U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PEGGY E. CARSON and DEPARTMENT OF DEFENSE, DEFENSE GENERAL SUPPLY CENTER, Richmond, VA

Docket No. 98-2332; Submitted on the Record;
Issued June 21, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issue is whether appellant is entitled to a schedule award for a permanent impairment of the left lower extremity.

On December 28, 1995 appellant, then a 39-year-old sales store checker, filed a claim for injuries sustained on that date when she slipped on steps. The Office of Workers' Compensation Programs accepted appellant's claim for lumbar strain, a contusion of the left hip and a strain of the left knee and leg.

In a report dated January 13, 1997, Dr. Ross D. Lynch, a Board-certified orthopedic surgeon, discussed appellant's complaints of back pain radiating down "as far as the calf." He diagnosed back and left leg pain of uncertain etiology and recommended objective testing.

In an office visit note dated May 26, 1997, Dr. Lynch related:

> "[Appellant's] EMGs [electromyogram] that were previously done were normal. Her MRI [magnetic resonance imaging study] shows some very minor abnormalities, but no herniated disc, no focal bulges, no annular tears, and no compromise of the spinal canal at any level. I do not think her pain is on a neurogenic basis. Her reflexes are intact. Tension sings are equivocal. She just kind of goes on and on about how she hurts in this area."

He stated, "Her diagnosis would have to be that of a contusion in the buttocks region or in the lower back region." Dr. Lynch found that appellant had reached maximum medical improvement and had a five percent whole person impairment.

On June 12, 1997 appellant filed a claim for a schedule award. In support of her claim, appellant submitted a report dated January 22, 1997, from Dr. J.D. McInnis, a general practitioner. He noted that appellant had "problems with the left posterior thigh with pain which probably is related to a source within the thigh itself and the abnormal distribution probably

comes from the fact that she has had a skin graft in that area -- the left leg being the donor for the injury to the right leg." Dr. McInnis obtained range of motion findings for appellant's lumbar spine and listed whole person impairment ratings based on her back condition. He then stated: "There is a 40 percent relationship between the leg and whole person, therefore the 20 percent whole person impairment would be 50 percent to the leg and [the] 13 percent whole person impairment would be 42 percent to the leg." In an accompanying evaluation form of the same date, Dr. McInnis indicated that appellant had normal flexion and extension of the knee, no ankylosis and a five percent impairment of the left lower extremity due to pain or weakness. He then recommended a 50 percent impairment rating of the left lower extremity.

By letter dated July 3, 1997, the Office informed appellant's representative that the Federal Employees' Compensation Act[1] did not provide schedule awards for impairments of the back or whole person. In another letter of the same date, the Office requested that Dr. Lynch evaluate appellant to determine whether she had a permanent impairment due to her accepted employment injury in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). The Office included a form for Dr. Lynch's completion.

In a report dated July 14, 1997, Dr. John J. Lammie noted that he had referred appellant to Dr. Lynch who opined that she had a five percent whole person impairment.

On September 30, 1997 an Office medical adviser reviewed Dr. Lynch's May 26, 1997 report and found that, according to the A.M.A., *Guides* appellant had a one percent permanent impairment of the left lower extremity due to pain from the femoral nerve.

By letter dated November 26, 1997, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. John Shuster, an orthopedic surgeon, for a second opinion evaluation.

In a report dated December 18, 1997, Dr. Shuster discussed appellant's complaints of left leg pain and low back pain. He reviewed the EMG and MRI scan and found that they were both normal. Dr. Shuster listed range of motion findings for appellant's back. He noted that appellant "has been rated at five percent whole person disability in the past, which I think is probably appropriate and I would not increase it at this time."

By letter dated May 26, 1998, the Office informed Dr. Shuster that the Office did not accept whole person disability ratings and requested that he provide an opinion regarding whether appellant had an impairment of the lower extremities due to her spinal condition.

In a report dated June 2, 1998, Dr. Shuster found that appellant's employment-related lumbar strain had resolved. He stated, "The medical connection between the fall and the pain was that apparently [appellant] fell and most of the complaints have largely resolved. Unfortunately, her physical examination was inconsistent for any type of radiculopathy, so I am unable to really comment on that." Dr. Shuster concluded, "I see no left lower extremity

[1] 5 U.S.C. §§ 8101-8193.

impairment rating and could only assign some minor back pain which apparently is not even admissible in federal cases."

By decision dated July 17, 1998, the Office denied appellant's claim for a schedule award on the grounds that the evidence did not establish that she had a ratable impairment of her left lower extremity. The Office found that Dr. Shuster had provided an impartial medical examination and concluded that she had no impairment of her left lower extremity.

The Board finds that the case is not in posture for decision due to a conflict in the medical evidence.

Under section 8107 of the Act[2] and section 10.304 of the implementing federal regulations,[3] 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 single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* have been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[4]

The Board initially notes that the Office incorrectly characterized Dr. Shuster as an impartial medical examiner. At the time of the Office's referral of appellant to Dr. Shuster, the record did not contain a conflict in medical opinion.[5] In its July 17, 1998 decision, the Office found that a conflict in opinion existed between the impairment findings of Dr. McInnis and the Office medical adviser. However, Dr. McInnis did not provide an impairment determination in accordance with the A.M.A., *Guides* and thus his opinion is of insufficient probative value to create a conflict in medical opinion. In his January 22, 1997 report, he attributed appellant's leg pain to a prior skin graft which was unrelated to her employment injury. Dr. McInnis then obtained range of motion findings for appellant's back and determined that she had whole person impairments due to her back condition. The Act, however, does not provide schedule awards for impairments of the back or body as a whole.[6] While he, in reports dated January 22, 1997, found that appellant had a 42 and a 50 percent impairment of the left lower extremity, it appears that he obtained this finding by assigning appellant a whole person impairment due to problems with her back and then converting this whole person impairment to an impairment of the leg. Thus, his findings are not in accordance with the Act. Further, although Dr. McInnis indicated that appellant had a five percent impairment of the left lower extremity due to pain, he did not

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.304.

[4] *James J. Hjort*, 45 ECAB 595 (1994).

[5] The Board further notes that the Office did not provide notice to appellant that a conflict in the medical evidence existed and that it had selected Dr. Shuster to perform an impartial medical examination. Thus, Dr. Shuster cannot serve as an impartial medical specialist; *see Henry J. Smith, Jr.*, 43 ECAB 524 (1992).

[6] 5 U.S.C. § 8107(c).

provide a rationalized opinion regarding whether the leg pain was related to her employment injury or her nonemployment-related skin graft.

The Board finds, however, that there is a conflict in the medical evidence between Dr. Lynch, appellant's attending physician, and Dr. Shuster, the Office referral physician.

In his report dated January 13, 1997, Dr. Lynch discussed appellant's complaints of back pain radiating into her left leg. In a report dated May 26, 1997, he diagnosed a contusion of the buttocks or lower back and found that appellant had a five percent impairment to the whole person. The Office medical adviser reviewed Dr. Lynch's May 26, 1997 report and applied the provisions of the A.M.A., *Guides* to his findings. The Office medical adviser noted his diagnosis of a contusion of the buttocks with pain as a residual symptom. Dr. Lynch found that, according to Table 20 on page 151 of the A.M.A., *Guides*, pain with decreased sensibility yielded a 60 percent impairment. The Office medical adviser multiplied the 60 percent impairment for graded pain by 2 percent, the maximum impairment for sensory deficits in the femoral nerve according to Table 68 on page 89, to find that appellant had a 1 percent impairment of the lower extremity due to pain.

Dr. Shuster, on the other hand, reviewed the results of objective tests, listed findings on physical examination, and indicated that he found no evidence of radiculopathy. He concluded that appellant had no impairment of the left lower extremity.

Section 8123(a) of the Act,[7] provides in pertinent part: "[I]f there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination." 5 U.S.C. 8123(a).

Consequently, the case is remanded for the Office to refer appellant, together with the case record and a statement of accepted facts, to an appropriate Board-certified specialist for a rationalized medical opinion regarding whether appellant has a permanent impairment of the left lower extremity entitling her to a schedule award.

[7] 5 U.S.C. §§ 8101-8193.

The decision of the Office of Workers' Compensation Programs dated July 17, 1998 is hereby set aside and the case is remanded for further proceedings consistent with this opinion by the Board.

Dated, Washington, D.C.
June 21, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member