U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARGRET E. THOMAS and U.S. POSTAL SERVICE,
POST OFFICE, Newark, NJ

Docket No. 00-2415; Submitted on the Record;
Issued October 17, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant has a permanent impairment of her right lower extremity resulting from her January 28, 1988 employment injury.

On January 28, 1988 appellant, then a 39-year-old letter sorting machine operator, injured her right knee when she slipped on the floor at work and fell. The Office of Workers' Compensation Programs accepted her claim for lumbar sprain, neck sprain and right knee sprain. Appellant received compensation for temporary total disability and returned to work in 1990.

On October 12, 1990 Dr. Sebastian O. Abide, a Board-certified orthopedic surgeon and Office referral physician, reported a normal orthopedic examination. Both lower extremities had normal motion in all joints. There was no tenderness. The muscles had normal tone and strength and there was no atrophy. The ankle and knee reflexes were normal and the sensation in both lower extremities was normal. He concluded that there were no findings to suggest any residual physical impairment as a result of the January 28, 1988 employment injury. Appellant's subjective complaints, he reported, were not substantiated by any objective physical findings.

On January 3, 1991 Dr. Ronald M. Selby, a Board-certified orthopedic surgeon and Office referral physician, also reported a normal orthopedic examination. Examination of the right knee revealed no effusion, erythema, warmth, ecchymosis or atrophy. The patella was nontender. There was near full and painless range of motion. Joint lines were nontender. Lachman, anterior and posterior draw signs and collateral ligament testing were intact. Testing for meniscal pathology was negative.

On May 21, 1993 Dr. David M. Myers, an orthopedic surgeon, examining appellant at her attorney's request, reported that he had reviewed certain medical records, including the reports of Drs. Abide and Selby. Unlike those physicians, he concluded that appellant had significant residuals causally related to her January 28, 1988 employment injury. With respect to the right knee there was a zone of marked tenderness about the anteromedial aspect of this extremity with radiation of tenderness primarily anteriorly. Distal quadriceps flattening was

noted. There was quadriceps tenderness. Knee extension lacked 10 degrees, flexion lacked 5 degrees and lower leg rotation produced anteromedial knee pain. There was crepitus on the extremes of knee motion. The draw test was negative. The grind test was positive. The squat test was performed with intense complaints of medial knee pain particularly noted on attempting to resume the erect position.

Dr. Myers reported that "disability is equivalent to 57.5 percent of partial total…." This evaluation, he stated, was made in accordance with but not exclusively with the American Medical Association (A.M.A.), *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), as well as other factors as described in the examination findings reported.

Appellant requested a schedule award for the right knee.

On July 5, 1995 Dr. Selby again reported a normal orthopedic examination. An examination of the right knee revealed no effusion, erythema, warmth, ecchymosis or atrophy. The patella was nontender. The joint lines were nontender. There was a full and painless range of motion. Lachman, anterior and posterior draw signs and collateral ligament testing were intact and testing for meniscal pathology was negative.

On September 11, 1995 Dr. Bernard A. Rineberg, a Board-certified orthopedic surgeon and Office referral physician, reported that as far as appellant's knee was concerned, she was not currently bothered by it. Appellant had no signs of any residual instability or any other abnormalities. If she had a strain or sprain of that knee, he explained, one would either find current residuals in the examination or one would expect it to be fully healed. Dr. Rineberg found no residuals and believed that appellant had a normal knee from an orthopedic standpoint. He concluded that she had no physical impairment as a result of the January 28, 1988 accident.

On October 30, 1997 the Office advised that a schedule award could not be processed based on the medical evidence submitted, as Dr. Myers did not utilize the A.M.A., *Guides* or indicate the specific pages, tables and figures he used to determine a 57.6 percent permanent impairment.

On March 2, 1998 Dr. Myers reported that he used Table 72 (page 110), Table 75 (page 113), Table 77 (page 120), Table 82 (page 130) and Table 20 (page 151). On May 1, 1998 the Office medical adviser reviewed the evidence and concluded that Dr. Myers had not indicated how he arrived at his impairment rating.

In a decision dated July 17, 1998, the Office denied appellant's claim for a schedule award. The Office found that there was no medical evidence in the file to explain how the percentage impairment was calculated.

Appellant requested reconsideration and submitted the January 8, 1999 report of Dr. Horia H. Schwartz, a Board-certified physiatrist. She found no evidence of measurable atrophies but did find weakness overall of the right lower extremity, especially the right quads. By palpation, she noticed a mild flattening of the vastus medialis. There was grinding during mobilization on both knees, much more so on the right than on the left. There was evidence of 15 degrees of mediolateral instability in varus and valgus overall. Deep tendon reflexes were bilaterally sluggish. There was no sensory differentiation. There was overall generalized

weakness, however, minimally by comparison to the left side and more prevalent in the right. Dr. Schwartz gave the following diagnosis:

> "Number one, I believe that this lady has been left with permanent residuals of mild cervical sprain; number two, moderately severe lumbosacral spine sprain and strain with evidence of radiculopathy involving the right lower extremity; number three, permanent residuals of internal derangement of the right knee with mediolateral instability and evidence of chondromalacia."

Using Table 39, page 77, of the 4th edition of the A.M.A., *Guides*, Dr. Schwartz found a Grade I weakness in extension, representing a 25 percent impairment of the right lower extremity. Using Table 83, page 130, she found a 3 percent impairment due to a Grade 3 spinal nerve sensory deficit at L5. Using Table 12, page 45, she found a 9 percent impairment due to a Grade 4 motor deficit at L5. Dr. Schwartz reported that the combined total was 12 percent and appellant's condition was causally related to her accident within a reasonable medical probability.

The Office determined that a conflict in medical opinion existed on how great a permanent impairment existed, if any, due to the accepted work injury. To resolve this conflict, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Richard Lebovicz, a Board-certified orthopedic surgeon.

In a report dated July 28, 1999, Dr. Lebovicz related appellant's history of injury, medical course and current complaints. On examination of the lower extremities, he found no evidence of any muscle wasting. There were no fasciculations. Deep tendon reflexes were equal bilaterally. Motor and sensory function were grossly intact. Distal pulses were present. There was no evidence of any clonus. Babinski reflexes were within normal limits. There was a negative flip test bilaterally. Straight leg raising was to 65 degrees on the right, 75 degrees on the left. Range of motion of the hips appeared to be equal bilaterally. There was no tenderness within the groin.

Examination of the right knee showed no significant swelling. There was minimal tenderness about the medial as well as the lateral joint line. Upon mild palpation in the calf region as well as along the pretibial region, it elicited discomfort. The same was true for the left leg. Appellant's right knee was stable on varus and valgus stress at 0 and at 30 degrees. Lachman's test was negative. Anterior and posterior drawers were negative. There was no excessive anteversion of the hips or external tibial torsion of the legs. With the leg in a straight leg raised position it did not elicit any significant patellofemoral crepitus. There was a mild amount of hypermobility of the right patella as well as on the left side. Minimal tenderness was elicited with patellofemoral compression. Pivot shift test was negative. Gait appeared to be normal.

Dr. Lebovicz reported that he was unable to confirm the 12 percent rating given by Dr. Schwartz for spinal nerve sensory and motor deficits involving the L5 distribution. He

reported that he was unable to find significant residuals that would corroborate Dr. Myers' rating of 57.5 percent. Dr. Lebovicz added:

> "I cannot explain why a soft tissue injury would take five years to recover from. I cannot explain why after several years the back spasms, pain and discomfort of the neck and right knee continue to occur. When she was examined on June 18, 1999 there were relatively little objective findings to explain her continuous low back symptoms. In regard to her right lower extremity, I cannot find any significant weakness that reflected permanent impairment. In regard to the right knee and patellofemoral joint, I do not feel that there is significant disease that can be related to any permanent impairment as outlined by the A.M.A., [*Guides*] criteria. I do feel that some of her subjective complaints in regard to her back and lower extremities are related to her habitus and a deconditioned state. [Appellant] may very well benefit from a short course of work hardening to try to improve her posture and improve on the biomechanics of her back and lower extremities. However, if she does not maintain good biomechanics of her back and lower extremities, the benefits may only be short lived."

In a decision dated August 17, 1999, the Office denied appellant's claim for a schedule award. The Office found that the weight of the medical evidence rested with Dr. Lebovicz, the referee medical examiner.

The Board finds that the medical evidence fails to establish that appellant has a permanent impairment of her right lower extremity resulting from her January 28, 1988 employment injury.

A claimant seeking compensation under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence.[2] Section 8107 provides that if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[3]

A conflict in medical opinion arose in this case on whether appellant had a permanent impairment of her right lower extremity resulting from her January 28, 1988 employment injury. The Office referral physicians, Drs. Abide, Selby and Rineberg, reported normal orthopedic examinations. They found no physical impairment as a result of the January 28, 1988 employment injury. Appellant's physicians, Drs. Myers and Schwartz, found significant residuals causally related to her January 28, 1988 employment injury and permanent residuals of internal derangement of the right knee with mediolateral instability and evidence of

[1] 5 U.S.C. §§ 8101-8193.

[2] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[3] 5 U.S.C. § 8107(a). It is thus the claimant's burden of establishing that she sustained a permanent impairment of a scheduled member or function as a result of her employment injury. *See Raymond E. Gwynn*, 35 ECAB 247 (1983); *Philip N.G. Barr*, 33 ECAB 948 (1982).

chondromalacia. Dr. Myers reported a 57.5 percent permanent impairment overall, while Dr. Schwartz reported a 12 percent permanent impairment of the right lower extremity.

Section 8123(a) of the Act provides in part: "If there is 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 an examination."[4]

To resolve the outstanding conflict in this case, the Office referred appellant, together with the case record and a statement of accepted facts to Dr. Lebovicz, a Board-certified orthopedic surgeon. He reviewed appellant's history and reported his findings on examination. Dr. Lebovicz reviewed in some detail the relevant medical opinions supporting and negating permanent impairment. In a well-reasoned report, he concluded that he could find no permanent impairment causally related to the January 28, 1988 employment and that he could not understand how a soft tissue injury would take so long to recover from. He felt that appellant's complaints were instead related to her habitus and deconditioned state.

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[5]

The Board finds that the opinion of Dr. Lebovicz is based on a proper factual background and is sufficiently well rationalized that it constitutes the weight of the medical evidence on the issue of permanent impairment. As the weight of the medical evidence establishes that appellant has no permanent impairment of her right lower extremity resulting from her January 28, 1988 employment injury, the Board will affirm the denial of her claim for a schedule award.[6]

[4] 5 U.S.C. § 8123(a).

[5] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

[6] Appellant has not submitted a well-reasoned medical opinion establishing a causal relationship between the incident of January 28, 1988 and the finding of a herniated disc in her lumbosacral spine. Until such a causal relationship is established, she is not entitled to any schedule award for permanent impairment of the lower extremities caused by such a herniation.

The August 17, 1999 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
October 17, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member