately after the collision. She reported pain in her left shoulder, lower back, lower abdomen, and neck, and she had mid-thoracic spinal tenderness. She also was confused and had poor short term memory.

She underwent exploratory abdominal surgery and an emergency splenectomy. She remained in the hospital for seven days, during which she was also diagnosed as having a fractured right ankle. Four months later, she had more surgery due to complications from the splenectomy. The scar from the second surgery continued to cause the woman pain.

The woman also suffered emotional injuries. After the collision, she experienced anxiety and was afraid to ride trains. A disabled or overcrowded train caused her to experience panic attacks.

As a result, she was required to undergo extensive psychotherapy. She was diagnosed with depression and post-traumatic stress disorder, which without therapy would have been debilitating.

During litigation a year after the collision, the plaintiff's medical expert confirmed that the woman still suffered from persistent, intermittent episodes of pain in her abdomen and had constant soreness in her right ankle. The doctor concluded that she had been totally disabled for three months after the collision and continued to experience significant permanent partial disability. The woman returned to full-time employment after three months and subsequently was advanced at her job.

After reviewing the plaintiff's medical records, her economic expert applied the VA schedule to her injuries and calculated a 40 percent loss of earning capacity. This determination involved the following steps.

First, each injury was evaluated separately to determine its disabling effects. Next, the individual disability ratings were combined to determine her overall disability and resulting loss of earning capacity.

According to the schedule, a splenectomy results in a 30 percent loss of earning capacity.<sup>(13)</sup> For the plaintiff's scarring, the schedule sets forth a 10 percent loss of earning capacity, based on a 10-inch scar over the thoracic and abdominal area that objective findings show to be tender and painful.<sup>(14)</sup> For the psychiatric disorders, the schedule specifies a combined disability rating of 10 percent.<sup>(15)</sup> The combined rating is based on the plaintiff's periodic anxiety and panic attacks, which limited her ability to function. However, it also considers the fact that she was able to go about her normal activities and attend work.

The total disability rating of 40 percent is based on the combined ratings table in §4.25. A 30 percent rating for a splenectomy combined with a 10 percent rating for scarring yields a 37 percent rating. Combining this with the additional 10 percent rating for the psychiatric disorders yields a combined disability rating of 43 percent, which must be rounded to the nearest number divisible by 10. Accordingly, the combined disability rating for loss of future earning capacity was 40 percent.

At the time of the collision, the plaintiff was earning \$29,000 annually. Two years later, she was earning \$32,000. Based on the VA schedule, there was evidence of a substantial permanent loss to her earning capacity. So the plaintiff's medical economist reduced her earning capacity by 40 percent for each year she would continue to work.

At the time of arbitration, the plaintiff had a work-life expectancy of 30.9 years (assuming she would retire at 65). The VA schedule provided an objective measure of the plaintiff's partial loss of future earning capacity. Realistically, her reduced earning capacity would most likely manifest itself more prominently at the midpoint of her work-life expectancy because she would not likely be able to continue working for the full 30.9 years.

The expert calculated a figure representing the income she would have lost if she had had a complete loss of earning capacity, then reduced that amount to present value. The expert then calculated 40 percent of the total-loss figure, establishing a dollar amount that would compensate the woman for her 40 percent permanent loss of future earning capacity.

The VAs disability ratings can be useful to a judge and jury in their evaluation of an injured party's impairment of earning capacity in civil occupations. When presented with expert testimony, the schedule provides probative evidence of an injured person's diminution of earning capacity because it is relevant, reliable, material, and authoritative. Providing detailed information regarding the extent of a plaintiff's economic injuries will result in more adequate awards for future damages due to partial loss of earning capacity.

#### Notes

1 38 C.F.R §4.1 (1994) (emphasis added).

2 AMERICAN MEDICAL ASS'N, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 2 (3d ed. 1990) (emphasis added).

3 United States v. Brasltier, 548 F.2d 1315, 1325 (9th Cir. 1976), *cert. denied*, 429 U.S. 1111 (1977).

4 *Elias v. Ford Motor Co.*, No. 82-1587L (1st Cir. 1983). This unreported decision is the only federal case the author could locate reviewing this use of the VA disability rating schedule.

5 *Id.* at 7.

6 *Id.* at 8.

7 403 N.E.2d 402 (Mass. 1980).

8 *Id.* at 405.

9 *Id.*

10 *Id.*

11 *Id.* (emphasis added).

12 *Connolly v. Amtrak*, No. 92-12602-K (Mass., Suffolk County Super. Ct. July 12, 1993).

13 38 C.F.R. §4.117.

14 38 C.F.R. §4.118.

15 38 C.F.R. §4.132.