United States Department of Labor
Employees' Compensation Appeals Board

KELDRICK R. HAMILTON, Appellant	)	
and	)	**Docket No. 04-1208**
	)	**Issued: October 13, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Dallas, TX, Employer	)	

Appearances:
Keldrick R. Hamilton, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On April 5, 2004 appellant filed a timely appeal of the March 19, 2004 merit decision of the Office of Workers' Compensation Programs, which denied modification of the September 2, 2003 decision denying appellant's claim for a schedule award and wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant established that he sustained a recurrence of disability on January 18, 2003, causally related to his September 17, 2002 employment injury; and (2) whether appellant is entitled to a schedule award for permanent impairment of his left lower extremity.

FACTUAL HISTORY

On September 17, 2002 appellant, then a 24-year-old letter carrier, sustained a traumatic injury to his left big toe while in the performance of duty. Appellant stopped work on

September 26, 2002. The Office accepted the claim for contusion of the left big toe. Appellant returned to part-time, limited duty on December 21, 2002. He continued to work in that capacity until January 30, 2003.[1] On January 31, 2003 the employing establishment advised appellant that he was being terminated for cause. The Office paid appropriate wage-loss compensation through January 17, 2003.

On March 20, 2003 appellant filed a claim (Form CA-7) for wage-loss compensation beginning January 18, 2003. Appellant also filed a claim for a schedule award. Appellant's initial treating physician, Dr. Emerson Emory, an internist, reported on January 27, 2003 that appellant was able to perform part-time, limited-duty work and he anticipated returning appellant to his regular duties on March 2, 2003. Dr. Emerson passed away on January 28, 2003 and his colleague, Dr. Kevin E. Cowens, Sr., a neurologist, took over appellant's treatment. In a report dated February 27, 2003, Dr. Cowens diagnosed a left foot contusion with great toe fracture. He further indicated that appellant was totally disabled beginning February 14, 2003.[2] In a March 19, 2003 report, Dr. Cowens indicated that appellant was totally disabled beginning February 5, 2003. He also provided an April 29, 2003 permanent impairment rating of 14 percent for the left lower extremity. On May 8, 2003 Dr. Richard H. Weiner, a podiatrist, found that appellant had a zero percent impairment.

The Office referred appellant for examination by Dr. John A. Sklar, a Board-certified physiatrist, who in a report dated August 1, 2003 found that appellant had a three percent left lower extremity impairment in regard to the medial plantar nerve. However, Dr. Sklar found that this impairment was not work related. He stated that in regard to appellant's work-related injury he had reached maximum medical improvement on November 18, 2002. According to Dr. Sklar, appellant's ongoing pain and dysfunction of the left medial plantar nerve were not employment related. He also stated that there was no reason why appellant could not return to full duty within two to four weeks of his September 17, 2002 injury and certainly no reason he should not work full duty at this time.

By decision dated September 2, 2003, the Office denied appellant's claim for a schedule award. Additionally, the Office found that appellant failed to establish that he was disabled as of January 18, 2003. Consequently, the Office denied appellant's claim for wage-loss compensation.

Appellant requested reconsideration on February 17, 2003. The Office reviewed the claim on the merits and, in a decision dated March 19, 2004, denied modification of the September 2, 2003 decision.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a

[1] The employing establishment was unable to provide modified work from January 4 to 17, 2003.

[2] The February 27, 2003 report appears to be backdated as Dr. Cowens indicated in the report that he treated appellant on March 19, 2003.

previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[3] This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, non-performance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[4]

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position, or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the employment-related condition or a change in the nature and extent of the light-duty job requirements.[5]

ANALYSIS -- ISSUE 1

Based on the advice of his then treating physician, Dr. Emory, appellant returned to part-time, limited duty on December 21, 2002. The employing establishment provided part-time work in accordance with Dr. Emory's restrictions and the Office compensated appellant for the balance of his eight-hour workday. From January 4 to January 17, 2003, the employing establishment was unable to provide part-time, limited-duty work so the Office paid wage-loss compensation for total disability during that timeframe. Beginning January 18, 2003, the employing establishment was again able to accommodate appellant's work restrictions. Appellant returned to work that day and he continued to work in a part-time, limited-duty capacity until the employing establishment dismissed him effective January 31, 2003. The Office, however, did not pay any additional wage-loss compensation after January 17, 2003. As the record indicates that appellant worked part-time, limited duty during the period January 18 to January 30, 2003, he is entitled to wage-loss compensation for the remainder of his normal eight-hour workday.[6]

The employing establishment dismissed appellant for cause effective January 31, 2003. The stated reasons for terminating employment were because of appellant's "unsatisfactory performance," for providing false information on a preemployment medical history questionnaire, for altering an absentee excuse for court duty and for providing false information to an attending physician. Section 10.5(x) specifically provides that the withdrawal of a light-duty assignment for reasons of misconduct or nonperformance of job duties does not constitute a

[3] 20 C.F.R. § 10.5(x) (1999).

[4] *Id.*

[5] *Barry C. Peterson*, 52 ECAB 120, 125 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

[6] The employing establishment certified that appellant worked part time, approximately five hours per day, from January 21 to January 25, 2003 and from January 27 to January 30, 2003.

recurrence of disability.[7] Thus, while the employing establishment effectively withdrew appellant's light duty assignment, this action under the circumstances does not establish a recurrence of disability.

Appellant may also establish a recurrence of disability by demonstrating a change in the nature and extent of the employment-related condition or a change in the nature and extent of the light-duty job requirements.[8] With respect to the latter means of establishing a recurrence of disability, appellant has not alleged nor does the record support that there was a change in the nature and extent of the light-duty job requirements prior to appellant's January 31, 2003 dismissal for cause.

The remaining question is whether appellant demonstrated a change in the nature and extent of his employment-related condition. Appellant had been performing part-time, limited-duty work through January 30, 2003 and Dr. Emerson anticipated returning him to his full-time, regular duties on March 2, 2003. However, Dr. Cowens reported on February 27 and March 19, 2003 that appellant was totally disabled due to his employment-related injury. Although he initially noted that appellant's disability began February 14, 2003 he later reported that the disability began February 5, 2003. Dr. Cowens also provided several Texas Workers' Compensation work status reports. In his first such report dated February 10, 2003 he merely noted that appellant's condition prevented him from returning to work. Dr. Cowens submitted similar work status reports dated February 24, March 10 and March 24, 2003. He released appellant to return to work without restrictions on April 3, 2004. However, none of Dr. Cowens' reports provide an explanation as to why appellant was unable to perform any type of work beginning February 5, 2003. As the medical evidence fails to provide any rationale in support of the claimed period of total disability, appellant has failed to satisfy his burden of proof in demonstrating a change in the nature and extent of his employment-related condition. Accordingly, the Office properly denied appellant's claim for wage-loss compensation beginning January 31, 2003.

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[9] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulation has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate

[7] 20 C.F.R. § 10.5(x) (1999).

[8] *Barry C. Peterson, supra* note 5.

[9] The Act provides that for a total, or 100 percent loss of use of a leg, an employee shall receive 288 weeks of compensation. 5 U.S.C. § 8107(c)(2).

standard for evaluating schedule losses.[10] Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).[11]

ANALYSIS -- ISSUE 2

Appellant's podiatrist, Dr. Weiner, found that he had a zero permanent impairment and Dr. Cowens reported on April 29, 2003 that appellant had a 14 percent permanent impairment of the left lower extremity. Dr. Cowens appears to have based his impairment rating on restricted range of motion. However, his narrative report did not include any physical findings or measurements that would support such a rating. Because Dr. Cowens did not provide a rationalized medical opinion, his April 29, 2003 report is insufficient to establish entitlement to a schedule award.

The Office referred appellant to Dr. Sklar, who reported that appellant self-limited his toe and foot range of motion and strength, and therefore, range of motion and strength could not be used as the basis of an impairment rating. While Dr. Sklar found that appellant had a three percent left lower extremity impairment due to dysfunction of the left medial plantar nerve, he stated that this impairment was not due to appellant's work-related injury. Accordingly, Dr. Sklar found that appellant did not have a permanent impairment related to his accepted employment injury. As the medical evidence does not establish any permanent impairment due to the September 17, 2002 employment injury, the Office properly denied appellant's claim for a schedule award.

CONCLUSION

The Board finds that appellant is entitled to wage-loss compensation for partial disability during the period January 18 through January 30, 2003. The Office's March 19, 2004 decision is modified to reflect appellant's entitlement to wage-loss compensation for the above-noted period. The Board also finds that appellant failed to establish that his claimed recurrence of disability on or after January 31, 2003 was due to his September 17, 2002 employment injury. The Board further finds that appellant failed to establish entitlement to a schedule award for permanent impairment of his left lower extremity.

[10] 20 C.F.R. § 10.404 (1999).

[11] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003); FECA Bulletin No. 01-05 (issued January 29, 2001).

ORDER

IT IS HEREBY ORDERED THAT the March 19, 2004 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: October 13, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member