United States Department of Labor
Employees' Compensation Appeals Board

D.T., Appellant	)	
and	)	**Docket No. 10-455**
	)	**Issued: September 15, 2010**
U.S. POSTAL SERVICE, ATLANTA AIRPORT MAIL CENTER, Atlanta, GA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 1, 2009 appellant timely appealed the September 23, 2009 merit decision of the Office of Workers' Compensation Programs, which denied her claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the schedule award claim.[1]

ISSUE

The issue is whether appellant has a ratable impairment of the upper or lower extremities.

FACTUAL HISTORY

Appellant, a 49-year-old clerk, was injured in the performance of duty on September 9, 2005 when a bulk mail container struck her from behind and pinned her against the wall. The

[1] The record on appeal contains evidence received after the Office issued its September 23, 2009 decision. The Board may not consider evidence that was not in the case record when the Office rendered its final decision. 20 C.F.R. § 501.2(c) (2009).

Office initially accepted her claim for back contusion and right shoulder contusion. The claim was later expanded to include lumbar sacroiliac dysfunction and right shoulder soft tissue bicep injury as accepted conditions.[2] Appellant was off work for approximately eight months due to her injury and the Office paid her appropriate wage-loss compensation. In May 2006 she began working part time. Appellant returned to work in a full-time, limited-duty capacity on June 21, 2006.[3]

On August 18, 2006 appellant filed a claim for a schedule award. In a report dated October 10, 2006, her treating physician, Dr. Ernest L. Howard II, a Board-certified physiatrist, found 10 percent whole person impairment due to lumbar spine injury. He found a diagnosis-related estimate (DRE) lumbar category III impairment based on lumbar radiculopathy. Dr. Howard further explained that the 10 percent whole person impairment represented a 24 percent lower extremity. Although initially he did not identify the affected lower extremity, Dr. Howard subsequently explained that appellant's lumbar radiculopathy affected her left lower extremity. The Office advised both appellant and her physician that lumbar radiculopathy was not an accepted condition. Additionally, it explained that a whole person impairment rating based on a DRE lumbar category III impairment was not a recognized basis for granting a schedule award.

Appellant filed a second claim for a schedule award on February 11, 2008. In support of this latest claim, she submitted a January 22, 2008 report from Dr. John W. Ellis, a Board-certified family practitioner, who found 12 percent impairment of the right upper extremity based on decreased shoulder range of motion (10 percent) and sensory deficit involving the brachial plexus (2 percent). Dr. Ellis also found 6 percent impairment of the right lower extremity and 19 percent impairment of the left lower extremity due to motor and sensory deficits involving both the L5 and S1 nerve roots.

The district medical adviser (DMA) reviewed Dr. Ellis' report and recommended that the Office refer appellant for a second opinion examination with a Board-certified orthopedic surgeon.

Dr. Alexander N. Doman, a Board-certified orthopedic surgeon and Office referral physician, examined appellant on February 19, 2009. He characterized her as morbidly obese at 5 feet 4 inches, weighing 278 pounds. During his physical examination of the lower extremities, Dr. Doman noted "[g]ross signs of intentional symptom magnification...." He also reported that deep tendon reflexes were normal and there was no sign of muscular atrophy. Physical examination of the upper extremities revealed positive Tinel's sign at both wrists, no signs of muscular atrophy, normal grip strength and normal sensation. Dr. Doman also reported excellent range of motion in both shoulders with some mild restriction at the extremes of forward flexion. There was no evidence of glenohumeral instability of either shoulder and there was excellent

[2] While the Office's January 4, 2006 acceptance letter identified one of appellant's accepted conditions as "right shoulder soft tissue bicep," the referenced ICD-9 code "726.10" pertains to "Disorders of bursae and tendons in shoulder region, unspecified," which include rotator cuff syndrome NOS and supraspinatus syndrome NOS.

[3] The Office subsequently found that appellant's June 21, 2006 limited-duty assignment as an air records processor fairly and reasonably represented her wage-earning capacity. Appellant had zero percent loss of wage-earning capacity.

rotator cuff strength, bilaterally. Dr. Doman reviewed recent x-rays of the lumbar spine and shoulders, which were essentially normal. He also commented about a recent nerve conduction velocity study that was consistent with left carpal tunnel syndrome (CTS). Dr. Doman's sole diagnosis was malingering.

The Office posed several questions, which Dr. Doman answered. The first was whether there was evidence of lumbar degenerative disc disease (DDD), and if so, did the September 9, 2005 employment injury cause, aggravate or otherwise contribute to this condition. Dr. Doman replied that there was minimal evidence radiographically of degenerative disc changes at the L4-5 level. However, he did not believe appellant was symptomatic from this. Dr. Doman explained that these disc changes are seen in the majority of people her age and without symptoms. He also noted that appellant was morbidly obese. Dr. Doman further explained that the mechanism of injury would not have resulted in injury involving the worsening of DDD of the lumbar spine. He reiterated that appellant was malingering. Dr. Doman also stated that she did not have a permanent impairment of her lower extremities. He commented that any symptoms appellant related involving her lower extremities was the result of malingering and not the result of an orthopedic condition. With respect to permanent impairment of the upper extremities, Dr. Doman stated that the September 9, 2005 employment injury did not cause or contribute to appellant's left CTS. Consequently, he did not provide an impairment rating for CTS. Dr. Doman also found that appellant did not have any permanent partial impairment of the right shoulder. He characterized her complaints of right shoulder pain as factitious and attributed it to malingering.

The DMA fully agreed with Dr. Doman's February 19, 2009 findings.

In a March 6, 2009 decision, the Office denied appellant's claim for a schedule award based on Dr. Doman's February 19, 2009 report.

By decision dated June 11, 2009, the Branch of Hearings and Review set aside the March 6, 2009 decision and remanded the case for referral to an impartial medical examiner (IME). The hearing representative found a conflict in medical opinion between appellant's physicians, Dr. Ellis and Dr. Howard, and the Office referral physician, Dr. Doman.

On remand, the Office referred appellant to Dr. C. Thomas Hopkins, Jr., a Board-certified orthopedic surgeon. In a report dated August 27, 2009, Dr. Hopkins, the IME, noted that appellant was morbidly obese at 272 pounds and a height of 5 feet 4 inches. On physical examination there was full range of motion in the right shoulder, no detectable weakness and no irritability about the rotator cuff. Dr. Hopkins' lower extremity examination revealed full range of motion in the hips. He noted surprisingly that any attempt at hip flexion elicited complaints of low back pain. Dr. Hopkins also reported some hamstring tightness. Appellant's motor and sensory examination was intact. There was no tenderness to palpation about either hip, but Dr. Hopkins qualified this particular finding noting that appellant's morbid obesity precluded deep palpation of the bursa. He also found interesting appellant's complaint of back pain when he tapped her heels and rolled her hips, which he characterized as completely nonphysiologic and considered a positive Waddell's sign. X-rays obtained that day showed degenerative changes in the lower lumbar spine.

Dr. Hopkins' assessment was morbid obesity with a body mass index of 46.7. He also noted chronic low back pain without evidence of radiculopathy or evidence of any work-related injury or sequela thereof. Dr. Hopkins indicated that appellant's right shoulder contusion had completely resolved and that she had a normal examination of the right shoulder with no impairment. He also noted that appellant's history of CTS predated the September 9, 2005 employment injury. Dr. Hopkins further explained that morbidly obese individuals have a tendency to develop CTS. Lastly, he noted a possible progression of degenerative changes in the lumbar spine that was not work related. Dr. Hopkins explained that this latter condition was part of the normal aging process for a morbidly obese individual. The IME concluded that appellant had no evidence of a work-related impairment and that she was able to return to work without restrictions.

On September 8, 2009 the DMA, Dr. Guillermo M. Pujadas, a Board-certified orthopedic surgeon, reviewed Dr. Hopkins' report and did not express any disagreement with either his examination findings or conclusions.

In a decision dated September 23, 2009, the Office denied appellant's claim for a schedule award. It based its decision on the IME's August 27, 2009 report.

LEGAL PRECEDENT

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.[4] 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 regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[5] Effective May 1, 2009, schedule awards are determined in accordance with the 6th edition of the A.M.A., *Guides* (2008).

The Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.[6]

[4] For total loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2) (2006). For total loss of use of an arm, an employee shall receive 312 weeks' compensation. *Id*. at § 8107(c)(1).

[5] 20 C.F.R. § 10.404.

[6] 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994). Where the Office has referred appellant to an IME to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

ANALYSIS

The Office found there was a conflict of medical opinion between appellant's physician, Dr. Ellis, and the Office referral physician, Dr. Doman. Because of this conflict the Office referred appellant to an IME to resolve the issue of the extent of any upper or lower extremity permanent impairment. Dr. Hopkins, the IME, found that appellant had fully recovered from her right shoulder contusion. He also reported a normal right shoulder examination. On physical examination there was full range of motion in the right shoulder, no detectable weakness and no irritability about the rotator cuff. In light of the normal examination findings, the IME reasonably concluded that appellant had no impairment associated with her accepted right shoulder employment injury.

With respect to appellant's lumbar spine and lower extremities, Dr. Hopkins' noted there was chronic low back pain without evidence of radiculopathy. He further stated that there was no evidence of any work-related injury or sequela. On physical examination appellant had full range of motion in the hips and her motor and sensory examination was intact. Dr. Hopkins also reported that some of appellant's low back complaints were completely nonphysiologic. With respect to appellant's lumbar DDD, he stated that it was completely unrelated to her employment. In fact, it was part of the normal aging process for a morbidly obese individual. Dr. Hopkins concluded that there was no evidence of a work-related impairment and that appellant was able to return to work without restrictions.

The Board finds that the Office properly accorded determinative weight to Dr. Hopkins' findings, as he was the IME.[7] As outlined above, Dr. Hopkins' opinion is well reasoned and based upon a proper factual background. Accordingly, his August 27, 2009 findings represent the weight of the medical evidence. As such, the Office properly denied appellant claim for a schedule award.

CONCLUSION

Appellant does not have a ratable impairment of either the upper or lower extremities. Consequently, she is not entitled to a schedule award.

[7] *Gary R. Sieber*, *supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the September 23, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 15, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board