U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MATTHEW F. CARCEL and U.S. POSTAL SERVICE,
SANTA PAULA POST OFFICE, Santa Paula, Calif.

Docket No. 95-2845; Submitted on the Record;
Issued June 1, 1998

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had a 39 percent loss of wage-earning capacity.

On April 26, 1990 appellant, then a 36-year-old letter carrier, filed a claim for left foot pain and tenderness from walking on concrete for five hours a day while delivering mail. He stopped working on April 24, 1990, returned to work intermittently thereafter and subsequently resigned from the employing establishment. The Office accepted appellant's claim for plantar fasciitis of the left foot and aggravation of Morton's neuroma. The Office began payment of temporary total disability compensation effective October 24, 1990.

In a July 25, 1995 decision, the Office found that appellant could perform the duties of a mail room supervisor and therefore had a 39 percent loss of wage-earning capacity. The Office reduced appellant's compensation effective July 23, 1995.

The Board finds that the Office properly determined that appellant had a 39 percent loss of wage-earning capacity.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of compensation benefits. Once the medical evidence suggests that a claimant is no longer totally disabled but rather is partially disabled, the issue of wage-earning capacity arises.[1] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications, and the availability of suitable employment.[2] Accordingly, the

[1] *Garry Don Young*, 45 ECAB 621 (1994).

[2] *See generally*, 5 U.S.C. § 8115(a); A. Larson, *The Law of Workmen's Compensation* § 57.22 (1989).

evidence must establish that appellant can perform the duties of the job selected by the Office and that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[3]

In a March 5, 1993 report, Dr. Joseph J. Toland, III, a Board-certified orthopedic surgeon, stated that appellant had tenderness on the medial side of the posterior edge of the left os calcis but no soreness along the medial or lateral borders of the os calcis. He reported that vertical compression between the metatarsal heads caused no tenderness which indicated that the diagnosis of Morton's neuroma was questionable. He noted from x-rays that there was no abnormality in appellant's foot or ankle except for a small spur protruding from the anterior heel face of the left os calcis. He concluded that appellant could perform most tasks in the employing establishment. He cautioned that appellant should not go back to carrying a bag of mail for four to five hours a day. In a March 26, 1993 work restriction evaluation form, Dr. Toland reported that appellant could sit continuously for eight hours a day, walk, bend or stand intermittently for four hours a day and squat and twist intermittently for two hours a day. He indicated that appellant could lift up to 20 pounds. He stated that appellant could not work eight hours a day but could work four hours a day to start and build up to eight hours. In an October 29, 1993 work restriction evaluation form, Dr. Toland changed the work restrictions to indicate that appellant could walk intermittently for two hours a day, lift and stand intermittently for one hour a day, bend continuously for eight hours and twist intermittently for six hours a day. He reported that appellant could work eight hours a day at sedentary work.

In a July 12, 1993 report, a rehabilitation counselor stated that vocational testing showed appellant had a wide range of abilities and skills which offered direct entry and assets in a number of work group areas. He noted that appellant had no areas of vocation deficit as shown in the tests. He commented that appellant's profile suggested compatibility with a work environment characterized by defined procedures and structured work demands.

In a February 14, 1994 report, Dr. David C. Rosenthal, a podiatrist, related that appellant complained his left heel still hurt, especially when walking for any period of time. He stated that heel spur syndrome or plantar fasciitis should not be a debilitating condition resulting in disability for work. Dr. Rosenthal indicated that there were no findings to indicate Morton's neuroma. He concluded that appellant had a chronic condition which he found hard to relate to appellant's employment. Dr. Rosenthal commented that appellant's condition may have been a work-related problem initially but added that long-term plantar fasciitis and heel spur syndrome did not stem from one incident. He stated that appellant had a chronic problem just from everyday walking. Dr. Rosenthal indicated that with treatment appellant should be able to do any form of work that the employing establishment should deem necessary for him to do.

In a March 14, 1995 work restriction evaluation, Dr. Toland stated that appellant could sit intermittently for eight hours a day, stand intermittently for six hours a day, walk intermittently for five hours a day, bend or climb steps intermittently for three hours a day. He

[3] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

indicated that appellant could lift intermittently but when asked what he would lift and how much lifting he would be required to perform, he reported that appellant could lift up to 20 pounds. Dr. Toland noted that the activities of squatting, kneeling and twisting were not applicable in appellant's case. He concluded that appellant could start working six hours a day and work up to eight hours a day. In a March 14, 1995 office note, Dr. Toland stated that there was no reason in the world appellant could not do a sedentary job. He recommended that appellant continue to use a sponge pad for his heel. Dr. Toland stated that putting appellant back on the street full time immediately might be detrimental but indicated that there was no reason why appellant could not do the jobs requiring lesser activity.

The Office concluded that appellant could perform the duties of a mailroom supervisor.[4] The position was described as a light position requiring the ability to lift up to 20 pounds and one to two year of vocational preparation. A state employment service representative indicated that the job was performed in sufficient numbers so as to be reasonably available within appellant's commuting area. The position was within appellant's physical restrictions and lifting limitations as set forth by Dr. Toland and Dr. Rosenthal. Appellant's prior position in the employing establishment provided the vocational preparation for the position. The state employment service indicated that the position was reasonably available within appellant's commuting area. Appellant contended that he was unable to find work in this position within his commuting area. The Board has consistently held, however, that the fact that appellant has been unsuccessful in obtaining a job in the selected position does not establish that the work is not available in the area.[5]

[4] Department of Labor, *Dictionary of Occupational Titles*, DOT No. 209.137.010 (1984).

[5] *Steve Costello*, 37 ECAB 251 (1985).

The decision of the Office of Workers' Compensation Programs dated July 25, 1995 is hereby affirmed.

Dated, Washington, D.C.
June 1, 1998

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member