

On April 5, 2000 a magnetic resonance imaging (MRI) scan of the left shoulder revealed biceps tendinitis. An MRI scan of the lumbar spine that same date revealed anterior bulging of the L3-4 disc, desiccation of the L1-2, L2-3, L4-5 and L5-S1 discs and a broad thin herniated disc at L5-S1 with thecal compression.

On October 15, 2002 appellant saw Dr. Arthur H. Tiger, a Board-certified orthopedic surgeon, for an evaluation of permanent impairment. Dr. Tiger estimated a 20 percent impairment of the left upper extremity and a 24 percent permanent impairment of the left lower extremity.

The Office submitted Dr. Tiger's report to an Office medical adviser for review. On January 28, 2003 the medical adviser reported that the evidence was insufficient to support that the diagnosis of herniated lumbar disc was related to the December 29, 1999 employment injury. He explained that a lumbar strain was diagnosed right after the injury. There was no further medical workup or treatment recorded until April 2000, when an MRI scan was obtained. The medical adviser reviewed Dr. Tiger's clinical findings and determined that appellant had a seven percent impairment of the left upper extremity.

The Office determined that a conflict in medical opinion existed between appellant's physician, Dr. Tiger, and the Office medical adviser on the extent of any permanent impairment resulting from the December 29, 1999 employment injury. To resolve the conflict, the Office referred appellant, together with the case file and a statement of accepted facts, to Dr. Robert Dennis, a Board-certified orthopedic surgeon, for an evaluation and opinion.¹

On April 17, 2003 Dr. Dennis related appellant's history of injury, medical treatment and complaints. He described his findings on physical examination of the upper extremities and lumbar spine. Dr. Dennis reviewed appellant's case file and the statement of accepted facts and diagnosed the following:

"1. Lumbar sprain, superimposed on, what I believe to be, a preexisting herniated disc at L5-S1 that failed to reveal demonstrable clinical findings on today's examination. There was certainly no evidence of sciatica and a normal straight-leg-raising. I found no limb involvement secondary to the lumbar spine or secondary to any local knee or ankle pathology that could be in any way identified as abnormal and certainly could not be traced back to the 1999 injury.

"2. Left shoulder sprain.

"3. I believe this left shoulder sprain was superimposed on some mild [acromioclavicular] joint arthropathy and transient tend[i]nitis of the shoulder tendon seen on MRI which I believe have completely resolved based on today's examination."

¹ Section 8123(a) of the Federal Employees' Compensation 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." 5 U.S.C. § 8123(a).

Responding to questions posed by the Office, Dr. Dennis reported that residuals of appellant's accepted lumbar and left shoulder sprain had resolved:

“[Appellant] repeatedly reminded me how there were other people present on the day that she alleged that she was injured regarding her lumbar spine who were more physically fit, being men, to lift the heavy boxes that she was assigned. She [had] a certain degree of hostility and anger in her voice. However, the lumbar sprain that she experienced, which, at most was the definitive diagnosis, was transient and it has completely resolved at this point. The MRI [scan] findings, which were positive, I believe were preexisting and the examination of the lumbar spine was so benign, on today's evaluation, that I would state that even the MRI [scan] findings produced subclinical findings. I believe that she has long since resolved the residuals of the lumbar sprain that occurred long ago.

“The examination of the claimant's shoulder was carefully carried out as could be seen under physical examination. I found no pathology, no impingement findings, no real evidence of atrophy whatsoever and no rationale to support any opinions that could be expressed as [appellant] suffering from a functional impairment identifiable to the left shoulder. Whatever transient she had of the left shoulder, has resolved, in my opinion and I found no abnormalities that could be quantified against any table or chart in the 5th [e]dition of the A.M.A., *Guides* and produce an abnormal number.”

In a decision dated June 26, 2003, the Office found that appellant was not entitled to a schedule award because the weight of the medical evidence, as represented by the opinion of Dr. Dennis, established that she had no permanent impairment of the left shoulder and no injury-related low back condition.

Appellant requested reconsideration. She objected that Dr. Dennis' office was outside her area, that he did not have the opportunity to review her MRI scans, that he provided no rationale for his remarks on preexisting conditions, that he was upset that she was 45 minutes late for her appointment and that Dr. Dennis did not report his extensive measurements.

In a decision dated August 25, 2003, the Office reviewed the merits of appellant's claim and denied modification of its prior decision.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.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. A claimant seeking compensation under the Act has the burden to establish the essential elements of her claim by the

² 5 U.S.C. § 8102(a).

weight of the reliable, probative and substantial evidence.³ A claimant seeking a schedule award under section 8107; therefore, has the burden to establish that she sustained a permanent impairment of a scheduled member or function as a result of an injury sustained while in the performance of duty.⁴

ANALYSIS

The Office accepted that appellant sustained a left shoulder strain and lumbar strain on December 29, 1999 when she lifted a parcel in the performance of duty. As she seeks a schedule award in this case, appellant has the burden to establish that this lifting incident on December 29, 1999 caused a permanent impairment of a scheduled member or function. She has not met her burden of proof.

The record in this case, contains no medical opinion affirmatively supporting that the lifting incident on December 29, 1999 caused a permanent impairment of a scheduled member or function. When the attending orthopedist, Dr. Tiger, reported on October 15, 2002 that appellant had a 20 percent impairment of the left upper extremity and a 24 percent permanent impairment of the left lower extremity, he did not address the issue of causal relationship, that is, he did not state whether or discuss how the work incident on December 29, 1999 caused or contributed to a permanent impairment of her left upper or left lower extremity. When the Office medical adviser reviewed Dr. Tiger's report, he also did not state whether or discuss how the lifting incident caused or contributed to a permanent impairment of the left upper or left lower extremity. He reported that the diagnosis of herniated lumbar disc was not related to the employment injury and that appellant had a seven percent permanent impairment of the left upper extremity, but he did not attribute this permanent impairment to the December 29, 1999 employment injury. Thus, when the Office referred appellant to Dr. Dennis, the impartial medical specialist, no physician affirmatively reported that she had an injury-related permanent impairment.

Dr. Dennis is the only physician to address the issue. He reported that the lumbar sprain appellant sustained was transient and had completely resolved. Dr. Dennis' examination of appellant's lumbar spine was so benign that the reported MRI scan findings produced subclinical findings. He concluded: "I believe that she has long since resolved the residuals of the lumbar sprain that occurred long ago." Dr. Dennis also found no pathology on examination of the left shoulder. He reported that whatever transient she had of the left shoulder had resolved.

Because the conflict between Dr. Tiger and the Office medical adviser concerned the extent or percentage of appellant's permanent impairment, its causal relationship to the accepted employment injury or whether appellant continued to suffer residuals of the accepted employment injury, Dr. Dennis is considered an impartial medical specialist on the former issue and an Office impartial physician on the latter issues. His opinion on the latter issues is not

³ *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

⁴ See, e.g., *Ernest P. Govednik*, 27 ECAB 77 (1975) (no medical evidence that the employment injury caused the claimant to have a permanent loss of use of a leg or any other member of the body specified in the schedule).

entitled to the special weight normally accorded the opinion of an impartial medical specialist.⁵ Nevertheless, as his opinion on continuing residuals is consistent with the lack of positive clinical findings and as there is no medical opinion to the contrary, his opinion constitutes the weight of the medical evidence and establishes that residuals of the accepted left shoulder and lumbar strains have resolved.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she has a permanent impairment of a scheduled member or function causally related to her December 29, 1999 employment injury. The weight of the evidence, as represented by the April 17, 2003 opinion of Dr. Dennis, establishes that residuals of her accepted employment injury have resolved, leaving no permanent impairment to a scheduled member or function.

ORDER

IT IS HEREBY ORDERED THAT the August 25 and June 26, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 2, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁵ When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to a referee 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. *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).