U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM V. MILLER, JR. and U.S. POSTAL SERVICE,
POST OFFICE, Wichita Falls, TX

Docket No. 99-1532; Submitted on the Record;
Issued December 14, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established a recurrence of disability on or after October 24, 1997 causally related to his accepted October 26, 1993 employment injury; (2) whether appellant has greater than a 17 percent permanent impairment of his left lower extremity for which he received a schedule award; and (3) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request to reopen his recurrence claim for a merit review.

On October 27, 1993 appellant filed a traumatic injury claim for an injury to his lower back and thigh sustained on October 26, 1993 when he slipped and fell on a porch while delivering mail. The Office accepted his claim for a lumbar strain, contusion of the left hip and left ankle sprain. Appellant returned to limited-duty work for four hours per day on November 2, 1993 and eight hours per day effective February 1, 1994.

By letter dated May 24, 1995, the employing establishment issued a letter updating his temporary limited-duty position of city carrier to indicate a change in reporting time as well as noting the physical restrictions noted by appellant's physician, which included no working over 8 hours, no lifting over 20 pounds, no driving, no frequent squatting, bending, twisting, climbing or kneeling, no walking over 2 hours per day and no standing over 2 to 3 hours per day. Appellant accepted this assignment on May 26, 1995.

On December 5, 1994 appellant filed a claim for a schedule award.

By decision dated April 20, 1995, the Office denied appellant's claim for a schedule award on the basis that the medical evidence did not refer to any impairment to a function or member the body as set forth in section 8107 of the Federal Employees' Compensation Act.

Appellant requested reconsideration by undated letter received by the Office on May 31, 1995 and submitted a May 19, 1995 report by Dr. D. Brent Tipton, a physician Board-certified in physical medicine and rehabilitation, in support of his request.

On September 18, 1995 the Office vacated the prior decision and issued appellant a schedule award for a 17 percent permanent impairment of the left lower extremity.

In a report dated February 26, 1998, Dr. Webb B. Key, Jr. appellant's attending Board-certified family practitioner, concluded that appellant was totally disabled due to his employment injury. Dr. Key stated:

> "On October 25, 1997 I considered him at the point to be disabled. He had not had any improvement, no matter what we did during the period of time from his injury, and in fact has gone downhill. I realize now that we had filled out a form September 17 to December 17, 1997 that he could continue the same type of work he had been for eight hours. Let me address that at this time. At the time we let the patient go he was not able to work eight hours a day. He was not really able to work four hours a day. His ability to lift was less than 20#, probably, although we did not check it here in the office, his impairment when he came into the office and moved showed that he would not be able to bend, lift, stoop or do anything or lift anything much more than his arms without increased back pain and increased weakness. He still has a gait disturbance, as he walks he has pain just walking down the hallway to my office, which is about 20 to 30 feet. He certainly would not be able to stand, sit or walk for eight hours a day, even with broken up periods."

In conclusion, Dr. Key opined that appellant did not have a recurrence of disability, "but a continuing worsening of the original conditions that put him on limitations."

On February 28, 1998 appellant filed a recurrence claim for total disability commencing October 24, 1997. On the form he indicated that he retired effective October 24, 1997 on disability.

By decision dated May 27, 1998, the Office denied appellant's claim for a recurrence of disability on the basis that appellant failed to submit any evidence showing that he was totally disabled from his light-duty position or that the nature and extent of the job duties had changed. In the attached memorandum, the Office noted that appellant had stopped his limited-duty position on October 24, 1997, the date he began receiving a retirement annuity.

By letter dated June 4, 1998, appellant requested reconsideration and submitted a June 3, 1998 report by Dr. Key in support of his request.

In his June 3, 1998 report, Dr. Key noted that in his prior letter he had described the changes in appellant's physical abilities. He noted that appellant's ability to lift was not limited to no more than 20 pounds, that he was unable to lift, bend, stoop and that appellant could not sit, walk or stand for 8 hours per day or even sit for more than 10 to 15 minutes or walk more than 200 feet without having increased pain and discomfort.

By decision dated September 14, 1998, the Office denied appellant's request for reconsideration on the basis that the medical evidence was insufficient to warrant modification.

Appellant requested reconsideration of the September 14, 1998 decision by letter dated January 20, 1999 and enclosed a copy of a January 7, 1999 report by Dr. Felipe Garcia, Jr., a physician Board-certified in physical medicine and rehabilitation, in support of his request. He also contended that the report by Dr. Garcia was sufficient to establish that he was entitled to an additional schedule award as Dr. Garcia opined that he had a 23 percent permanent impairment of the left lower extremity.

In his January 7, 1999 report, Dr. Garcia concluded that appellant had a 23 percent impairment of the whole person based upon the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). He noted appellant's range of motion as follows:

> "Maximum true lumbar flexion angle is 20 degrees. Maximum true lumbar extension angle is 15 degrees. Maximum straight-leg raising on the right is 50 degrees. Maximum straight-leg raising on the left is 45 degrees. Maximum lumbar right lateral flexion angle is 25 degrees. Maximum lumbar left lateral angle was 15 degrees. Along the left hip, hip flexion is 100 degrees. Hip extension is 15 degrees. Adduction is 20 degrees. Abduction is 45 degrees. Internal rotation is 55 degrees. External rotation is 40 degrees. On left ankle measurement using goniometer testing, plantar flexion is 25 degrees. Dorsiflexion is 90 degrees. Inversion and arc are 10 to 20 degrees. Eversion is 10 to 20 degrees."

In reaching his disability impairment rating based upon range of motion, Dr. Garcia calculated a 13 percent impairment of the hip based upon Table 40 at page 78, a 4 percent impairment of the left ankle based upon Table 42 at page 78, a 5 percent impairment of the spine based upon Table 75 at page 113, a 2 percent impairment of the lumbosacral spine using right and left lateral rotations based upon Table 81 at page 128. Utilizing the Combined Values Chart, Dr. Garcia determined appellant had a 23[1] percent impairment of the whole person.

On January 20, 1999 appellant filed a claim for a schedule award.[2]

[1] The Board notes that using the Combined Values Chart to add the impairment ratings, the total impairment rating equals 22 percent.

[2] This was under claim number A16-0232407.

In a February 18, 1999 report, the Office medical adviser reviewed Dr. Garcia's report and noted:

> "In his assessment, Dr. Garcia describes ROM [range of motion] of the left hip and ankle, listing degrees of motion present and then the resulting impairment based on the appropriate tables in the fourth edition of the A.M.A., *Guides* (T[able] 40, 42, 43, p[age] 78). In these tables only mild, moderate or severe levels of impairment are presented. The methodology of utilization of these table (sic) require that only the worse loss of motion is to be used to determine the degree of impairment. In the case of the hip, loss of motion in flexion and extension would result in mild impairment (five percent) and not five percent for flexion and also five percent for extension. Dr. Garcia recommends 13 percent impairment. I am unable to follow his line of reasoning in the determination of impairment based on loss of motion of the hip. Please ask Dr. Garcia to explain his rationale for arriving in 13 percent PPI [proximal interphalangeal] (apparently whole body) based on loss of the hip.
>
> "He then describes loss of motion of the ankle and hindroot. Based on the measurements provided in his report, the A.M.A., *Guides* would indicate an impairment of seven percent and two percent, respectively. Dr. Garcia recommends four percent impairment of the ankle. I must assume he means four percent whole body impairment and this does result in nine percent PPI of the lower extremity."

Lastly, the Office medical adviser noted that Dr. Garcia included a rating based upon loss of motion in the lumbar spine, that the physician noted no lumbar radiculopathy and that spine is not a scheduled member under the Act. Thus, the Office medical adviser concluded that appellant had a 14 percent permanent impairment of the left lower extremity.

By decision dated February 23, 1999, the Office found the evidence insufficient to modify September 18, 1995 schedule award decision and denied appellant's request to increase his schedule award.

By nonmerit decision dated February 23, 1999, the Office determined that appellant had failed to provide sufficient evidence to warrant merit review of the May 27 and September 14, 1998 decisions, which had determined that appellant had not established a recurrence of total disability on October 24, 1997.

The Board finds that the issue of recurrence of disability is not in posture for decision.

When an employee who is disabled from the job he or she held when injured because of employment-related residuals returns to a light-duty position or the medical evidence of record establishes that he or she can perform the light-duty job, the employee has the burden of establishing by the weight of the reliable, probative and substantial evidence a recurrence of total disability that prevents him from performing such light duty.[3] However, it is well established

[3] *Richard E. Konnen*, 47 ECAB 388 (1996).

that proceedings under the Act are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[4]

In support of his claim, appellant submitted a February 26, 1998 report in which Dr. Key determined that appellant sustained a worsening of his original employment-related injury that put him on restrictions to the point of total disability as of October 25, 1997. In his report, he indicated that he had treated appellant since his October 23, 1993 employment injury and that appellant did not improve regardless of the treatment given and that appellant's condition had gone downhill since the injury. Dr. Key noted that at the time appellant was released to work eight hours per day that appellant was not really able to work eight hours or even four hours per day. In addition, he noted that appellant "still has a gait disturbance, as he walks he has pain just walking down the hallway to my office which is about 20 to 30 feet" and opined that appellant would be unable to "stand, sit or walk for eight hours per day, even with broken up periods."

The Board notes that, while the opinion of Dr. Key is not completely rationalized, it indicates that appellant sustained an employment-related recurrence of disability on October 24, 1997 and is not contradicted by any substantial medical or factual evidence of record. Therefore, while the opinion is not sufficient to meet appellant's burden of proof to establish his claim, it raises an uncontroverted inference between appellant's claimed recurrence of disability and the accepted employment injuries, and is sufficient to require the Office to further develop the medical evidence and the case record.[5]

Accordingly, the case will be remanded to the Office for further evidentiary development regarding the issue of whether appellant sustained a recurrence of disability on or after October 24, 1997 due to his employment injury. The Office should prepare a statement of accepted facts and obtain a medical opinion on this matter. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.[6]

Next, the Board finds that appellant has no more than a 17 percent impairment of his left lower extremity.

Under section 8107 of the Act[7] and section 10.304 of the implementing federal regulations,[8] schedule awards are payable for permanent impairment of specified body members, functions or organs. 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 under the law for all claimants, good administrative practice necessitates the use of a

[4] *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1983).

[5] *John J. Carlone*, 41 ECAB 354 (1989).

[6] In view of the Board's disposition of the merits of appellant's claim, the issue of whether the Office abused its discretion in denying merit review is moot.

[7] 5 U.S.C. §§ 8101-8193.

[8] 20 C.F.R. § 10.304.

single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides*[9] have been adopted by the Office and the Board has concurred in such adoption as an appropriate standard for evaluating schedule losses.[10]

Dr. Garcia, in a January 7, 1999 report, applied the fourth edition of the A.M.A., *Guides* and found that appellant had a 23 percent impairment of the whole person. He calculated a 13 percent impairment of the hip based upon Table 40 at page 78, a 4 percent impairment of the left ankle based upon Table 42 at page 78, a 5 percent impairment of the spine based upon Table 75 at page 113, a 2 percent impairment of the lumbosacral spine using right and left lateral rotations based upon Table 81 at page 128. The Act, however, does not provide a schedule award for whole person impairments or impairments to the spine or back.[11] Dr. Garcia, therefore improperly included his findings that appellant had a 5 percent impairment of the spine and a 2 percent impairment of the lumbosacral spine in utilizing the A.M.A., *Guides* to determine that appellant had a 23 percent disability impairment of the whole person.

The Office medical adviser properly applied the A.M.A., *Guides* to Dr. Garcia's findings.[12] The Office medical adviser found that appellant had a 14 percent impairment of the left lower extremity based upon his loss of motion in flexion and extension in the hip and his ankle. Furthermore, Dr. Garcia's calculations for the hip and ankle, without including 5 percent impairment of the spine and 2 percent impairment of the lumbosacral spine using right and left lateral rotations, equal 16 percent impairment for the left lower extremity pursuant to the Combined Values Chart. Thus, the medical evidence of record does not support a finding that appellant is entitled to an additional schedule award. The Office, therefore, properly concluded that appellant did not have more than 17 percent impairment of his left lower extremity.

[9] A.M.A., *Guides* (4th ed.).

[10] *See James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[11] 5 U.S.C. § 8107(c).

[12] The Board agrees with the Office medical adviser that it is unclear how Dr. Garcia arrived at a 13 percent impairment of the hip by utilizing Table 40 at page 78 or a 4 percent impairment using Table 42 at page 78. The Board notes that when the impairment rating for the spine is not included in the calculation of appellant's impairment for schedule award purposes, that the impairment rating does not exceed 17 percent for the left lower extremity, for which appellant has already received an award.

The February 23, 1999 decision of the Office of Workers' Compensation Programs denying appellant's request for an increase in his schedule award is hereby affirmed. The February 23, 1999, September 14 and May 28, 1998 decisions of the Office denying appellant's claim for recurrence of disability are hereby set aside and remanded for further development consistent with this opinion.

Dated, Washington, DC
December 14, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member