United States Department of Labor
Employees' Compensation Appeals Board

LILLIAN YVONNE MOORE, Appellant	)	
and	)	**Docket No. 04-162**
	)	**Issued: April 14, 2004**
U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Washington, DC, Employer	)	

Appearances:
Lillian Yvonne Moore, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 28, 2003 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated September 29, 2003 in which the Office 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 this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she is entitled to a schedule award for her accepted employment injuries of lumbar strain, permanent aggravation of degenerative disc disease with left leg neuropathy and consequential injuries of left torn medial meniscus, internal derangement of the left knee and chondromalacia patella of both knees.

FACTUAL HISTORY

This case has been before the Board previously.[1] By decision dated April 10, 2003,[2] the Board remanded the case to the Office, finding that a conflict in the medical opinion evidence had not been resolved regarding whether appellant was entitled to a schedule award. The Board specifically found that the impartial examiner, Dr. Easton L. Manderson, Board-certified in orthopedic surgery, had not reviewed a January 31, 2002 electromyography (EMG) test and had not evaluated appellant's chondromalacia for an impairment. The Board further noted that the report of an Office medical adviser, who extrapolated Dr. Manderson's data, was flawed. For these reasons, the Board remanded the case for referral to another impartial examiner for a thorough and fully rationalized medical opinion. The law and the facts as set forth in the previous Board decision and order are incorporated herein by reference.

Subsequent to the Board's April 10, 2003 decision, on July 9, 2003 the Office referred appellant, along with a statement of accepted facts, a set of questions and the medical record, to Dr. John B. Cohen, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

Appellant's treating Board-certified orthopedic surgeon, Dr. Hampton J. Jackson, Jr., submitted a number of reports dating from January 29 to August 13, 2003, in which he continued to advise that appellant was totally disabled. In a report dated May 29, 2003, he noted findings of tenderness and spasm in the lower back and continued evidence of internal derangement of the left knee which caused it to give way on multiple occasions.

In a report dated August 14, 2003, Dr. Cohen, the referee examiner, noted appellant's multiple pain complaints. Examination findings included full range of motion of both ankles and knees with mild crepitus of the left patella and no effusion of either knee. Sitting straight leg raising test and motor examination of the lower extremities were normal with intact reflexes at the knee and ankle. Dr. Cohen noted that appellant complained of buttock pain on the left with supine straight leg raising and hip flexion which did not radiate beyond the knee. When standing, appellant could extend her heels and toes without difficulty and had lumbar flexion to 90 degrees, left to right lateral bending of 20 degrees, and hyperextension of 10 degrees. Dr. Cohen stated that he had reviewed magnetic resonance imaging (MRI) scan reports of the left knee and lumbar spine dated July 11, 2002[3] and advised that his physical examination was inconsistent with the MRI scans. He noted that appellant had no atrophy of the left thigh or calf when compared to the right. Dr. Cohen opined that her complaints were related to degenerative disc disease at L5-S1 and advised that she "clearly has unrelated degenerative arthritis of her left

[1] On May 23, 1990 appellant fell from her chair at work, injuring her lower back. The Office initially accepted that she sustained an employment-related lumbar strain and later expanded the accepted conditions to include permanent aggravation of degenerative disc disease with left leg radiculopathy and consequential injuries of the left torn medial meniscus, internal derangement of the left knee and chondromalacia patella in both knees.

[2] Docket No. 03-690 (issued April 10, 2003).

[3] The left knee demonstrated mild chondromalacia, degenerative changes and a horizontal tear of the middle third of the lateral meniscus. Tears were not present in the medial compartment or cruciate ligament. The lumbar spine demonstrated no herniated disc with mild disc bulging at L3-4, L4-5 and L5-S1 and moderate disc narrowing at L5-S1 with adjacent bony degenerative changes.

knee, which is not as a result of her injury in 1990" and questioned whether appellant had left lumbar radiculopathy, based on his examination, stating, "it is unclear to me whether this lady suffered anything more than a lumbosacral contusion." He recommended a repeat EMG/nerve conduction study (NCV) examination and concluded that appellant had no permanent impairment due to the 1990 injury. In response to an Office August 25, 2003 letter, in a supplementary report dated September 15, 2003, Dr. Cohen reported that an EMG/NCV was normal. He advised that appellant's complaints were subjective and her patellar chondromalacia and lateral meniscus tear were not related to the employment injury.

By decision dated September 29, 2003, the Office found that appellant was not entitled to a schedule award for her employment injuries. The Office specifically found that, while the left knee MRI scan demonstrated a lateral meniscus tear and arthritis of the lateral compartment, Dr. Cohen advised that the knee conditions noted on the MRI scan were not related to the meniscus tear diagnosed by Dr. Dorn and were due to degenerative arthritis. The Office further commented that Dr. Cohen believed appellant's patellar chondromalacia was unrelated to the May 23, 1990 employment injury.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act[4] and section 10.404 of the implementing federal regulation, schedule awards are payable for permanent impairment of specified body members, functions or organs.[5] The Act, however, does not 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment*[6] (hereinafter A.M.A., *Guides*) has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[7]

The schedule award provision under the Act are limited to specific members or functions of the body enumerated under section 8107 and its implementing regulation. A schedule award is not payable for loss or loss of use, of any member of the body not specifically enumerated and is not payable for the body as a whole.[8] Neither the Act nor the implementing federal regulation provide for the payment of a schedule award for loss of use of the back or spine.[9] The 1960 amendments to the Act, however, modified the schedule award provision to provide for an award

[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8107; 20 C.F.R. § 10.404 (1999).

[6] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ___ (Docket No. 01-1361, issued February 4, 2002).

[7] *See Joseph Lawrence, Jr., supra* note 6; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[8] *See Ann L. Tague*, 49 ECAB 453 (1998).

[9] *See Pamela J. Darling*, 49 ECAB 286 (1998).

for permanent impairment to a member of the body covered by the schedule, regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Thus, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.[10] Furthermore, any previous impairment to the member under consideration is included in calculating the percentage of loss.[11]

ANALYSIS

In the instant case, in its April 10, 2003 decision, the Board found that a conflict in the medical opinion evidence remained regarding whether appellant was entitled to a schedule award for her employment-related conditions, and remanded the case to the Office. Thereafter, on July 9, 2003, the Office referred appellant to Dr. Cohen, who is Board-certified in orthopedic surgery, for an impartial evaluation. Dr. Cohen was also asked to provide an impairment rating under the standards provided in the A.M.A., *Guides*. Based on Dr. Cohen's reports of August 14 and September 15, 2003, by decision dated September 29, 2003, the Office found that appellant was not entitled to a schedule award. The Board, however, finds that this case is not in posture for decision regarding appellant's entitlement to a schedule award.

The Board notes that the Office construed Dr. Cohen's report to conclude that appellant was not entitled to a schedule award because he advised that appellant's knee conditions were due to degenerative arthritis and not the meniscus tear diagnosed by Dr. Dorn, and that Dr. Cohen further believed that appellant's patellar chondromalacia was unrelated to her May 23, 1990 employment injury. The Board, however, disagrees with the Office's determination. The accepted conditions in this case are lumbar strain, permanent aggravation of degenerative disc disease with left leg radiculopathy and consequential injuries of left torn medial meniscus, internal derangement of the left knee and chondromalacia patella in both knees. There is no evidence of record to indicate that the Office has rescinded acceptance of any of these conditions. Furthermore, as stated previously, any previous impairment to the member under consideration is included in calculating the percentage of loss for a schedule award.[12]

In reports dated June 26 and 29, 2003, the initial referee examiner, Dr. Manderson, advised that appellant exhibited L5 radiculopathy on examination and diagnosed chronic lumbar pain, herniated disc by history and examination suggesting L5 radiculopathy and L4-5 disc disease and status post arthroscopy of the left knee with lateral compartment disease. He advised that appellant had a 13 percent whole person impairment based on a lumbosacral spine injury. In a July 18, 2002 report, Dr. Manderson reported his review of the July 11, 2002 MRI scans and advised that the degenerative changes of appellant's lumbar spine and bilateral chondromalacia

[10] *See Thomas J. Engelhart*, 50 ECAB 319 (1999).

[11] *Mike E. Reid*, 51 ECAB 543 (2000). Office procedures provide exceptions that when the prior impairment is due to a previous work-related injury, the percentage already paid is subtracted from the total percentage of impairment. Likewise, if the Veterans Administration has paid a claimant for a previous impairment to the same member in which case an election will be required. Federal (FECA) Procedural Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(a)(2) (November 1998).

[12] *Id.*

were probably aggravated by the May 23, 1990 fall. He stated that acceptance of the left torn medial meniscus was improper.

Appellant's treating physician, Dr. Jackson, continues to advise that appellant is permanently disabled due to the accepted injuries with physical findings including a 1 millimeter loss of patellofemoral cartilage. Dr. Cohen advised that appellant "clearly" had degenerative arthritis of the left knee. Moreover, while Dr. Cohen advised that a repeat EMG had been performed which was normal, he did not provide an explanation regarding this finding to indicate whether appellant did or did not have a left leg impairment, and left leg radiculopathy had been diagnosed by Drs. Jackson and Manderson and was demonstrated on the EMG dated January 31, 2002.

Section 15.12 of the fifth edition of the A.M.A., *Guides* describes the method to be used for evaluation of impairment due to sensory and motor loss of the extremities as follows. The nerves involved are to be first identified. Then, under Tables 15-15 and 15-16, the extent of any sensory and/or motor loss due to nerve impairment is to be determined, to be followed by determination of maximum impairment due to nerve dysfunction in Table 15-17 for the upper extremity and Table 15-18 for the lower extremity. The severity of the sensory or motor deficit is to be multiplied by the maximum value of the relevant nerve.[13] Evaluation of knee arthritis can be found at section 17.2h of the A.M.A., *Guides*, with arthritis impairments rated under Table 17-3[14] and diagnosis-based estimates at Table 17-33.[15]

The Board therefore finds that a conflict remains regarding whether appellant is entitled to a schedule award, and the case must be remanded to the Office to refer appellant to another impartial examiner[16] to obtain an impairment rating based on appellant's accepted injuries, including preexisting conditions. The Office shall then issue a *de novo* decision, consistent with this decision of the Board.

CONCLUSION

The Board finds that, as a conflict of medical opinion remains, this case is not in posture for decision regarding appellant's entitlement to a schedule award.

[13] A.M.A., *Guides*, *supra* note 6 at 423.

[14] *Id.* at 544.

[15] *Id.* at 546.

[16] Office procedures provide that, if clarification is needed, the impartial examiner should be contacted. Federal (FECA) Procedural Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.5(b)(2) (March 1994); *but see Vaheh Mokhtarians*, 51 ECAB 190 (1999).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 29, 2003 be vacated and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: April 14, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member