U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARSHALL V. SANDUSKY and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Louisville, KY

Docket No. 01-56; Submitted on the Record;
Issued July 26, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant met his burden of proof to establish that he has a permanent impairment of his left lower extremity, which would entitle him to a schedule award.

This is the second appeal in the present case. In the prior appeal, the Board issued a decision[1] on May 22, 2000 in which it set aside the November 24, 1998 decision of the Office of Workers' Compensation Programs and remanded the case to the Office for further development.[2] The Board determined that that the August 14, 1998 opinion of Dr. Frank A. Burke, a Board-certified orthopedic surgeon who served as an Office referral physician, was not complete with respect to the evaluation of the permanent impairment of appellant's left lower extremity. The Board indicated that Dr. Burke's evaluation of appellant's peripheral sensory loss was incomplete and equivocal and that it was not able to determine whether his evaluation was performed in accordance with the relevant standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993).[3] The Board noted that Dr. Burke reported range of motion findings for appellant's lower extremities which he indicated were normal, but that it was unclear from the record whether Dr. Burke performed all the relevant range of motion tests described in the A.M.A., *Guides*.[4] The Board directed the Office

[1] Docket No. 99-904.

[2] On September 8, 1997 appellant, then a 49-year-old claims examiner, sustained an employment-related herniated nucleus pulposus at L5-S1 when he bent down to pick up stacks of files at work. He stopped work on September 12, 1997 and later returned to light-duty work; appellant received compensation for periods of disability. On October 14, 1997 he underwent a laminotomy, mesiofacetectomy, foraminotomy and disc excision at L5-S1 on the left which was authorized by the Office. In April 1998, appellant alleged that he was entitled to a schedule award due to his September 8, 1997 employment injury. By decision dated November 24, 1998, the Office determined that appellant is not entitled to a schedule award for his left lower extremity.

[3] *See* A.M.A., *Guides* 48, at 88-93.

[4] *See id.* at 77-82.

to conduct a complete evaluation, in accordance with the relevant standards of the A.M.A., *Guides,* regarding whether appellant has a permanent impairment of his left lower extremity, to be followed by an appropriate decision. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On remand, the Office referred appellant to Dr. Robert L. Keisler, a Board-certified orthopedic surgeon, for evaluation regarding whether he has a permanent impairment of his left lower extremity. By decision dated August 29, 2000, the Office denied appellant's schedule award claim on the grounds that the medical evidence did not show that he had a permanent impairment of his left lower extremity which would entitled him to a schedule award. The Office based its denial on the August 9, 2000 opinion of Dr. Keisler.

The Board finds the case is not in posture for decision regarding whether appellant met his burden of proof to establish that he has a permanent impairment of his left lower extremity, which would entitle him to a schedule award.

An employee seeking compensation under the Federal Employees' Compensation Act[5] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative, and substantial evidence,[6] including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.[7] However, it is well established 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.[8]

The schedule award provision of the Act[9] and its implementing regulations[10] 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.[11]

In denying appellant's schedule award claim, the Office relied on the August 9, 2000 report of Dr. Keisler, the Board-certified orthopedic surgeon who served as an Office referral

[5] 5 U.S.C. §§ 8101-8193.

[6] *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

[7] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

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

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404.

[11] *See id.*; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

physician on remand to the Office. The Board finds that the opinion of Dr. Keisler on the extent of the permanent impairment of appellant's left lower extremity impairment is in need of further clarification and that the case should be remanded to the Office for further development.

In his August 9, 2000 report, Dr. Keisler reported the findings of his examination[12] and diagnosed degenerative disc disease; foraminal arthrosis of the lumbar spine; apparent spinal stenosis; history of acute back pain; status post laminotomy, fasciectomy and foraminotomy at L5-S1 on the left; and possible residual radiculopathy. He noted that "the effects of the lifting incident" would have resolved in 6 to 12 weeks and that it could not be determined whether the "acute event in 1997" or the surgery produced a period of radiculopathy. Dr. Keisler noted that, although the current findings were not explainable by radiculopathy alone, he suspected that there was a radiculopathy, which was part of the pathologic process of the preexisting low back condition. He indicated that appellant did not appear to have a separate left foot problem. Dr. Keisler stated:

> "The statement of accepted facts accepts herniated nucleus pulposus, but does not accept the possibility of an independent problem with the foot or leg itself. The symptoms, if related to the lifting event and disc herniation (in part), would represent referred symptoms to the foot and leg rather than independent impairment of the leg itself. There is no impairment of the foot or leg, other than that which relates to the spine and impairment rating as included in a spine rating. It should be noted that there are symptoms and signs that are not explainable by radiculopathy. It is also not possible for those symptoms to be the result of a back injury in 1997. There is some rationale that possibility of a lifting stress led to surgery, even though the underlying condition was preexisting and may have needed surgery in the future. This would suggest that one percent of the impairment is the result of the transition from nonoperative to postsurgical status. This would be associated with both back and leg symptoms (if a spinal origin).
>
> "There is no independent impairment rating or impairment of the left lower extremity that could be the result of a lifting injury to the spine in 1997."

In his report, Dr. Keisler presented an equivocal opinion regarding the nature of appellant's left lower extremity condition. He indicated that appellant may have a left radiculopathy but he did not provide a clear and unequivocal opinion on this matter. Dr. Keisler also suggested that appellant does not have any symptoms in his left lower extremity, which could be referable to the September 8, 1997 employment injury, a herniated nucleus pulposus at L5-S1, but he did not adequately explain the basis for this apparent opinion.[13] Furthermore, he suggested that appellant has an impairment of his lower extremity related to his back surgery in October 1997, but he did not adequately explain his comments in this regard and it remains

[12] He noted that appellant reported numbness and aching in the lateral aspect of the left foot from below the malleolus extending to the fifth toe.

[13] It should be noted that other medical evidence of record, including that of Dr. Burke, the Board-certified orthopedic surgeon, who initially examined appellant for the Office, suggests that appellant had a continuing left radiculopathy referable to the accepted herniated nucleus pulposus at L5-S1.

unclear whether Dr. Keisler has accepted that the surgery was related to appellant's employment injury.

On remand, the Office should request that Dr. Keisler provide additional clarification, as denoted above, regarding his opinion on the permanent impairment of appellant's left lower extremity.[14] If Dr. Keisler is unwilling or unable to provide such clarification, the Office should refer appellant to another appropriate specialist for evaluation. After such development as it deems necessary, the Office should issue an appropriate decision regarding appellant's entitlement to schedule award compensation for permanent impairment of his left lower extremity.

The August 29, 2000 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
July 26, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[14] If it is determined that appellant has permanent lower extremity impairment referable to his employment injury, the appropriate standards of the A.M.A., *Guides* should be used to evaluate such impairment.