

File Number:
HR12-D-H

U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
Phone: (202) 693-0045

RECEIVED SEP 27 2010

SEP 20 2010

Date of Injury:
Employee:

Dear Ms.

This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A hearing was held on 06/21/2010. Based upon that hearing, it has been determined that the decision of the District Office should be reversed as outlined in the attached decision.

Your case file has been returned to the Cleveland District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 9 CLE
LONDON, KY 40742-8300

Sincerely,



Carol E. Adams
Hearing Representative

DEPARTMENT OF DEFENSE
DEFENSE EDUCATION ACTIVITY
BENEFITS UNIT
4040 NORTH FAIRFAX DRIVE
ARLINGTON, VA 22203

PAUL H FELSER
FELSER LAW FIRM
PO BOX 10267
SAVANNAH, GA 31412

U.S. DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U.S. Code 8101 et. seq. of _____ ; Claimant; Employed by the Department of Defense; Case number _____. A hearing was held on June 21, 2010.

The issue for determination is whether the claimant is entitled to compensation for wage loss beginning on December 9, 2009.

_____, while employed with the Department of Defense as a teacher, filed an occupational claim on August 27, 2009, for date of injury of October 4, 2007, for an injury to her left foot and back. Her case was accepted for plantar fibromatosis of the left foot and right side sciatica.

Under case number _____, the claimant suffered a traumatic injury to her right foot on December 9, 1997. The claim was accepted for right foot contusion, right closed dislocation of the foot tarsometatarsal joint and fracture of other tarsal and metatarsal bones. The claimant was found to have permanent impairment as the result of the injury and was awarded a schedule awarded a 7% permanent impairment of the right lower extremity. The claimant returned to regular duty after the injury.

In the instant case, on December 16, 2009, the claimant filed a claim for compensation for total disability beginning on December 9, 2009.

The Office determined the information was insufficient to award payment of compensation. Therefore, by development letter dated January 5, 2010, the claimant was advised of the deficiencies of her claim and the information needed to support payment of compensation.

In response the Office received a letter from the Attorney Paul Felser who indicated that the claimant was entitled to compensation because the employer had failed to accommodate the claimant's restrictions in order for the claimant to continue in her employment.

By letter dated January 13, 2010, the Office wrote for clarification and advised the claimant of the additional evidence needed to support payment of compensation. The claimant was provided thirty days to perfect her claim.

Additional factual and medical evidence was received.

The Office determined that the evidence was insufficient to support that the claimant's work restrictions were not accommodated by the employer. The Office also found that the claimant had failed to establish that her inability to perform her duties as a teacher was due to the work

injury of October 4, 2007. Therefore, by decision dated February 13, 2010, the claim for compensation was denied.

The claimant disagreed with the decision and, through her attorney, requested a hearing before an OWCP representative

A hearing was held on June 21, 2010. The claimant testified on her own behalf. The claimant was represented by Attorney Paul Felser.

The employing agency was sent a copy of the transcript and afforded twenty days to submit comment or evidence.

A review of the record has been undertaken.

In a report dated June 11, 2009, Dr. Andrew Hamilton stated that the claimant suffered from left side fasciitis and right side sciatica. He noted it was caused by the claimant spending long periods of time standing as a teacher. He also noted that the claimant had previously suffered an injury to her right foot, which he suspected caused her to bear more weight on her left extremity, causing left plantar fasciitis. This, in turn, led to the claimant weight-bearing through her right lower extremity, causing right side sciatica. The doctor also noted that the sciatica was temporary but that the plantar fasciitis was likely to continue for the foreseeable future as long as the claimant continued to do a job that involved standing. He recommended that she restrict herself from standing no more than one hour on her job.

By report dated September 3, 2009, Dr. Hamilton outlined the equipment and accommodations the claimant would need on her job in order to continue to work as a teacher. He noted the claimant needed a motorized chair; dishwasher; reorganization of the classroom, so chair could be maneuvered; tablet form computer and computer inFocus projector with sound; an overhead projector on low table; hands on Elmo device; laser pointer; Smart Board and computers for students, lab equipment Probeware; stippled matting; tables at craft height and toilet facilities within easy walking distance.

Dr. Hamilton in his report dated September 10, 2009, stated the original injury of Lis Franc subluxation of the ankle was a terrible injury to the foot and that if not permanently immobilized by surgery arthritis progresses relentlessly in the affected joints. The doctor noted that during the ten years from between the original injury to her fifth foot in 1997 and 2007 when the other symptoms began to surface, the claimant's arthritis must have progressed to a point such that she was unable to stand in a position that did not antagonize the plantar muscles of her foot. The doctor in his opinion reasoned that the claimant had the tendency to development plantar fasciitis which had previously resolved. However, the increased weight bearing through her left foot led to the plantar fasciitis recurring. The doctor opined, since the claimant could not support her weight on either foot, that she inevitably developed sciatica.

On November 8, 2009, the claimant was seen at the United States Naval Hospital in Japan and was diagnosed with pain, left plantar fasciitis and right Lis Franc.

A report dated November 19, 2009, was received from Dr. Hamilton. The doctor provided a history of the claimant being transferred, through her work, to Japan. He noted that the claimant had been able to stay off her feet through the summer and experienced some relief. He noted that

her school had indicated that they would provide accommodation so she could teach from a seated position. The doctor noted that he had provided a list of ten things, which would help her teach while seated. He noted that when the claimant returned to work from the summer that none of the accommodations were in place and that her foot problems quickly resurfaced. He noted that the claimant advised him that the heel pain became so severe that she went to the emergency room. The doctor examined the claimant and found that there was hypertonia of her foot at the insertion of the tendocalcanium and the left lower leg was mildly edematous. The doctor noted the claimant related that she had increased pain from the plantar fasciitis because she had to stand on cement floors. The doctor concluded his report by stating that he did not foresee any chance of improvement as long as she continued to work standing on her feet. He recommended that she be restricted to working totally sedentary. If she did not, he opined that it may result in her inability to walk unaided.

On February 4, 2010, the claimant was examined by doctor James Parker. He noted that he had reviewed the claimant's record and that he agreed with the healthcare providers that her foot conditions were made worse by prolonged walking and standing. He recommended fully sedentary work.

On February 18, 2010, J. Gregory Waller, D.P.M, examined the claimant and diagnosed heel spur and plantar fasciitis. The doctor taped her ankle and recommended shoes she should wear.

On February 22, 2010, the claimant was seen in follow up with Dr. Weller. The claimant reported a decrease in pain. The doctor completed a CA-20 and noted that the claimant had plantar fasciitis and heel spur due to her standing and walking. He related the diagnoses to her work.

A report dated June 3, 2010, from Dr. Ramon Perez, orthopedic surgeon, was received. The doctor indicated that the claimant was seen in the orthopedic department and was diagnosed with moderate degree of right forefoot and midfoot osteoarthritis with a history of plantar fasciitis. He noted her conditions were chronic, painful and progressive in nature. The doctor limited the claimant from prolonged standing and associated activities. He recommended that she work from a seated position and not stand or walk more than five minutes per hour.

Dr. Waller provided two additional reports dated August 3, and August 17, 2010.

In the report dated August 3, 2010, Dr. Waller indicated that he had reviewed the claimant's job description and that he found several areas that needed to be changed for the claimant to fulfill her job requirements. The doctor described how plantar fasciitis developed and noted that once the plantar fascia became inflamed it was usually a slow insidious progression that is exacerbated by periods of standing and walking. He stated the condition could take more than a year to resolve even if a person was off their feet away from work. He explained that the condition was not helped much by short term rest but could improve some with a change in activities as long as the person was not doing the same day to day action such as at work. He noted that treatment usually included changes in job description of the person. The doctor limited the claimant from standing for any length of time and that rising from a seated position acted to prolong the condition. The doctor concluded that the claimant could not continue to meet her job description without some reasonable accommodations as described by other physicians.

In the report dated August 17, 2010, Dr. Weller mainly explained how the claimant was able to stand at home and walk at home to perform her daily routines because she could rest for longer lengths of time and could sit whenever needed, but on the job, the doctor explained she was unable to do this and had to continue on her teaching duties.

Under 20 CFR §10.5 (f) "Disability means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total."

The question in this case is not whether the claimant could do modified duty work but whether the claimant was disabled from performing her full-duty work on December 9, 2009, and continuing because of her work injury. This is not a recurrence of disability because the claimant was not disabled from working until December 9, 2009. She continued to be exposed to the same work factors until she was no longer able to continue. Therefore, the issue is whether her disability began on December 9, 2009, the date she was last exposed to the work that caused her condition. The record shows the claimant recovered from her original work injury of her right leg sufficient to return to full duty. Under the instant case number the claimant eventually developed left plantar fasciitis and sciatica as the result of standing and walking on her job. It appears the claimant continued to work in her full duty position until she stopped work on December 9, 2009. The medical records support that her fasciitis condition continued to worsen with exposure to her walking and standing. Her physicians restricted her from working her full duties but she still kept working. Finally, based on her doctor's restrictions, the claimant stopped work on December 9, 2009, and she has not returned. After review of the evidence, I find that the claimant was unable to earn wages that she was receiving at the time of injury because of partial disability; therefore, she is entitled to compensation for wage loss. The employer indicated that they were willing to accommodate the claimant, somewhat, but the employer has never offered a formal job in writing as described in the procedure manual¹ Therefore, I find that the decision of the Office must be reversed. I find the claimant has provided sufficient evidence to support that she was disabled from performing her full work duties and, therefore, is entitled to the payment of compensation from December 9, 2009, and continuing.

Before payment of compensation is made, the Office should send Form 1032 to determine whether the claimant is receiving retirement benefits, requiring that an election of benefits be offered. Also, since the injury under case number _____ and the instant case are closely connected, the case files should be doubled.

¹ Federal Employees Compensation Act, Procedure Manual, Part 2-0814-4a.

In accordance with the above findings the decision of the Office is reversed and the case returned for payment of compensation for any wage loss beginning on December 9, 2009, and continuing.

Dated: SEP 20 20

Washington, D.C.



Carol Adams
Hearing Representative
for
Director, Office of Workers'
Compensation Programs