U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HENRY E. DISMUKE and U.S. POSTAL SERVICE,
NORTH TEXAS MAIL PROCESSING CENTER, Coppell, TX

Docket No. 03-654; Submitted on the Record;
Issued May 7, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant is entitled to a schedule award as a result of his employment-related lumbar spine or right shoulder injuries.[1]

In this case, the Office accepted that on June 18, 1993 appellant, then a 49-year-old mailhandler, sustained a right shoulder strain and right rotator cuff tendinitis in the performance of duty. On June 15, 1995 appellant filed an additional claim for occupational disease, alleging that he injured his back in the performance of duty. On February 8, 1996 the Office accepted appellant's claim for a lumbar disc ligament injury with secondary inflammation. He stopped work on March 30, 1995 and the Office began paying appropriate compensation benefits.

On December 11, 1998 appellant filed a claim for a schedule award for permanent impairment.

In a decision dated October 22, 2002, the Office denied appellant's claim for a schedule award on the grounds that the medical evidence was insufficient to establish that he had any permanent impairment causally related to his accepted employment injuries.

The Board finds that appellant is not entitled to a schedule award as a result of his employment-related lumbar spine or right shoulder injuries.

[1] This case has previously been before the Board. In a decision dated November 3, 1997, the Board affirmed the Office of Workers' Compensation Programs' decision dated July 7, 1995 denying appellant's request for an oral hearing. In a decision dated April 12, 2001, the Board affirmed a November 12, 1998 decision of the Office reducing appellant's monetary compensation by 100 percent on the grounds that he failed to cooperate with vocational rehabilitation efforts without good cause.

The schedule award provisions of the Federal Employees' Compensation Act[2] and its implementing federal regulation[3] set forth the number of weeks of compensation to be paid for permanent loss of the members, functions and organs of the body listed in the schedule. No schedule award is payable for a member, function or organ of the body not specified in the Act or in the regulations.[4] As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or cervical spine or for the whole person,[5] no claimant is entitled to such an award.[6] However, amendments to the Act in 1960 modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originates in a scheduled or nonscheduled member. As the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originates in the spine if the medical evidence establishes impairment as a result of the employment injury.[7] The Act does not specify the manner in which the percentage of loss of a member shall be determined and the method for making such a determination rests in the sound discretion of the Office.[8] The Office has adopted and the Board has approved, the use of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.[9]

In support of his claim for a schedule award, appellant initially submitted a report dated November 18, 1998 from Dr. H. Clay Henderson, his treating Board-certified family practitioner. In his report, he stated:

> "[Appellant] was seen and evaluated today in follow up primarily for an impairment rating. Based on description in Chapter 3, [s]ection 31K, it describes neurogenic injuries. As [appellant] does not have a specific nerve injury to any single nerve and has diffuse injury throughout the lower extremities in the distribution of the sciatic nerve, I am going to use the same table as is on page 52, which describes how to rate the brachial plexus injury, but I am going to do it for the lumbar plexus as described for the sciatic injury. Based on that, I am giving him a 90 percent sensory deficit and a 10 percent motor deficit for a combined lower extremity impairment rating of 96 percent. Using the converting table, 96 percent lower extremity impairment times a conversion factor of .6 to convert the whole body impairment yields 57.6 percent whole body impairment rounded up

[2] 5 U.S.C. §§ 8101-8193.

[3] 20 C.F.R. § 10.404.

[4] *John Yera*, 48 ECAB 243 (1996); *Thomas E. Stubbs*, 40 ECAB 647 (1989).

[5] *Francesco C. Veneziani*, 48 ECAB 572 (1997); *Gary L. Loser*, 38 ECAB 673 (1987).

[6] *Id.*

[7] *John Litwinka*, 41 ECAB 956 (1990); *Rozella L. Skinner*, 37 ECAB 398 (1986).

[8] *Andrew Aaron, Jr.*, 48 ECAB 141 (1996); *see Richard W. Robinson*, 39 ECAB 484 (1988).

[9] A.M.A., *Guides* (5th ed. 2001).

for a whole body impairment rating of 58 percent relative to the injury of his bilateral lower extremities, as has been well elaborated throughout the record."

At the request of the Office, an Office medical adviser reviewed Dr. Henderson's report and concluded that it contained insufficient information to determine appellant's entitlement to a schedule award.

On the advice of the Office medical adviser, on March 11, 1999 the Office referred appellant, together with a statement of accepted facts, the relevant medical evidence of record and a list of questions to be answered, to Dr. Bernie L. McCaskill, a Board-certified orthopedic surgeon, for a second opinion evaluation. In his report dated April 1, 1998, Dr. McCaskill discussed all of appellant's employment-related injuries and associated medical treatment and diagnostic testing. He noted appellant's complaints of continuous and diffuse pain, numbness and burning in the lower back, both arms and both legs, as well as his complaints of diffuse facial symptoms, headaches, diffuse chest symptoms, mid back pain symptoms and diffuse symptoms affecting his genitalia and anus. With respect to his upper extremities, Dr. McCaskill stated that appellant demonstrated a full active range of motion of both upper extremities, both shoulders, elbows, wrists and hands, with no obvious swelling, atrophy, deformity or other objective evidence of a significant musculoskeletal injury in either upper extremity. Radial pulses were intact bilaterally; there were no abnormal neurological findings; strength in all motor groups was normal and five for five; all reflexes were symmetrical and there was no evidence of peripheral nerve entrapment in either upper extremities. Examination of appellant's posterior neck, mid back and lower back was unremarkable with no obvious spasm or deformity, but light touch over the mid and lower back, light pressure over the apex of appellant's head and any passive movement of his back, torso or pelvis elicited complaints of significant pain. Appellant was able to flex forward with his knees extended and come within 14 inches of reaching his toes, but demonstrated mild limitation of active lumbar extension and lateral lumbar flexion bilaterally. He demonstrated no abnormal mechanical movements when moving through this range of motion. With respect to appellant's lower extremities, Dr. McCaskill noted that there were no abnormal neurological findings in either lower extremity and no obvious swelling, atrophy, deformity or other objective evidence of a significant musculoskeletal injury. Pedal pulses were intact bilaterally; strength in all motor groups was normal and five for five and all reflexes were symmetrical. Dr. McCaskill diagnosed multi-focal subjective complaints without objective evidence of a significant musculoskeletal or neurological injury of any type. In response to the Office's specific questions, he responded:

"I believe that [appellant] was for practical purposes at maximum medical improvement two years following the injury of February 26, 1995. I base that opinion upon the fact that I do not believe that any additional supervised medical treatment would have been of predictable benefit beyond that point."

* * *

"I have indicated appellant's subjective complaints above as well as the results of my examination of him. He does not at this time have any physical findings suggestive of a significant physical injury. The extent of appellant's subjective complaints cannot be reasonably explained by any physiologic process which

might be related to activity at work. His clinical presentation is grossly functional. I do not believe that the previously done electrodiagnostic studies are valid or meaningful or that appellant has any type of neurological injury. I believe that his complaints are related to motivational factors rather than physical injury. I believe that any diagnosis which might be associated with appellant's complaints would be based on subjective complaints. His medical history supports only the contention that he might have at one time sustained an injury to his neck and/or lower back. Appellant's history does not substantiate any specific injury to either upper or lower extremity as the result of work-related activity. I again see no clear or objective evidence of a significant ongoing neck or lower back condition resultant from the alleged work-related activity."

* * *

"I do not believe that [appellant] has any permanent physical impairment resultant from the injuries in question."

Appellant subsequently submitted additional treatment notes and medical reports from Dr. Henderson dated January 25, 27, February 15, May 26, June 4, August 5, 9, 19 and October 13, 1999, January 17 and March 1, 2001, August 2, May 14, July 16 and October 29, 2002. In these reports, Dr. Henderson consistently diagnosed chronic pain, fibromyalgia, reflex sympathetic dystrophy, lumbar spondylosis, myofascitis, disc disruption, radiculitis and facet tenderness. He concluded that appellant has a 100 percent bilateral lower extremity disability due to the mental aspects of chronic pain.

The Board initially notes that none of the medical conditions diagnosed by Dr. Henderson have been accepted by the Office as employment related. While he indicated that these conditions were causally related to appellant's employment injuries, he did not explain, with supporting medical rationale, the nature of the relationship between these diagnosed conditions and the accepted right shoulder strain and right rotator cuff tendinitis or lumbar disc ligament injury with secondary inflammation. Therefore, Dr. Henderson's opinion is of insufficient probative value to support appellant's claim.[10]

In contrast, Dr. McCaskill provided a well-rationalized, thoroughly documented report explaining that he found no clear objective evidence of a significant ongoing upper extremity, neck or lower back condition resultant from the alleged work-related activity and does not believe that appellant has any permanent physical impairment resultant from the injuries in

[10] To establish causal relationship between a condition, including any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence supporting such a causal relationship. *David M. Ibarra*, 48 ECAB 218 (1996). Rationalized medical evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. *Charles E. Evans*, 48 ECAB 692 (1997).

question. Therefore, the Office properly found that Dr. McCaskill's well-rationalized report constituted the weight of the medical evidence in this claim.[11]

The decision of the Office of Workers' Compensation Programs dated October 22, 2002 is hereby affirmed.

Dated, Washington, DC
May 7, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[11] The Board notes that, by letter dated May 21, 1999, appellant requested that Dr. McCaskill's report be expunged from the record on the grounds that Dr. McCaskill had been disciplined in 1992 by the Texas State Board of Medical Examiners for poor quality of care. The Office properly declined to expunge Dr. McCaskill's report, as Dr. McCaskill had not had his medical privileges removed and continues to practice as a licensed physician. *Thomas P. Healey*, 25 ECAB 346 (1974). (An individual whose license had been revoked and has not been restored is not a "physician" within the meaning of the Act).