U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICKEY FOSTER and U.S. POSTAL SERVICE,
POST OFFICE, Dallas, TX

Docket No. 99-1796; Submitted on the Record;
Issued September 5, 2000

DECISION and ORDER

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

The issues are: (1) whether appellant has established that he has more than a nine percent permanent impairment of the left lower extremity, for which he has received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant's position as a modified limited-duty city mail carrier fairly and reasonably represented his wage-earning capacity.

In the present case, the Office has accepted that appellant, a letter carrier, developed a left plantar fascitis and a calcaneal spur in February 1996 in the performance of his federal employment.[1] The Office authorized surgery for a left plantar fasciotomy on September 5, 1996 and again on September 23, 1997, and also left tarsal release surgery on June 30, 1998. Appellant stopped work on September 23, 1997 and returned to light duty on October 20, 1997.

On April 24, 1998 appellant filed a CA-7 claim for compensation indicating that he intended to claim schedule award compensation for possible permanent impairment of the use of his feet as a result of his accepted work conditions and authorized surgeries. Due to his medical restrictions, appellant's employing establishment offered him a limited-duty position as a modified limited-duty city mail carrier on June 10, 1998, at level 5, step 0, with a base salary of $37,623.00 per year. Appellant accepted the modified-duty position on June 15, 1998. He stopped work again on June 30, 1998 and returned to full-time light duty on November 23, 1998. Appropriate benefits for wage loss were paid for intermittent periods of disability.

In an independent medical evaluation report dated February 22, 1999, Dr. Mark Parker, a Board-certified physician in physical medicine and rehabilitation, reported that appellant had reached maximum medical improvement. He indicated that appellant had experienced bilateral foot pain over the years with the majority of the pain suffered in his left foot. Dr. Parker noted each of appellant's surgical procedures and that his electrical studies were normal without

[1] The Board notes that the Office initially denied appellant's occupational disease claim by decision dated January 22, 1997, to which appellant requested reconsideration on March 3, 1997. Due to reorganization in the Office, a new claims examiner was assigned to the case who reorganized the file and further developed the record. The Office later accepted the CA-2 claim on July 17, 1997.

evidence of tarsal tunnel syndrome. He opined, however, that appellant had chronic plantar fascitis and that he continued to experience foot pain. Dr. Parker found appellant with atrophy in the left calf compared to the right and that the range of motion in his left ankle was diminished. He measured dorsiflexion to 0 degrees, plantar flexion to 30 degrees, inversion to 20 degrees and eversion to 10 degrees, and determined that appellant had a 16 percent impairment to the left lower extremity due to work conditions. He stated: "[F]rom Table 42 [of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition 1993)[2]] for loss of dorsiflexion, the patient has a seven percent impairment and loss of plantar flexion, a seven percent impairment of the left lower extremity. "From Table 43, the patient has a one percent impairment for loss of inversion and a one percent impairment for loss of eversion. These add to a 16 percent of the left lower extremity."

On March 25, 1999 an Office medical adviser reviewed Dr. Parker's report. He stated that, pursuant to the A.M.A., *Guides*, Table 42 and 43 recommended only a single amount of impairment based on the use of mild, moderate or severe situations described by either one, or both limited motions, however, Dr. Parker seemed to have allowed impairment for each of the motion descriptions. The Office medical adviser referred to the ranges of motion that Dr. Parker outlined in his report and assessed a seven percent mild impairment rating for loss of motion of the ankle according to Table 42, page 78, and a two percent mild impairment rating for loss of motion of the hind foot, according to Table 43, page 78. He concluded that appellant sustained a nine percent permanent impairment.

On April 14, 1999 the Office granted appellant a schedule award for a nine percent permanent impairment of the left lower extremity. The period of the reward ran from February 22 to August 22, 1999.

In a decision dated April 23, 1999, the Office determined that appellant's position of modified limited-duty city carrier with wages of $727.52 per week, effective November 19, 1998, fairly and reasonably represented his wage-earning capacity.

The Board finds that the Office properly determined that appellant has no more than a nine percent permanent impairment of the left lower extremity for which he has received a schedule award.

Under section 8107 of the Federal Employees' Compensation Act[3] and section 10.304 of the implementing federal regulations,[4] schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to

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

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.304.

all claimants. The A.M.A., *Guides* have been adopted by the Office[5] and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[6]

The April 14, 1999 schedule award was based on the March 25, 1999 report of the Office medical adviser, who reviewed Dr. Parker's February 22, 1999 findings and assessed an impairment rating of nine percent for the left lower extremity using Table 42 and 43 on page 78 of the A.M.A., *Guides*. In his March 25, 1999 report, the Office medical adviser noted that Dr. Parker, who assessed a 16 percent impairment rating must have included impairments for each of the motion descriptions, although Tables 42 and 43 of the A.M.A., *Guides* recommended only a single amount of impairment, based on the use of mild, moderate or severe impairment estimates. He found that Dr. Parker's reported dorsiflexion to 0 degrees and plantar flexion to 30 degrees converted to a 7 percent mild impairment for the left ankle and his reported inversion to 20 degrees and eversion to 10 degrees each converted to a combined 2 percent mild impairment for the hind foot. According to the estimates in Table 42 diagnosing ankle impairments, an extension measurement of 0 degrees yields a 7 percent mild impairment, while plantar flexion to 30 degrees does not provide an impairment rating. According to estimates in Table 43 diagnosing hind foot impairments, an inversion to 20 degrees and an eversion to 10 degrees each yield a 1 percent mild impairment rating. The Office medical adviser's combined assessment of nine percent permanent impairment of the left lower extremity, therefore, directly corresponds with Tables 42 and 43 of the A.M.A., *Guides*. The Office properly concluded that appellant sustained a nine percent permanent impairment for which he received a schedule award.

The Board further finds that the Office properly determined that appellant had no loss of wage-earning capacity as a result of his employment-related condition.

Under section 8115(a) of the Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent the employee's 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] Office procedure provides that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity shall be made after an employee has been working in a given position for more than 60 days.[9] In *Corlisia L. Sims*,[10] the Board explained that the 60-day period is a minimum period of reemployment before the Office can make a determination that the position fairly and reasonably represents wage-earning capacity. If the Office makes a

[5] A.M.A., *Guides*.

[6] *James A. Sellers*, 43 ECAB 924 (1992).

[7] 5 U.S.C. § 8115(a).

[8] *Monique L. Love*, 48 ECAB 378 (1997); *Nancy L. Christiansen*, 48 ECAB 579 (1997); *Joseph M. Popp*, 48 ECAB 624 (1997).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

[10] 46 ECAB 172 (1994).

determination on wage-earning capacity prior to the expiration of the 60-day period, the decision must be set aside.[11]

In the instant case, appellant developed a plantar fasciitis and a calcaneal spur of the left foot while performing duties at work. Due to his physical restrictions caused by these conditions, appellant accepted the position of modified limited-duty city mail carrier, level 5, step 0 with a base salary of $37,623.00 per year, effective November 19, 1998, in lieu of his date-of-injury position of letter carrier, level 5, step 0 with a base salary of $37,029.00 per year. By decision dated April 23, 1999, the Office determined that appellant's return to work on November 19, 1998 with weekly earnings of $727.52 per week reasonably represented his wage-earning capacity. The Office terminated appellant's benefits because his actual wages met or exceeded the wages of the job held when injured. Appellant had no loss of wage-earning capacity at the time he was transferred to his new position of modified limited-duty city mail carrier on November 19, 1998 and he had worked successfully in his modified position for at least 60 days when the Office evaluated his wage-earning capacity. The record does not contain any evidence showing that the modified city mail carrier position constitutes part time, sporadic, seasonal or temporary work.[12] Moreover, the record does not reveal that the position is a make-shift position designed for a claimant's particular needs. Therefore, the Board finds that the Office properly calculated appellant's wage-earning capacity and that appellant has not sustained a compensable loss of wage-earning capacity.

The decisions of the Office of Workers' Compensation Programs dated April 23 and 14, 1999 are affirmed.

Dated, Washington, D.C.
September 5, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

[11] *Id.*

[12] Federal (FECA) Procedure Manual, Part 2 – Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (December 1993).