U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM K. JONES and DEPARTMENT OF AGRICULTURE, PLANT METHODS DEVELOPMENT CENTER, Whiteville, N.C.

Docket No. 97-1272; Submitted on the Record;
Issued January 12, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether appellant has more than a 15 percent permanent impairment to his left leg; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant was not entitled to compensation for loss of wage-earning capacity based on loss of earnings from farming activities.

In the present case, appellant, a mechanical engineering technician, filed a claim alleging that he sustained an injury to his left ankle in the performance of duty on August 24, 1993. The Office accepted the claim for left ankle sprain and torn lateral ligaments of the left ankle. Appellant underwent ankle surgery in October 1994.

By decision dated October 25, 1995, the Office issued a schedule award for a 15 percent permanent impairment of the left leg. Appellant requested a hearing and on October 22, 1996 a hearing was held before an Office hearing representative. By decision dated December 13, 1996, the hearing representative affirmed the October 25, 1995 decision.

The Board finds that appellant has not established more than a 15 percent permanent impairment to the left leg.

Section 8107 of the Federal Employees' Compensation Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[1] Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal

[1] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.304(b).

justice for all claimants the Office has adopted the American Medical Associations, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.[2]

In the present case, the attending orthopedic surgeon, Dr. William S. Ogden, provided a form report (CA-1303) dated September 5, 1995, indicating that appellant had 20 degrees of dorsiflexion and plantar flexion in the left ankle, with 15 degrees of inversion and 10 degrees of eversion. An Office medical adviser properly found that under the A.M.A., *Guides* 20 degrees of plantar flexion is a 7 percent impairment to the foot, while 15 degrees of inversion and 10 degrees of eversion each result in a 2 percent impairment.[3] The impairment for loss of range of motion is thus 11 percent.

With regard to weakness, pain, or sensory deficit, Dr. Ogden reported an impairment of 15 percent. This is inconsistent with his overall finding of a 15 percent impairment to the leg, since clearly appellant had some impairment based on loss of range of motion and Dr. Ogden did not provide further information. The Office medical adviser properly applied the method for rating an impairment for strength deficit; the affected nerve is identified and the maximum percentage for loss of function in the identified nerve is graded according to the appropriate tables. In this case, that medical adviser identified the S1 nerve root, which has a maximum of 20 percent impairment for loss of function due to strength deficit,[4] and he graded the impairment at 25 percent of the maximum,[5] for a 5 percent impairment. The 11 percent for range of motion and the 5 percent for weakness are then combined using a Combined Values Chart for a total of 15 percent.[6]

Appellant did submit a brief treatment note from Dr. Ogden dated April 16, 1996, which stated that appellant "will have a 20 percent disability to his ankle because of chronic instability." Dr. Ogden does not provide additional detail or refer to the A.M.A., *Guides* and, therefore, the report is of diminished probative value to the issue of whether appellant has more than a 15 percent impairment to the leg. The Board notes that Dr. Ogden reported full range of motion, even though a portion of the prior schedule award was based on loss of range of motion. In the absence of a reasoned report that explains why appellant is entitled to more than a 15 percent impairment to the left leg, the Board finds that appellant has not established entitlement to an increased schedule award in this case.

The Board further finds that the Office properly determined that appellant was not entitled to compensation for loss of wage-earning capacity based on loss of earnings from farming activities.

---

[2] *A. George Lampo*, 45 ECAB 441 (1994).

[3] A.M.A., *Guides* at 78, Tables 42, 43 (4th ed. 1993).

[4] *Id.,* 130, Table 83.

[5] *Id.,* 151, Table 21.

[6] *Id.,* 322, 24. The A.M.A., *Guides* note that the method for combining impairments is based on the idea that a second or succeeding impairment should apply not to the whole, but only to the part that remains after the first impairments have been applied.

The Board notes that this issue was initially raised at the October 22, 1996 hearing and no additional evidence was submitted prior to the January 14, 1997 Office decision. Although appellant has indicated on appeal an intent to submit additional evidence through a request for reconsideration to the Office, he does indicate his disagreement with the January 14, 1997 Office decision and, therefore, the Board will review the January 14, 1997 decision, based on the evidence of record.

With respect earnings from private employment in consideration of pay rate and wage-earning capacity, the Office properly noted the general rule in its January 14, 1997 decision:

> "The requirement that where an employee is employed in one or two concurrent employments, the employments must be similar in nature in order to permit the inclusion of earnings from both sources in determining the injured employee's wage basis, is one of general application in the field of workman's compensation law."[7]

In *Clouser*, the Board further noted that "the technical job title itself, however, is not the controlling factor, but rather whether appellant's employment as a farmer is in fact so similar to his government employment that earnings from the former may be considered in determining his wage-earning capacity in the latter."[8]

Based on the testimony at the October 22, 1996 hearing, appellant stated that he lived on a family tobacco farm and normally he had earnings from his farming activities. Appellant argued that his employment injury had reduced his earnings from tobacco farming and, therefore, had reduced his wage-earning capacity. As noted above, before private earnings can be considered in a wage-earning capacity determination, the private employment must be so similar to the federal employment that it is appropriate to include such private earnings. In this case, appellant described his federal employment as "build[ing] prototype equipment for government needs that can[not] be bought across the board, or contracted." Appellant did not discuss his farming activities in detail, but presumably they involved tending a tobacco crop and operating necessary equipment to plant and harvest the crop. Based on the evidence of record, the Board finds that the two employments are not similar in nature. The federal employment appeared to be an engineering position that involved designing and building equipment; the Board is unable to find that the farming activities are so similar that they must be included in a wage-earning capacity determination under the Act. Accordingly, the Board finds that the Office properly found that appellant's earnings from farming were not to be included in a wage-earning capacity determination.

The decisions of the Office of Workers' Compensation Programs January 14, 1997 and December 12, 1996 are hereby affirmed.

Dated, Washington, D.C.

---

[7] *Leo Clouser*, 5 ECAB 366 (1953).

[8] *Id; see also Frazier V. Nichol*, 37 ECAB 528 (1986) (the federal duties of a forestry technician were not sufficiently similar to the private employment as a "tree planter").

January 12, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member