U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOUISE F. LANDSMARK and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Jamaica, N.Y.

Docket No. 96-362; Submitted on the Record;
Issued March 18, 1998

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained a recurrence of disability on April 8, 1993 causally related to her September 7, 1990 employment injury; and (2) whether appellant has more than a 36 percent permanent impairment of her right lower extremity for which she received a schedule award.

The Board has duly reviewed the case on appeal and finds that appellant has not met her burden of proof in establishing a recurrence of disability on April 8, 1993.

Appellant sustained a sprained right knee, tear of the lateral and medial meniscus and a Baker's cyst on September 7, 1990 in the performance of duty. The Office of Workers' Compensation Programs entered appellant on the periodic rolls on June 13, 1991. Appellant's attending physician, Dr. Shahid Mian, a Board-certified orthopedic surgeon, released appellant to return to duty on March 11, 1992 with restrictions. Appellant returned to duty on March 12, 1992. Appellant filed a notice of recurrence of disability on September 20, 1994 alleging on April 8, 1993 she resigned as the employing establishment failed to comply with her light-duty requirements. By decision dated March 23, 1995, the Office denied appellant's claim finding no evidence of a change in her condition or light-duty requirements. Appellant requested reconsideration on May 18, 1995 and by decision dated August 11, 1995, the Office denied modification of its March 23, 1995 decision.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establish that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden, the employee must show a

change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[1]

In this case, appellant alleged a change in the nature and extent of her light-duty requirements. Dr. Mian reported on March 9, 1992 that appellant could return to work on March 11, 1992 with no prolonged standing, walking or lifting. Dr. Mian repeated these restrictions on December 8, 1993. Appellant stated that she was required to "lift, cart and push" cases weighing up to 25 pounds, that she had to walk to the printer repeatedly.

The employing establishment completed a report of termination of disability on March 12, 1992 and indicated that appellant returned to work on March 11, 1992 performing regular duty. Appellant's regular-duty position of clerk typist required lifting to 10 pounds, walking and standing up to 6 hours, sitting and stooping for 2 hours and repeated bending up to 4 hours. However, the employing establishment reported that appellant was allowed to sit or stand for as long as she wished and that she was advised that someone would be available to assist her in moving files. Appellant also had full use of a desk located near the printers. The employing establishment stated that appellant was employed primarily as a typist, but was occasionally asked to perform other work. The employing establishment stated that folders could be brought and picked up from her desk. The employing establishment stated that files weighed less than 25 pounds and that the average file weighed 3 pounds or less.

In support of her claim, appellant submitted an affidavit from James Armet, president of the union. Mr. Armet submitted the affidavit to dispute testimony of appellant's supervisor in a hearing regarding unemployment benefits. He reviewed testimony by appellant and her supervisor and offered comments regarding it. However, as Mr. Armet did not offer any independent knowledge of appellant's job duties, his affidavit is insufficient to establish that she was required to work outside her limited-duty restrictions. Therefore, appellant has not established that she was required to work outside her light-duty restrictions resulting in a recurrence of disability.

Appellant also failed to submit medical evidence establishing that she experienced a change in the nature or extent of her injury-related condition. Dr. Mian did not address appellant's work restrictions following his December 8, 1993 report until April 5, 1994. He then again found that she was limited from prolonged standing, walking or lifting. Dr. Mian noted appellant had no pain in her knee in March 1993 and found in July 17, 1993 her knee examination was unchanged. However he completed a work restriction evaluation on April 5, 1994 and indicated that appellant could sit for 3 hours continuously and for 3 hours intermittently; walk for 2 hours continuously and 2 hours intermittently; stand for 1 hour continuously and 1 hour intermittently; bend for 1 hour continuously and 1½ hours intermittently and lift up to 10 pounds. He indicated that appellant could not work eight hours a day.

Dr. Mian completed a work restriction evaluation on June 28, 1994 and indicated that appellant could work four hours a day. He indicated appellant could sit for four hours, walk for

[1] *Terry R. Hedman*, 38 ECAB 222 (1986).

two hours, bend for one hour and stand for one hour all intermittently. Dr. Mian limited appellant's lifting to five pounds.

These reports are not sufficient to establish that appellant sustained a recurrence of disability in April 1993. Dr. Mian's contemporaneous reports do not indicate a worsening of appellant's condition or a change in her work restrictions. Although Dr. Mian changed appellant's work restrictions one year after she stopped work, he did not indicate that appellant was unable to work on April 8, 1993.

In a report dated April 15, 1995, Drs. Peter K.W. Lee and Robert A. Marini, physicians Board-certified in physical medicine and rehabilitation, noted appellant's history of injury and restricted her bending, squatting, climbing, kneeling, pushing and pulling as well as sitting and standing. The physicians found that appellant should not lift more than 10 pounds. This report does not support that appellant sustained a change in her condition in April 1993 necessitating a work stoppage and constituting a recurrence of total disability.

As appellant has failed to submit the necessary medical or factual information to establish that she sustained a recurrence of total disability on April 8, 1993, the Office properly denied her claim.[2]

The Board further finds that appellant's entitlement to an additional schedule award is not in posture for decision.

The Office granted appellant a schedule award for 36 percent permanent impairment of her right lower extremity to run from July 23, 1992 through July 18, 1994 on January 25, 1993. By letter dated April 29, 1994, appellant requested a continuation of her schedule award. The Office denied appellant's request for an additional schedule award on March 23, 1995. Appellant requested reconsideration and the Office denied modification of its March 23, 1995 decision on August 11, 1995.

Under section 8107 of the Federal Employees' Compensation Act[3] and section 10.304 of the implementing federal regulations,[4] schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants the Office adopted the American Medical

[2] In a report dated March 2, 1995, Dr. Roy A. Perles, a podiatrist, opined that appellant had developed a foot condition as a result of her accepted knee injury. As the Office has not issued a final decision on the issue of a consequential injury, the Board will not address it for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.304.

Association, *Guides to the Evaluation of Permanent Impairment*[5] as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[6]

In his April 5, 1994 report, Dr. Mian noted that appellant's right knee exhibited 20 degrees of valgus deformity, a large effusion and tenderness over the medial and lateral joint line. He stated appellant's range of motion was 130 degrees and that there was no ligamentous instability. He noted that appellant underwent arthroscopic surgery which demonstrated tears of the medial and lateral menisci, chondromalacia-Grade III of the medial and lateral femoral condyle and Grade II of the medial and lateral tibial plateau, as well as hypertrophic synovitis. She also had one centimeter of right thigh atrophy.

The Office medical adviser reviewed Dr. Mian's report, however, he did not consider impairment ratings due to valgus deformity, or thigh atrophy. The A.M.A., *Guides* provide that valgus deformity of 20 degrees is a 35 percent impairment.[7] The A.M.A., *Guides* provide that thigh atrophy of one centimeter is three percent impairment of the lower extremity.[8] Based on Dr. Mien's report it appears that appellant is entitled to an additional schedule award. Furthermore, the Office medical adviser found that the A.M.A., *Guides* did not provide for impairment ratings for chondromalacia, effusion crepitus and tenderness. On remand the Office should refer appellant for examination by an appropriate Board-certified specialist to determine her permanent impairment due to her accepted condition including arthritis, range of motion and other impairments as provided in the A.M.A., *Guides*.

[5] A.M.A., *Guides* 4th ed. (1993).

[6] *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[7] A.M.A., *Guides*, 78, Table 41.

[8] *Id.* 77, Table 37.

The decisions of the Office of Workers' Compensation Programs dated March 25 and August 11, 1995 are affirmed in regard to the denial of appellant's claim for recurrence of disability on April 8, 1993. The decisions are set aside and remanded for further development consistent with this opinion in regard to appellant's claim for an additional schedule award.

Dated, Washington, D.C.
March 18, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member