United States Department of Labor
Employees' Compensation Appeals Board

E.W., Appellant	)	
and	)	**Docket Nos. 09-944 & 09-1352**
	)	**Issued: June 15, 2010**
U.S. POSTAL SERVICE, MAIN POST OFFICE, Warren, OH, Employer	)	

Appearances:
John P. Lutseck, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On February 26, 2009 appellant, through counsel, filed a timely appeal of the April 2 and November 18, 2008 merit decisions of the Office of Workers' Compensation Programs regarding a schedule award. The Board assigned Docket No. 09-944. On April 28, 2009 appellant, through counsel, filed a timely appeal from merit decisions of the Office dated April 23, 2008 and February 18, 2009 that terminated his entitlement to wage-loss and schedule award compensation benefits for refusing suitable work. The Board assigned Docket No. 09-1352. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the schedule award and termination issues.

ISSUES

The issues are: (1) whether appellant has more than nine percent permanent impairment of the left lower extremity for which he received a schedule award; and (2) whether the Office properly terminated his compensation effective May 11, 2008 on the grounds that he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c).

FACTUAL HISTORY

On June 15, 2004 appellant, then a 54-year-old letter carrier, filed a traumatic injury claim alleging he injured his left ankle that day when he stepped into a depression in the grass. The Office accepted the claim for left ankle fracture and sprain and accepted his October 2, 2004 claim for a recurrence of disability. It authorized left ankle surgery, which was performed on April 25, 2005. By letter dated April 7, 2005, the Office placed appellant on the periodic rolls for temporary total disability.

In an October 30, 2006 letter, Dr. Stephanie M. Galey, appellant's treating physician, requested authorization for a functional capacity evaluation to be performed to determine appellant's work capability and restrictions.

On April 20, 2007 the Office received an October 11, 2006 report from Dr. Galey, who related that appellant stated he was unable to stand for more than 20 minutes without having pain, that he was unable to go up stairs, has swelling in his ankle during the day and uses both a cane and ankle brace. A physical examination revealed some venous discoloration, restricted range of motion and some foot dysesthesias diffusely.

On June 12, 2007 the Office authorized a functional capacity evaluation. It was performed on June 26, 2007 and a report issued on July 5, 2007. The report indicated that appellant was capable of working four hours per day with restrictions. It noted restrictions of 25- to 30-minute sitting duration during 4 hours; 5- to 10-minute standing duration for 1 hour; occasional short distance walking for 1 hour; occasional above shoulder lifting of 12.6 pounds; occasional lifting of 12.6 pounds from desk to chair; occasional pushing and pulling of 13.3 pounds and occasional carrying of 8.6 pounds.

On October 18, 2007 the Office referred appellant to Dr. Michael J. Jurenovich, an orthopedic surgeon, to provide an opinion on whether appellant was capable of working an eight-hour day. In a November 13, 2007 report, Dr. Jurenovich, based upon a physical examination, review of the medical records, comprehensive functional capacity evaluation and statement of accepted facts, concluded that appellant was capable of working an eight-hour day with restrictions. A physical examination revealed negative drawer sign and fairly good left ankle range of motion. Dr. Jurenovich reported appellant's toe flexion and extension were fairly good. In an attached work capacity evaluation form, he stated that appellant was capable of working an eight-hour day with restrictions. The restrictions included three to four hours of standing, bending/stooping, operating a motor vehicle at work and operating a motor vehicle to and from work; four to five hours of reaching; three to four hours of pushing, pulling and lifting 10 to 20 pounds; three to four hours squatting and kneeling and two to three hours climbing.

On January 29, 2008 the employing establishment offered appellant the limited-duty position of modified city letter carrier. The duties included two hours of scanning delivery confirmation packages by route; four hours of casing and carrying auxiliary routes; one hour of printing and verifying test reports from the prior day; and two to three hours of delivering late arriving express mail. Physical restrictions of the position included two hours of standing; three to four hours of walking, stooping and bending; and two to three hours of sitting and driving.

The hours were from 4:30 a.m. to 2:30 p.m. with a two-hour lunch and the position was located at Warren Main Post Office.

On February 14, 2008 the Office received appellant's undated letter refusing the offered position on the grounds that it went against the restrictions noted by Drs. Galey and Dr. Nasimullah Rehmatullah, an orthopedic surgeon.

On February 15, 2008 the employing establishment offered appellant the limited-duty position of modified city letter carrier with modified restrictions. The duties included one hour of scanning delivery confirmation packages by route; 30 minutes of printing and verifying delivery confirmation reports from the prior day; and two to three hours of delivering late arriving express mail and four hours of carrying/casing auxiliary routes with less than 10 pounds. Physical restrictions of the position included four hours of standing; three hours of pushing, pulling and lifting 10 pounds; two to three hours of bending, stooping, walking, sitting and driving and no squatting or kneeling. The hours were from 4:30 a.m. to 2:30 p.m. and the position was located at Warren Main Post Office.

On February 23, 2008 appellant declined the offered position as the duties were beyond his capability.

On February 26, 2008 appellant informed the Office that he was electing to receive retirement benefits from the Office of Personnel Management (OPM) in lieu of compensation benefits effective March 16, 2008.

On March 3, 2008 the Office noted it had received appellant's letter declining the offered position, noting that he had retired and was unable to perform the duties of the offered position. It notified appellant that it found the modified city letter carrier position to be suitable. The Office advised appellant that he had 30 days to accept the offer or provide reasons why he believed the position was not suitable. Appellant did not accept the offer within the 30-day period.

Appellant filed a claim for a schedule award and submitted a February 8, 2006 report from Dr. John J. Vargo, an osteopath, in support of his request. Dr. Vargo provided findings on physical examination and diagnosed a left ankle fracture and left ankle sprain. He reported appellant used a cane to walk and had an antalgic limp. Dorsiflexion was 5 degrees, plantar flexion 20 degrees, inversion 10 degrees and eversion 0 degrees. Dr. Vargo stated that appellant had reached maximum medical improvement. Using Table 17-5, page 528 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), he calculated a total 20 percent whole person impairment based upon appellant's gait. Dr. Vargo noted that no other condition may be considered when basing an impairment solely on gait disturbance. He noted that appellant had an 11 percent whole person impairment based on his loss of range of motion. In reaching this determination, Dr. Vargo used Table 17-11, page 537 to find a three percent impairment for plantar flexion, a six percent impairment for flexion contracture and a zero percent impairment for extension. Using Table 17-12, page 537, he concluded that appellant had one percent impairment for eversion. Dr. Vargo then combined these percentages to find a total 11 percent lower extremity impairment due to loss of range of

motion. In concluding, he found a 20 percent whole person impairment due to the gait derangement.

On March 31, 2008 an Office medical adviser calculated a nine percent impairment of appellant's left lower extremity. He concluded that using the gait derangement to determine appellant's impairment was not the optimal method as set forth on page 529 of the A.M.A., *Guides*. As gait determination was not the optimal method, the Office medical adviser made his impairment determination based upon appellant's ankle range of motion. His determination was based on a seven percent for 0 degrees of dorsiflexion and 20 degrees plantar flexion, based on Table 17-11 at page 537 of the A.M.A., *Guides*, a two percent for 10 degrees of inversion and 0 degrees of eversion, based on Table 17-12 at page 537.

By decision dated April 2, 2008, the Office granted appellant a schedule award based on a nine percent impairment of the left lower extremity for 181.44 days, from March 16 to September 13, 2008.

By letter dated April 3, 2008, the Office advised appellant that he had failed to provide valid reasons for refusing to accept the limited-duty job and that, if he had not accepted the position and arranged for a report date within 15 days of the date of the letter, his entitlement to wage-loss and schedule award benefits would be terminated. It stated that no additional reasons for refusal would be accepted.

In an April 21, 2008 letter, appellant's counsel requested an oral hearing on the schedule award issue before an Office hearing representative, which was held on August 15, 2008.

By decision dated April 23, 2008, the Office terminated appellant's wage-loss compensation and schedule award benefits on the grounds that he declined an offer of suitable work.

On May 28, 2008 appellant and his counsel requested an oral hearing on the termination issue before an Office hearing representative, which was held on November 24, 2008.

By decision dated November 18, 2008, the Office hearing representative affirmed the April 2, 2008 schedule award decision on the grounds that the evidence established that appellant had no more than a nine percent impairment of his left lower extremity.

By decision dated February 18, 2009, a second Office hearing representative affirmed the Office's April 23, 2008 decision, finding that the evidence of record demonstrated that appellant had refused, without justification, an offered position that was medically, vocationally and educationally suitable. He found the weight of the evidence rested with the opinion of the second opinion physician, Dr. Jurenovich, as no contrary medical evidence was submitted subsequently. The hearing representative noted that Dr. Galey, in her October 11, 2006 report, deferred her opinion regarding appellant's work capability pending a functional capacity evaluation and no further information was received from her.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulations[2] set forth the number of weeks of compensation to be paid for 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.[3] 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.[4]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a left ankle fracture in the performance of duty on June 15, 2004. Appellant underwent a left ankle surgery on April 25, 2005. He filed a claim for a schedule award on March 12, 2008 and has the burden to establish by the weight of the medical evidence that his employment injury caused permanent impairment to his right leg. On appeal appellant's counsel contends that the Office erred in failing to base his schedule award on his gait disturbance which was higher than his loss of range of motion.

On February 8, 2006 Dr. Vargo found that appellant had a 20 percent whole person permanent impairment due to gait abnormality using Table 17-5 and an 11 percent impairment due to decreased range of motion using Tables 17-11 and 17-12 page 537. In reaching the 11 percent impairment determination, he used Table 17-11, page 537 to find a 3 percent impairment for plantar flexion, a 6 percent impairment for flexion contracture and a 0 percent impairment for extension. Using Table 17-12, page 537, Dr. Vargo concluded that appellant had one percent impairment for eversion. He then combined these percentages to find a total 11 percent lower extremity impairment due to loss of range of motion. Dr. Vargo noted that no other condition may be considered when basing an impairment solely on gait disturbance. Thus, his determination of a 20 percent whole person impairment was based solely on appellant's gait disturbance. The Board notes that a schedule award is not payable for an impairment of the whole person.[5] As Dr. Vargo's opinion does not conform to the A.M.A., *Guides*, it is of diminished probative value.[6]

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[1] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[2] 20 C.F.R. § 10.404.

[3] 5 U.S.C. § 8107(c)(19).

[4] 20 C.F.R. § 10.404; *see I.F.*, 60 ECAB ___ (Docket No. 08-2321, issued May 21, 2009); *A.A.*, 59 ECAB ___ (Docket No. 08-951, issued September 22, 2008).

[5] *See A.L.*, 60 ECAB ___ (Docket No. 08-1730, issued March 16, 2009); *D.H.*, 58 ECAB 358 (2007); *Marilyn S. Freeland*, 57 ECAB 607 (2006) (the Act does not authorize schedule awards for permanent impairment of the whole person).

[6] *Mary L. Henninger*, 52 ECAB 408 (2001).

The Office medical adviser properly reviewed the medical record and found a nine percent left lower extremity impairment. He concluded that using the gait derangement to determine appellant's impairment was not the optimal method as set forth on page 529 of the A.M.A., *Guides*. As gait determination was not the optimal method, the Office medical adviser made his impairment determination based upon appellant's ankle range of motion. His determination was based on a seven percent for 0 degrees of dorsiflexion and 20 degrees plantar flexion, based on Table 17-11 at page 537 of the A.M.A., *Guides*, a two percent for 10 degrees of inversion and 0 degrees of eversion, based on Table 17-12 at page 537. The Office medical adviser properly combined the impairment ratings for loss of ankle range of motion.

The Board finds that the medical adviser properly applied the A.M.A., *Guide*s to the findings of Dr. Vargo in calculating an impairment rating of nine percent permanent impairment of the left lower extremity. There is no other evidence of record, conforming with the A.M.A., *Guides*, indicating that appellant has any greater impairment.

LEGAL PRECEDENT -- ISSUE 2

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[7] Under section 8106(c)(2) of the Act, the Office may terminate the compensation of a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee.[8] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[9] Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[10]

Office regulations provide that, in determining what constitutes suitable work for a particular disabled employee, the Office should consider the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors.[11] It is well established that the Office must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position.[12] The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.[13]

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[7] *A.W.*, 59 ECAB ___ (Docket No. 08-306, issued July 1, 2008).

[8] 5 U.S.C. § 8106(c)(2); *see also Mary E. Woodard*, 57 ECAB 211 (2005); *Geraldine Foster*, 54 ECAB 435 (2003).

[9] *T.S.*, 59 ECAB ___ (Docket No. 07-1686, issued April 24, 2008); *Ronald M. Jones*, 52 ECAB 190 (2000).

[10] *Richard P. Cortes*, 56 ECAB 200 (2004); *Joan F. Burke*, 54 ECAB 406 (2003).

[11] 20 C.F.R. § 10.500(b).

[12] *Richard P. Cortes*, *supra* note 10.

[13] *Id.*; *Bryant F. Blackmon*, 56 ECAB 752 (2005).

ANALYSIS -- ISSUE 2

As noted above, the Office accepted appellant's claim for left ankle fracture and sprain and authorized left ankle surgery, which was performed on April 25, 2005. By letter dated April 7, 2005, it placed appellant on the periodic rolls for temporary total disability. Appellant notified the Office by letter dated February 28, 2008 that he was electing to receive retirement benefits from the OPM.

On appeal appellant's counsel contends that the issue is not whether appellant refused an offer of suitable work as he preferred to retire. He contends the issue is whether he is entitled to monetary compensation for his schedule award. Contrary to appellant's contention the issue of whether he refused an offer of suitable work is relevant to the issue of whether he is entitled to monetary compensation for his schedule award claim. As noted above, the penalty provision of section 8106(c) of the Act bars a claim for a schedule award for the period after the termination of compensation based on a refusal to accept an offer of employment.

The only relevant medical evidence in the record regarding the issue of appellant's work capability is a November 13, 2007 report from Dr. Jurenovich, a second opinion Board-certified orthopedic surgeon. Dr. Galey, appellant's treating physician, recommended a functional capacity evaluation be performed to determine appellant's work capability. She offered no opinion as to appellant's work capability or a report indicating she reviewed the June 26, 2007 functional capacity evaluation.

In a November 13, 2007 report, Dr. Jurenovich, a second opinion Board-certified orthopedic surgeon, based upon a physical examination, review of the medical records, functional capacity evaluation and statement of accepted facts, concluded that appellant was capable of working an eight-hour day with restrictions. A physical examination revealed negative drawer sign and fairly good left ankle range of motion. Dr. Jurenovich also reported appellant's toe flexion and extension were fairly good. He provided a comprehensive review of the factual and medical evidence, detailed his findings on physical examination of appellant and provided discussion for the conclusions he reached. Dr. Jurenovich concluded that appellant was capable of working with restrictions of three to four hours of standing, bending/stooping, operating a motor vehicle at work and operating a motor vehicle to and from work; four to five hours of reaching; three to four hours of pushing, pulling and lifting 10 to 20 pounds; three to four hours squatting and kneeling; and two to three hours climbing. The Board notes that there is no other contemporaneous medical evidence of record relevant to the issue of appellant's ability to perform the duties of the position offered by the employing establishment. On the basis of Dr. Jurenovich's report, the employing establishment offered appellant the limited-duty position of modified city letter carrier. The physical restrictions of the position included four hours of standing; three hours of pushing, pulling and lifting 10 pounds; two to three hours of bending, stooping, walking, sitting and driving and no squatting or kneeling, which were within appellant's work restrictions. In addition, the offer was in writing, included a description of the duties of the position, the physical requirements of those duties and the date by which appellant

was to either accept the offer or submit his reasons for refusal.[14] The Board finds that the Office met its burden to establish that the position was suitable.

The issue of whether an employee has the physical ability to perform the duties of a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.[15] The medical evidence provided by Dr. Jurenovich establishes the suitability of the offered position, in that the job offered satisfied appellant's physical limitations.

In light of the foregoing, the Board finds that the job offered was medically and vocationally suitable and the Office followed its procedures prior to termination of compensation. Accordingly, the Board finds that the Office met its burden of proof to terminate compensation.

CONCLUSION

The Board finds that the Office properly determined that appellant had no more than a nine percent permanent impairment of the left lower extremity, for which he received a schedule award. The Board further finds that the Office met its burden of proof to terminate appellant's compensation and schedule award benefits as of May 11, 2008, based on appellant's refusal to accept suitable work.

[14] 20 C.F.R. § 10.507.

[15] *See Maurissa Mack*, 50 ECAB 498 (1999).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 18, 2009 and November 18 and April 23, 2008 are affirmed.

Issued: June 15, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board