U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GINA E. NAVARETTE and DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, Tucson, AZ

Docket No. 03-1940; Submitted on the Record;
Issued December 1, 2003

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has greater than a three percent impairment of each of her lower extremities for which she received a schedule award.

On August 18, 1998 appellant, then a 32-year-old border patrol agent, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that on August 7, 1998 she was injured when she fell off a horse that was spooked by lightening. In support of her claim, appellant submitted an August 11, 1998 report from Dr. Kevin Bowers, an orthopedic surgeon, who diagnosed low back pain associated with likely transverse process fracture at L5-3 and spinous process fracture at L5 with avulsion fracture of right greater trochanter. In an August 24, 1999 report, Dr. John Naitoh, a urologist, noted that appellant complained of urinary problems. On examination he could find no significant abnormality, except some sciatic lower back pain and bladder irritation possibly due to a pinched nerve.

In an October 18, 1999 decision, the Office of Workers' Compensation Programs accepted the claim for a lumbar fracture. On October 25, 1999 appellant filed a recurrence of disability claim, noting that she still had lower back pain. In an October 27, 1999 report, Dr. Thomas Harris, an orthopedist, noted that appellant complained of back pain radiating into her leg and a bladder problem. On examination he found tenderness to palpation over the paraspinal muscles at L3-5 and S1 joints and buttocks areas. He diagnosed mild degeneration of the L4-5 intervertebral disc space with diffuse bulge, but no significant encroachment upon the foraminal thecal sac or central canal. He found no evidence of an occult fracture.

In a December 6, 1999 decision, the Office accepted appellant's claim for lumbar fracture, aggravation of a herniated disc and degenerative disc disease at L4-5.

In a December 14, 1999 report, Dr. Isaac Bakat, a neurologist, indicated that the basis for appellant's urinary complaint was not well explained but could be a spastic bladder due to a spinal cord injury secondary to her fall. In a February 25, 2000 report, Dr. Naitoh noted that appellant reported significant improvement in her bladder function.

On June 20, 2000 appellant requested a schedule award. In a July 24, 2000 report, Dr. Arthur Harris, an orthopedist and Office medical consultant, reviewed the medical evidence at the request of the Office. Dr. Harris noted that, when appellant was last seen by Dr. Thomas Harris, she had no muscle weakness, atrophy, impaired sensation or neurolgic deficit of either lower extremity. He noted that appellant did not complain of pain radiating into either extremity as a result of her lumbar spine injury. Dr. Thomas Harris concluded that appellant did not have any permanent impairment due to the accepted injury.

In an August 25, 2000 decision, the Office denied appellant's claim for a schedule award.

On September 9, 2000 appellant requested reconsideration, stating that she had constant pain in both legs and lower back that kept her awake at night. Appellant submitted a September 1, 2000 report from Dr. Thomas Harris who noted that her radicular symptoms of her lower extremities was not taken into consideration by the Office. He stated that appellant's pain was ratable in regards to the lower extremities and that appellant had impairment secondary to chronic radiculopathy of the lower extremities. Dr. Harris concluded that appellant had reached maximum medical improvement with radiating back pain that was intermittent, slightly increasing to occasionally moderate, that required pain medication to control.

In an October 30, 2000 report, Dr. William Curran, an orthopedic surgeon and second opinion referral physician, noted that appellant presented with intermittent low back pain and bilateral leg pain that was intermittent in frequency. Dr. Curran stated that appellant did not have low back stiffness but complained of tingling and numbness to her lower extremities, bilaterally. Her symptoms were made worse by lifting, bending, standing, sitting and lying flat on the back. On examination, Dr. Curran found the presence of lumbar lordorsis but no lumbar list or scoliosis. He found that appellant had palpable tenderness over her left sciatic notch with a range of lumbar motion of 50 degrees on the right and left, 30 degrees extension, right and left with lateral bending 15 degrees right and 20 degrees left. Dr. Curran noted that appellant's straight leg raising test from a sitting position was to 90 degrees bilateral without pain. Upon performing the Lasegue's sign testing, she complained of bilateral posterior thigh pain. Dr. Curran added that appellant's neurological examination was within normal limits. He diagnosed degenerative lumbar disc disease with herniated nucleus pulposus at L4-5 and found that appellant reached maximum medical improvement on August 1, 2000.

The Office referred the medical records back to the orthopedic consultant, Dr. Arthur Harris. In a November 17, 2000 report, Dr. Harris noted that for purposes of a schedule award appellant did not have any impairment due to muscle weakness, muscle atrophy, impaired sensation or neurologic deficit of either lower extremity. He found impairment of the lower extremities due to L5 radiculopathy. Dr. Harris applied Table 83, page 130, of the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* to find a maximum of five percent impairment allowed for sensory deficit of the L5 nerve root. He graded the pain under Table 11, page 48 by noting a Grade 3 classification, for pain which interfered with activity. He concluded that appellant had a three percent impairment of both the right and left lower extremities due to the accepted work injury of August 7, 1998. The date of maximum medical improvement was March 10, 2000, as described by her treating physician, Dr. Thomas Harris.

In a December 5, 2000 decision, the Office granted appellant a schedule award for a three percent impairment for each lower extremity.[1]

In a December 14, 2000 letter, appellant requested a review of the written record by the Branch of Hearings and Review. Appellant submitted a December 18, 2000 report from Dr. Thomas Harris who described exquisite tenderness over the greater trochanter area, with chronic bursitis of the right hip and chronic tenderness of her bony injury. He noted that her range of motion for forward flexion of the hip was less by 15 degrees and that, under the A.M.A., *Guides,* appellant had six percent impairment of the right hip secondary to the chronic bursitis of the greater trochanteric bursa and her related avulsion fracture. Dr. Harris added that appellant had pain with her range of motion in forward flexion and was ratable in regards to the hip.

In a December 18, 2000 letter, appellant's spouse noted that they were separated and alleged that she was fabricating the extent of her injury in order to receive a greater schedule award. He alleged that appellant had engaged in vigorous daily exercise and she was angry that she could not receive a schedule award for her back.

In a January 14, 2002 report, Dr. Thomas Harris stated that appellant continued to be tender to palpation in the paraspinal musculature bilaterally in the lumbar spine. He noted that straight leg raising produced pain in both the low back and to the posterior aspect of the leg and hip bilaterally at approximately 70 degrees. Dr. Harris found appellant was tender to palpation over the sciatic notch bilaterally and had normal neurovascular sensation.

In an April 23, 2002 decision, an Office hearing representative affirmed the December 5, 2000 schedule award.

In a December 9, 2002 letter, appellant requested reconsideration and submitted several progress notes from Dr. Thomas Harris, who noted that appellant had intermittent pain of varying degrees of severity. However, he did not rate her impairment under the A.M.A., *Guides*. In a November 13, 2002 report, Dr. Harris addressed a spine and sport functional capacity evaluation summary of September 27, 2002 and noted that appellant had Grade IV bilateral hip flexion muscle weakness and a five percent bilateral lower extremity impairment. He also opined that appellant had a Grade 4 bilateral knee extension/flexion muscle weakness, which he stated constituted a 12 percent impairment to each lower extremity. Dr. Harris found that appellant had a 16 percent lower extremity impairment to both her right and left legs.

The Office referred the case record back to Dr. Arthur Harris, the orthopedic consultant. In a February 3, 2003 report, Dr. Harris stated that the additional reports of Dr. Thomas Harris did not document any discrete muscle weakness or atrophy in either lower extremity. Dr. Arthur Harris noted that the functional capacity evaluation of September 27, 2002 did demonstrate weakness of bilateral hip flexion, bilateral knee extension/flexion and right ankle dorsiflexion. However, he could not determine from the functional capacity evaluation whether the muscle

[1] On December 19, 2000 appellant filed an appeal with the Board to review the December 5, 2000 schedule award. By order dated July 27, 2001, the appeal was dismissed in lieu of appellant's request for a hearing before the Office. Docket No. 01-588 (issued July 27, 2001).

weakness was related to appellant's residual problems with her lumbar spine fracture and disc herniation at L4-5. Dr. Harris also stated that Dr. Thomas Harris never previously documented any muscle weakness in either lower extremity, and that he was unable to resolve the discrepancy of the more recent findings of weakness of bilateral hip flexion, bilateral knee extension/flexion and right ankle dorsiflexion noted on the September 27, 2002 functional capacity evaluation. Dr. Harris concluded that, in the absence of correlation by a physician as to the presence of muscle weakness in these muscle groups, he did not feel the results of the spine and sport functional capacity evaluation was sufficient to allow an increased impairment rating for the lower extremities.

The Office referred appellant to Dr. Thomas Dorsey, a Board-certified orthopedic surgeon. In an April 2, 2003 report, Dr. Dorsey indicated that appellant's right and left hips showed flexion to 60 degrees, which he opined was a voluntary limitation of motion because when appellant sat her hips easily bent to 90 degrees. Dr. Dorsey found a full range of motion and no gross atrophy for either lower extremity.

The Office again forwarded the medical evidence to Dr. Arthur Harris. In an April 14, 2003 report, the orthopedic consultant applied the fifth edition of the A.M.A., *Guides* to find that appellant had a three percent impairment of both lower extremities. He based his estimate on a Grade 3 pain/decreased sensation that interfered with some activity (60 percent) Table 16-10, page 482 of the L5 nerve root (5 percent maximum) Table 15-18, page 424. Dr. Harris added that Dr. Dorsey's examination did not demonstrate any significant change in appellant's physical condition from prior examinations.

In a May 7, 2003 report, the Office denied modification of the prior schedule award finding the medical evidence insufficient to support an increase in the schedule award.

The Board finds that appellant has no more than a three percent impairment of each lower extremity.

The schedule award provisions of the Federal Employees' Compensation Act[2] and its implementing regulation[3] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[4]

In the present case, Dr. Arthur Harris, an Office orthopedic consultant, found that appellant had a Grade 3 pain/decreased sensation, (60 percent) that interfered with activity to the L5 nerve root, for which a maximum of 5 percent impairment is allowed for pain. Applying the

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] *Id*.

A.M.A., *Guides*, fifth edition, specifically Table 16-10, page 482 and Table 15-18, page 424, Dr. Harris found a 3 percent impairment to each lower extremity. Dr. Harris also noted that Dr. Dorsey's examination did not demonstrate any significant change in appellant's physical condition from prior examinations. His reports explained the basis for not accepting as valid the results of a functional capacity examination.

In a December 9, 2002 report, Dr. Thomas Harris relied on the spine and sport functional capacity evaluation to find bilateral hip flexion muscle weakness, Grade 4 bilateral knee extension/flexion muscle weakness which he concluded totaled a 16 percent impairment to the lower extremities. However, the December 9, 2002 report was the first time Dr. Harris, who submitted multiple reports, found muscle weakness in appellant's lower extremities and he failed to adequately explain how the muscle weakness appeared and how it was related to the accepted injury. The Board notes that Dr. Thomas Harris did not explain why the spine and sport functional capacity evaluation results were considered to be valid. Moreover, Dr. Dorsey, a Board-certified orthopedic surgeon, opined that appellant was voluntarily limiting her hip motion and he did not find additional impairment due to muscle weakness. He reported a full range of motion and no atrophy to either lower extremity.

For these reasons, the Board finds that the Office properly determined that appellant has no more than a three percent permanent impairment of each lower extremity. Appellant has not met her burden of proof to establish by the weight of the medical evidence that she is entitled any additional impairment for hip or knee impairment or muscle weakness due to her accepted injury.

The decision of the Office of Workers' Compensation Programs dated May 7, 2003 is affirmed.

Dated, Washington, DC
December 1, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member