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PATRICIA ARTHUR, Appellant)	
)	
and)	Docket No. 04-1818
)	Issued: April 22, 2005
U.S. POSTAL SERVICE, NORTH ROYALTON)	
BRANCH, Brunswick, OH, Employer)	
)	

Case Submitted on the Record

JURISDICTION

ISSUE

FACTUAL HISTORY

In an October 26, 1986 report, Dr. J.E. Lalak, a Board-certified radiologist, indicated that a lumbar myelogram showed a laterally herniated disc at L4-5. In a January 6, 1987 report,

Dr. Konstantin Kuschnir, an orthopedic surgeon, described his October 30, 1986 surgery on appellant's back, performing a discectomy and laminectomy at the L4-5 level, with foraminotomy and soft tissue release in the lateral aspect of the spinal canal. In a separate report, Dr. Kuschnir stated that he removed a large disc fragment from the L4-5 disc. The Office accepted appellant's claim and began payment of temporary total disability effective November 21, 1986. Appellant returned to work on February 17, 1987.

In an undated note, Dr. Kuschnir stated that in July 1987 appellant began complaining of increasing pain in her back and legs. On December 17, 1987 appellant was hospitalized on an emergency basis with acute pain in the lumbar area. She underwent surgery on December 21, 1987. Dr. Kuschnir diagnosed a recurrent L4-5 herniated disc. He performed a laminectomy with lateral guttural recess and foraminotomy and discectomy at the L4-5 level. He removed a very large herniated disc. Appellant returned to work on April 18, 1988 and received temporary total disability for the period she did not work.

In a September 8, 1989 report, Dr. C.J. Doyle, a Board-certified radiologist, stated that a computerized tomography (CT) scan of the lumbar spine showed marked degeneration of the L4-5 disc with postsurgical changes at the L4-5 interspace obscuring the dural sac and exiting nerve roots. He commented that it was impossible to tell if appellant had a recurrent disc protrusion. Dr. Doyle also noted moderate degenerative arthrosis of L3 through L5-S1 apophyseal joints.

In a November 13, 1989 note, appellant filed a claim for a schedule award. Her attorney submitted a September 19, 1989 report from Dr. Raul A. De La Iglesia, a specialist in preventive medicine and radiology, who indicated that appellant had a feeling of a cramp in her left leg while performing heel-toe walking. He found decreased perception of the left leg as well as weakness in the quadriceps, calf and hallucis longus tendons of the left foot. Dr. De La Iglesia noted a 1.5 centimeter (cm) atrophy of the left thigh and a 2.5 cm atrophy of the left calf. He indicated that appellant had a decreased patellar reflex on the left when compared to the right leg. Dr. De La Iglesia diagnosed failed back surgery syndrome, stating that appellant had motor and sensitivity changes in the left leg, with pain, numbness and tingling sensation, and weakness in the quadriceps, calf and hallucis longus tendons. He estimated that appellant had a 50 percent impairment of the left leg.

In a June 6, 1990 report to appellant's attorney, Dr. Kuschnir stated that appellant had a herniated nucleus pulposus at L4-5 with lumbosacral myofascitis. He noted that appellant had undergone two operations for this condition. Dr. Kuschnir indicated that appellant, as a direct result of the employment injury, had acute difficulties with her left leg, consisting of atrophy, numbness in the foot and leg, and difficulty in ambulation.

The Office authorized another CT scan of appellant's lumbar spine. In a February 6, 1991 report, Dr. Walter L. George, a Board-certified radiologist, stated that appellant had moderated degenerative changes in the facet joints at L3-4 and mild to moderate posterior bulging of the disc. He noted a laminectomy defect at L4-5. The CT scan showed extensive postsurgical fibrous tissue extending through the laminectomy defect into the spinal canal, blending with the density of the thecal sac. Dr. George commented that the sac and its contents could not be separately delineated from the posterior margin of the L4-5 disc, the nerve roots and

their respective lateral recesses. He noted that this was a repeat of the September 7, 1989 CT scan. Dr. George stated that the facet joints at the L4-5 level were sclerotic and hypertrophied. He pointed out that the neural foramina on both sides were compromised, particularly on the left.

In a December 2, 1991 memorandum, the Office medical adviser stated that appellant had a 10 percent permanent impairment for cramps in the left leg, a 4 percent permanent impairment for atrophy of the left leg, and a 5 percent permanent impairment for weakened reflexes in the left leg. He concluded, after using the combined values table of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,¹ that appellant had an 18 percent permanent impairment of the left leg. In a January 14, 1992 decision, the Office issued a schedule award for an 18 percent permanent impairment of the left leg.

On April 27, 2000 appellant underwent surgery for an anterior fusion of L4-5 and L5-S1. On June 8, 2000 Dr. Kuschnir had to perform additional surgery for revision of the incision made in the April 27, 2000 surgery. Appellant returned to work on October 4, 2000 and received temporary total disability compensation for the period she lost from work. Appellant continued to complain of pain in the back and lack of strength in the left foot.

In a March 18, 2002 report, Dr. Kuschnir stated that appellant was seen for complaints of radiating pain into the legs, specifically the backs of the legs and somewhat on the top of the right foot. He reported that, on physical examination, appellant was tender in the lumbosacral region to palpation from L5 to S1 and had muscle spasms. Dr. Kuschnir noted that ankle jerks were absent bilaterally. He indicated that appellant had less sensation, more in the left leg than in the right leg, in the L4-5 and L5-S1 nerve root distribution. Dr. Kuschnir stated that appellant had symptoms compatible with compression of the L5 and S1 nerve roots. In a July 15, 2002 office note, he stated that appellant had a ½ inch difference in circumference between the left calf and the right calf and between the left thigh and the right thigh. Dr. Kuschnir noted that appellant's strength was "not quite there." He indicated that the ankle jerks were 0 on the left leg and +1 on the right leg.

On November 12, 2002 the Office received an August 28, 2001 claim from appellant for a schedule award. In an undated report, received by the Office on November 18, 2002, Dr. Kuschnir stated that the atrophy of the left thigh equaled a two percent whole body impairment or an eight percent permanent impairment of the left leg. He reported that the atrophy of the calf equaled a 5 percent whole body impairment or a 13 percent permanent impairment of the left leg.

In a January 7, 2003 report, Dr. Andrew Goldberg, a Board-certified radiologist, stated that an MRI scan showed the previous partial decompressive laminectomies and the L4-5 fusion. He noted a slight anterolisthesis of L5 on S1. Dr. Goldberg found posterior disc bulging and moderate associated stenosis at L2-3 with compression of the thecal sac. He made the same findings at L3-4 to a slightly greater degree, with an eccentric disc protrusion to the right compressing the thecal sac and impinging on the adjacent neural foramen. Dr. Goldberg noted that the central canal was more capacious at both L4-5 and L5-S1 but there remained a moderate degree of foraminal impingement eccentric to the left at each level.

¹ 5th ed., 2001, pp. 604-06

In a June 16, 2003 report sent to appellant's attorney, Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon, found that appellant had marked tenderness in the midline and over both paraspinous muscular masses. He reported limitation in the motion of the lumbosacral spine. Dr. Kaffen commented that the straight leg raising test produced low back pain without radicular pain. He noted that appellant's calf circumference was 16 inches on the left leg and 17 inches on the right leg. Dr. Kaffen indicated that the neurological examination showed the deep tendon reflexes to be equal bilaterally in the legs with no sensory deficit and no weakness in gross muscle testing. He concluded that appellant had a 10 percent permanent impairment of the left leg due to moderate atrophy of the calf.

In a July 29, 2003 decision, the Office denied appellant's claim for an increased schedule award because the medical evidence did not show a permanent impairment of the left leg greater than the previously awarded 18 percent.

In an August 15, 2003 letter, appellant's attorney requested a hearing before an Office hearing representative. At the April 21, 2004 hearing, the attorney submitted additional medical evidence including Dr. Kuschnir's treatment notes, indicating that appellant still had lumbosacral pain with occasional radiation into her legs. The attorney also submitted an April 19, 2004 report from Dr. Kuschnir, who reported that a recent MRI scan showed epidural scarring on the left at L4-5 and L5-S1. He also noted that appellant had moderate foraminal impingement on the left at these levels. Dr. Kuschnir added that appellant had moderate to marked central canal stenosis with circumferential compression of the thecal sac at L2-3 and L3-4. He commented that appellant might need surgical interventions in the future, consisting of a decompression, laminectomy, and foraminotomy, because she was experiencing tremendous pain in the lower back and recurrence of numbness and radiating pain. Dr. Kuschnir stated that appellant, on examination, had knee jerks of +1 bilaterally and absent ankle jerks bilaterally. He indicated that appellant was very tender in the lumbosacral spine to palpation. Dr. Kuschnir reported that appellant had limited external and internal rotation of the hip due to the exacerbation of pain. He concluded that appellant's prognosis was poor and stated that, within a reasonable degree of medical certainty, she would continue to have problems with her back as well as all other symptoms stemming from the back injury.

In a June 14, 2004 decision, the Office hearing representative stated that the medical evidence did not show that appellant had more than an 18 percent permanent impairment in the left leg. He therefore affirmed the Office's July 29, 2003 decision.

LEGAL PRECEDENT

The schedule award provision of the Act² and its implementing regulation³ sets 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

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

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

Under the Act, the back is specifically excluded as an organ under section 8107.⁵ But, while a schedule award is not payable for an impairment of the back, a schedule award is payable for a permanent impairment of the legs that is due to a work-related back condition.⁶

ANALYSIS

The Office originally issued a schedule award for an 18 percent permanent impairment of the left leg, based on cramps in her leg, atrophy in the left leg, and weakened reflexes in the left leg. Dr. Kuschnir, in a March 18, 2002 report, described appellant's more recent findings such as radiating pain into the legs and the top of the right foot. He reported that appellant's ankle jerks on both legs were absent. Dr. Kuschnir also indicated that appellant had a decrease in sensation in the left leg. In a July 15, 2002 office note, he noted atrophy of both the thigh and the calf. Dr. Kuschnir stated that appellant's strength was "not quite there." He reported that the ankle jerk was zero on the left leg and plus one on the right leg. In a November 2002 report, Dr. Kuschnir stated that appellant had atrophy of the thigh and calf which equaled a 13 percent permanent impairment of the left leg.

In a June 16, 2003 report, Dr. Kaffen stated that appellant had a one inch atrophy of the left calf. He reported that straight leg raising only produced low back pain without radicular pain. Dr. Kaffen indicated that appellant had deep tendon reflexes that were equal bilaterally with no sensory deficit and no weakness in the muscles. He concluded that appellant had a 10 percent permanent impairment due to atrophy of the left leg.

In his August 15, 2003 report, Dr. Kuschnir stated that appellant had a recurrence of numbness and radiating pain. He indicated that the ankle jerks were absent bilaterally. He reported that the motion of the hips was limited due to pain.

Dr. Kuschnir, before and after Dr. Kaffen's report, described conditions of the left leg that contradicted Dr. Kaffen's findings. Dr. Kuschnir stated that appellant had numbness and radiating pain whereas Dr. Kaffen found no radicular pain and no sensory deficit. Dr. Kuschnir reported atrophy of the left calf and thigh but Dr. Kaffen only noted atrophy in the left calf. Dr. Kuschnir indicated that appellant had some weakness in the left leg whereas Dr. Kaffen reported no weakness in the left leg. Dr. Kuschnir consistently reported an absent ankle jerk in the left leg but Dr. Kaffen stated that appellant's deep tendon reflexes were normal. These reports have different findings on appellant's left leg condition which would form the basis of a permanent impairment rating. Both physicians are regarded as appellant's physicians. Their contradictory statements on appellant's symptoms lessen the probative value of their reports.

⁴ *Id.*

⁵ 5. U.S.C. § 8101(19); see *Francesco C. Veneziani*, 48 ECAB 572, 574 (1997).

⁶ *Denise D. Cason*, 48 ECAB 530, 531 (1997).

Appellant has not submitted a consistent report that would establish that she had more than an 18 percent permanent impairment.

CONCLUSION

Appellant did not meet her burden of proof in establishing that she had a permanent impairment greater than 18 percent for which she had received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 14, 2004 is affirmed.

Issued: April 22, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member