United States Department of Labor
Employees' Compensation Appeals Board

MARITZA SANCHEZ, Appellant	)	
	)	**Docket No. 06-620**
and	)	**Issued: June 8, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Boston, MA, Employer	)	

Appearances:
Maritza Sanchez, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On January 18, 2006 appellant filed a timely appeal from a December 14, 2005 merit decision of the Office of Workers' Compensation Programs, granting a schedule award for a 10 percent impairment of the right lower extremity. Appellant also appeals the Office's December 20, 2005 merit decision, finding that her actual wages fairly and reasonably represented her wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the schedule award and wage-earning capacity decisions.

ISSUES

The issues are: (1) whether appellant established that she has more than a 10 percent impairment of the right lower extremity; and (2) whether the Office properly determined that appellant's actual earnings as a modified letter carrier fairly and reasonably represented her wage-earning capacity.

FACTUAL HISTORY

On October 21, 2003 appellant, then a 31-year-old letter carrier, filed a traumatic injury claim alleging that on October 17, 2003 she fractured her right foot when she stepped from her

truck while performing her work duties. She stopped work on October 18, 2003. By letter dated February 9, 2004, the Office accepted her claim for right ankle sprain and fractured talus and navicular bone in the right foot. The Office subsequently authorized triple arthrodesis surgery on appellant's right foot, which was performed on April 22, 2004 by Dr. Kenneth M. Leavitt, her attending podiatrist. The Office paid her appropriate compensation.

Dr. Leavitt released appellant to return to part-time limited-duty work, four hours a day with certain restrictions on October 20, 2004. She returned to part-time limited-duty work on November 9, 2004. On December 6, 2004 Dr. Leavitt found that appellant could work eight hours a day, but only with a push cart. She could not handle any additional weight on her right foot.[1] Appellant returned to full-time limited-duty work on December 20, 2004.[2]

On April 8, 2005 appellant filed a claim for a schedule award. She submitted numerous medical records covering intermittent dates from March 22 to December 6, 2004 of Dr. Leavitt, Dr. Arnold D. Scheller, a Board-certified orthopedic surgeon, Dr. Bernardo J. Selim, a Board-certified internist and nurses and physicians whose signatures were illegible regarding her right foot problems and April 22, 2004 foot surgery. Appellant submitted Dr. Leavitt's April 19, 2005 duty status report, which diagnosed fractured talus of the right foot and noted her physical limitations. In an April 23, 2005 attending physician's report, he diagnosed a subtalar joint coalition fracture of the right foot. Dr. Leavitt indicated with an affirmative mark that the diagnosed condition was caused by the October 17, 2003 employment injury. His April 13, 2005 report revealed that appellant was one year status post triple arthrodesis of the right foot. Dr. Leavitt noted moderate discomfort and sensitivity at the surgical sites but stated that otherwise appellant was ambulating without much discomfort at the surgical sites. He stated that in light of the triple arthrodesis, she was experiencing pain in her ankle and mid-foot. In a May 2, 2005 report, Dr. Leavitt stated that appellant could work but she could not jump off her vehicle. He discharged her at that time.

By letter dated August 15, 2005, the Office advised appellant that additional medical information was needed to establish her schedule award claim. The Office instructed her to take an accompanying letter to her attending physician, which requested, among other things, an assessment of the extent of her permanent impairment based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001) and the date she reached maximum medical improvement.

The Office received Dr. Leavitt's August 24, 2005 report, which noted that appellant experienced pain overlying the lateral incision of the right foot and the anterior medial aspect of the right ankle joint. He injected both areas which provided immediate pain relief.

[1] By decision dated December 22, 2004, the Office denied appellant's claim for wage-loss compensation for disability during the period December 6 to 17, 2004 based on Dr. Leavitt's December 6, 2004 finding that she could work eight hours a day.

[2] The record reveals that when appellant returned to full-time limited-duty work on December 20, 2004, a push cart was not available. She continued to perform her work duties, but did not deliver mail.

In an October 12, 2005 report, Dr. Leavitt provided a history of the October 17, 2003 employment injury and his subsequent treatment of this injury. He noted that appellant returned to part-time work on October 20, 2004 following her April 22, 2004 surgery and physical therapy and that she returned to full-time work on January 1, 2005 with specified limitations. Dr. Leavitt stated that it was important to note that subsequent to the surgery, appellant still maintained a full range of motion in the ankle joint, but due to the surgery she would incur some excessive movement in the mid-foot joints distal to the calcaneocuboid and talonvaicular joints which may become osteoarthritic in the future. He further noted that since she retained active movement of the ankle and forefoot joints, she was able to ambulate normally although with decreased shock absorption in the rear foot due to the complete fusion of the talonavicular joint and calcaneocuboid joints. Based on the A.M.A., *Guides*, Dr. Leavitt determined that appellant had approximately a 50 to 55 percent impairment of the foot, which constituted a 20 percent impairment of the whole person as a result of the October 17, 2003 employment injury.

On November 17, 2005 an Office medical adviser reviewed Dr. Leavitt's October 12, 2005 report. Utilizing the A.M.A., *Guides* 542, section 17.2g, he stated that for the subtalar part of the foot, the optimal ankylosis position was neutral or zero degrees, without varus or valgus. He further stated that ankylosis in the neutral position constituted a 10 percent impairment of the right lower extremity. The Office medical adviser explained that impairment due to loss of ankle and/or subtalar motion was calculated as lower extremity impairment rather than foot impairment. He noted that there was no provision in the A.M.A., *Guides* for impairment due to triple arthrodesis. The Office medical adviser found no impairment for pain. He concluded that appellant reached maximum medical improvement in January 2005, the date she returned to work.

By decision dated December 14, 2005, the Office granted appellant a schedule award for a 10 percent impairment of the right lower extremity.

By decision dated December 20, 2005, the Office terminated appellant's compensation for wage loss effective December 20, 2004 on the basis that her actual earnings as a modified letter carrier ($798.40 per week) met or exceeded the current wages of the job held when injured ($706.30 per week). The Office determined that since she had demonstrated the ability to perform the duties of this position for two or more months, it was considered suitable for her partially disabled condition. The Office found that appellant's actual earnings met or exceeded the current wages of the job she held on the date of injury. Therefore, based on the provisions of 5 U.S.C. §§ 8106 and 8115, the Office determined that appellant's entitlement to wage-loss compensation ended on the date she was reemployed with no loss in earning capacity and, thus, terminated her compensation.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulation[4] sets forth the number of weeks of compensation to be paid for

[3] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[4] 20 C.F.R. § 10.404.

permanent loss or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.[5] 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 for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[6]

Before the A.M.A., *Guides* can be utilized, a description of appellant's impairment must be obtained from appellant's physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.[7]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a right ankle sprain and fractured talus and navicular bone in the right foot. On April 22, 2004 Dr. Leavitt performed a triple arthrodesis on the right foot.

In an October 12, 2005 report, Dr. Leavitt stated that following right foot surgery, appellant still maintained a full range of motion in the ankle joint, but she would incur some excessive movement in the mid-foot joints distal to the calcaneocuboid and talonvaicular joints, which may become osteoarthritic in the future due to the surgery. She also retained active movement of the ankle and forefoot joints and was able to ambulate normally although with decreased shock absorption in the rear foot due to the complete fusion of the talonavicular joint and calcaneocuboid joints. Dr. Leavitt opined that appellant had approximately a 50 to 55 percent impairment of the foot, which constituted a 20 percent impairment of the whole person based on the A.M.A., *Guides*, as a result of the October 17, 2003 employment injury. Dr. Leavitt, however, did not identify any applicable tables and figures in the A.M.A., *Guides* or otherwise explain how he arrived at his 50 to 55 percent impairment rating. Further, while the A.M.A., *Guides* provide for impairment to the individual member and to the whole person, the Act does not allow schedule awards for impairment to the whole person.[8] Dr. Leavitt's October 12, 2005 report is insufficient to establish that appellant is entitled to a schedule award for an additional impairment.

An Office medical adviser reviewed Dr. Leavitt's October 12, 2005 report and properly noted that the A.M.A., *Guides* provide for a 10 percent impairment of the lower extremity for

[5] 5 U.S.C. § 8107(c)(19).

[6] *Supra* note 4.

[7] *Robert B. Rozelle*, 44 ECAB 616, 618 (1993).

[8] *Phyllis F. Cundiff*, 52 ECAB 439 (2001); *John Yera*, 48 ECAB 243 (1996).

ankylosis in the neutral position.[9] This provision of the A.M.A., *Guides* states that ankylosis impairment in the neutral position is 4 percent for the whole person and 10 percent for the lower extremity. As Dr. Leavitt did not explain how his impairment rating was derived according to the A.M.A., *Guides*, there is no other medical evidence of record establishing greater impairment than that found by the Office medical adviser. The Board finds that the Office medical adviser properly concluded that appellant had a 10 percent permanent impairment of her right lower extremity.

LEGAL PRECEDENT -- ISSUE 2

It is well established that once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation of benefits.[10] After it has determined that an employee has a disability causally related to his or her federal employment, the Office may not reduce compensation without establishing that the disability ceased or that it is no longer related to the employment.

Section 8115(a) of the Act[11] provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings if her actual earning fairly and reasonably represent her wage-earning capacity.[12] 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 a measure.[13]

The formula for determining loss of wage-earning capacity, developed in the *Shadrick* decision,[14] has been codified at 20 C.F.R. § 10.403. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.[15]

ANALYSIS -- ISSUE 2

The Board finds that appellant's actual wages fairly and reasonably represent her wage-earning capacity. On November 9, 2004 appellant returned to work as a part-time modified letter carrier, which conformed to the restrictions outlined by Dr. Leavitt, who found that she could work four hours a day. She returned to full-time work, eight hours a day in the modified letter

[9] A.M.A., *Guides* 542.

[10] *See Lawrence D. Price*, 47 ECAB 120 (1995); *Charles E. Minniss*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

[11] 5 U.S.C. §§ 8101-8193.

[12] 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

[13] *Stanley B. Plotkin*, 51 ECAB 700 (2000).

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

[15] 20 C.F.R. § 10.403(c).

carrier position with restrictions set forth by Dr. Leavitt on December 20, 2004 and continued working in the position through December 20, 2005, the date the Office issued a formal loss in wage-earning capacity decision. The fact that she earned wages in this position through the date of the Office's decision supports her capacity to earn such wages.[16] Further, there is no evidence that the position was seasonal, temporary or make-shift work designed for appellant's particular needs.[17] Moreover, appellant has not submitted any medical evidence establishing that there was a material change in the nature and extent of the employment-related right ankle sprain and fractured talus and navicular bone in the right foot at the time of the Office's December 20, 2005 decision.[18]

As appellant's actual earnings in her modified letter carrier position fairly and reasonably represent her wage-earning capacity, the Board must determine whether the Office properly calculated her wage-earning capacity based on her actual earnings on December 20, 2005. The Board finds that the Office properly applied the *Shadrick* formula in determining loss of wage-earning capacity based on her actual earnings. Appellant's current weekly earnings of $798.40 per week as a modified letter carrier exceeded the current weekly wages of her date-of-injury position, which the Office identified as $706.30 per week. Therefore, she had no loss of wage-earning capacity under the *Shadrick* formula.[19]

CONCLUSION

The Board finds that appellant has failed to establish that she has more than a 10 percent impairment of the right lower extremity, for which she received a schedule award. The Board further finds that the Office properly determined that appellant's actual earnings as a modified letter carrier fairly and reasonably represented her wage-earning capacity.

[16] The Office procedure manual provides that, after a claimant has been working for 60 days, the Office will determine whether his actual earnings fairly and reasonably represent his wage-earning capacity and, if so, shall issue a formal decision no later than 90 days after the date of return to work. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997).

[17] *Elbert Hicks*, 49 ECAB 283 (1998).

[18] *See Laura E. Vasquez*, 49 ECAB 362 (1998).

[19] *Albert C. Shadrick*, *supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the December 20 and 14, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 8, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board