

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES HUMAN and U.S. POSTAL SERVICE,
POST OFFICE, Tulsa, Okla.

*Docket No. 97-2402; Submitted on the Record;
Issued June 17, 1999*

DECISION and ORDER

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

The issues are whether the Office of Workers' Compensations Programs properly determined the modified city carrier position, which appellant performed, fairly and reasonably represented his wage-earning capacity; and (2) whether appellant is entitled to a schedule award for his 1996 accepted knee condition.

The Board has duly reviewed the record in the present appeal and finds that the Office properly determined the modified city carrier position, which appellant performed, fairly and reasonably represented his wage-earning capacity.

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 his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity."¹ Office procedures indicate that a determination regarding whether actual wages fairly and reasonably represent wage-earning capacity should be made after a claimant has been working in a given position for more than 60 days.²

On January 30, 1996 appellant, then a 39-year-old letter carrier, sustained a right knee injury when he tripped on a wire while in the performance of his employment duties. Appellant, who had been working permanent limited duty, stopped work following the accident. The Office accepted appellant's claim for right knee contusion and internal derangement of the right knee and subsequently authorized right knee arthroscopy.

¹ 5 U.S.C. § 8115(a).

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (December 1993); see *William D. Emory*, 47 ECAB 365 (1996).

Appellant's right knee injury was managed with conservative care by Dr. John B. Vosburgh, a Board-certified orthopedic surgeon. In his initial report dated February 19, 1996, Dr. Vosburgh noted that appellant had a prior injury to his right knee in 1991, when he sustained a chondral fracture of the patella and the distal femur and stated that appellant's current injury seemed to have aggravated his prior condition. When appellant did not fully respond to conservative treatment, arthroscopic surgery was performed on May 9, 1996. On June 10, 1996 Dr. Vosburgh released appellant back to work and he returned to his regular duties as a modified city letter carrier, eight hours a day. In a decision dated October 30, 1996, the Office noted that appellant had been working successfully for at least 60 days, and, therefore, found that the modified city carrier position, with wages of \$679.25 per week, fairly and reasonably represented appellant's wage-earning capacity. The Office further determined that as appellant's actual wages as a modified city carrier met or exceeded the wages of the job held when injured, appellant had no loss of wages and was no longer entitled to wage-loss compensation.

Office procedures direct that where such a determination is made, based on work performance for at least 60 days, "a formal decision should be issued no later than 90 days after the date of return to work."³ The procedures indicate that factors to be considered in determining whether a claimant's position fairly and reasonably represents his or her wage-earning capacity include whether the job is part time, seasonal or temporary.⁴ The Board notes that the position of modified city carrier is the same position appellant was performing at the time of his January 30, 1996 accident and that appellant returned to this position eight hours a day. Therefore, based on appellant's performance of the modified city carrier position for at least 60 days, the Board finds that the Office properly determined that the position fairly and reasonably represented appellant's wage-earning capacity.

The Board further finds that this case is not in posture for a decision on the issue of whether appellant has established entitlement to a schedule award for his 1996 accepted knee condition.

Following his return to work, appellant continued to see Dr. Vosburgh on a periodic basis until August 28, 1996, when he was determined to have reached maximum medical improvement and released from care. In a narrative report dated August 28, 1996, Dr. Vosburgh stated that appellant's January 30, 1996 injury had aggravated his preexisting degenerative joint disease. He added that examination of the knee revealed no effusion, full range of motion and intact knee ligaments. Dr. Vosburgh concluded:

"I rate this man as having an additional eight percent permanent impairment to his right leg, over and above preexisting impairment because of this injury which affected the degenerative process in his knee joint. This rating is in accordance

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c)(1) (December 1993).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (December 1993).

with the Guidelines of the American Medical Association in their text on the *[Guides to the] Evaluation of Permanent Impairment*, edition IV.”

On April 4, 1997 Dr. R. Meador, an Office medical adviser, reviewed Dr. Vosburgh’s August 28, 1996 report at the request of the Office. Dr. Meador concurred with Dr. Vosburgh’s conclusion that the January 30, 1996 injury, had aggravated appellant’s preexisting degenerative joint disease and equated this diagnosis with an eight percent permanent impairment, pursuant to page 84 of the A.M.A., *Guides*. Dr. Meador further found that appellant’s meniscectomy equated to an additional 2 percent permanent impairment, for a combined permanent impairment of 10 percent of the right lower extremity.

In a decision dated April 15, 1997, the Office granted appellant a schedule award for 10 percent permanent impairment of the right lower extremity. In a subsequent decision dated April 30, 1997, however, the Office rescinded its April 15, 1997 decision on the grounds that appellant had previously received a schedule award for the same extremity. In its accompanying memorandum, the Office explained that on April 30, 1997, the employing establishment contacted the Office and informed them that in a prior claim, number 160202407, appellant was granted a schedule award for a 22 percent impairment of the right lower extremity. The Office concluded that, therefore, the evidence did not establish that appellant has sustained any greater impairment to the right lower extremity than that which was previously awarded and vacated its April 14, 1997 award.

The Board has duly considered the matter and notes that the Office, in its April 30, 1997 decision, based its decision, in part, on evidence in a prior compensation claim of appellant with the file number 160202407. As assembled, the case record now before the Board does not contain the prior compensation claim case file number 160202407 and as such, the case record forwarded to the Board is incomplete. The Board, therefore, finds that the issue of whether appellant is entitled to a schedule award for his January 20, 1996 accepted right knee injury is not in posture for a decision as the Board is unable to render an informed adjudication of the case. The case must be remanded to the Office for reconstruction of the record and an appropriate merit decision issued on appellant’s claim in order to preserve his right to appeal to the Board.

Therefore, the decisions of the Office of Workers' Compensation Programs dated April 30 and 15, 1997 are set aside and the case remanded to the Office for further proceedings consistent with this decision. The Office's October 30, 1996 decision is affirmed.

Dated, Washington, D.C.
June 17, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member