U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TIMOTHY M. CREMEANS and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Dayton, OH

Docket No. 00-432; Submitted on the Record;
Issued March 14, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether appellant has more than an 11 percent permanent impairment of his left leg.

On April 18, 1996 appellant, then a 39-year-old tractor operator, developed lower back pain while digging holes with a post hole digger. The Office of Workers' Compensation Programs accepted appellant's claim for an acute low back strain. He returned to work on May 6, 1996 but stopped again on November 4, 1996 and filed a claim for a recurrence of disability. Appellant underwent surgery on December 5, 1996 for an L5-S1 microdiscectomy to treat a herniated L5-S1 disc.

In a December 27, 1996 decision, the Office denied appellant's claim for a recurrence of disability on the grounds that the medical evidence of record failed to demonstrate a causal relationship between the recurrent condition and the condition previously accepted as a result of the April 18, 1996 employment injury. In a May 6, 1997 decision, issued without a hearing, an Office hearing representative found that appellant had submitted sufficient medical evidence to establish that he had a recurrence of disability for the period October 31 through November 3, 1996. The hearing representative therefore set aside the Office's December 27, 1996 decision and remanded the case for payment of appropriate compensation. He also ordered the referral of appellant to another physician for an opinion on whether appellant's herniated disc was causally related to the employment injury and whether the surgery was necessary to treat the condition. In an August 1, 1997 letter, the Office accepted appellant's claim for a herniated L5-S1 disc and the December 5, 1996 surgery. The Office authorized buy back of leave for the period November 3, 1996 through July 6, 1997 and began payment of temporary total disability compensation effective July 7, 1997.[1]

[1] On September 19, 1997 appellant underwent additional surgery in which Dr. Joseph H. Arguelles, a neurosurgeon, found that the left S1 nerve root was displaced by scar tissue with a small disc fragment within it.

On October 24, 1997 appellant filed a claim for a schedule award. In an August 10, 1999 decision the Office issued a schedule award for an 11 percent permanent impairment of the left leg.[2]

The Board finds that the case is not in posture for decision.

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulations[4] set forth the number of weeks of compensation to be paid for permanent loss or loss of use, of members or functions of the body listed in the schedule. However, neither the Act nor its regulations specify the manner in which the percentage loss of a member shall be determined. For consistent results and to ensure equal justice to all claimants, the Board has authorized the use of a single set of tables in evaluating schedule losses, so that there may be uniform standards applicable to all claimants seeking schedule awards. The American Medical Association, *Guides to the Evaluation of Permanent Impairment*[5] has been adopted by the Office as a standard for evaluating schedule losses and the Board has concurred in such adoption.[6]

In a February 9, 1999 report, Dr. Ronald W. Stout, Board-certified in family practice and occupational medicine, indicated that appellant's chief complaint was low back pain radiating into his left leg. He also noted that appellant was having difficulty due to a long history of deep venous thromboses and blood clots in his legs. On examination, Dr. Stout reported that appellant had limited motion in his back. He commented that appellant had no sensory deficit in pinprick testing. Dr. Stout indicated that appellant had decreased deep tendon reflexes at the patella on the left and no deep tendon reflexes at the Achilles tendon on the left. He found the quadriceps and extensor hallucis tendon strength to be less on the left than the right. Dr. Stout reported the calf circumference to be 43.5 centimeters (cm) on the left and 46 cm on the right. The thigh circumference was measured as 53 cm on the right and 51 cm on the left. Dr. Stout stated that the subjective symptoms were consistent with the objective symptoms. He concluded that appellant had reached maximum medical improvement. Dr. Stout stated that, under A.M.A., *Guides*, appellant had diagnosed related estimate lumbosacral category III, which equaled a 10 percent permanent impairment of the whole man.[7]

In a March 3, 1999 report, Dr. Nabil Angley, the Office medical adviser, a Board-certified orthopedic surgeon, commented that Dr. Stout's report was insufficient for a permanent impairment evaluation. Dr. Angley noted that appellant found no sensory deficit but did not

[2] Appellant accepted an offered light-duty position as a dispatcher from the employing establishment and returned to work on July 6, 1998. He stopped working in December 1998 and did not return thereafter. The Office accepted appellant's claim for back strain.

[3] 5 U.S.C. § 8107(c).

[4] 20 C.F.R. § 10.304.

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

[6] *Thomas P. Gauthier*, 34 ECAB 1060, 1063 (1983).

[7] A.M.A., *Guides*, page 102.

report whether appellant had any deficit in the motor nerves of the legs. He stated that Dr. Stout should specify which nerve was affected by deficit and indicate the grade or percentage of the nerve deficit. Dr. Angley commented that Dr. Stout had found weakness in the quadriceps, a knee extensor, and the extensor hallucis, a big toe extensor on the left but did not provide any findings on the status of the knee flexors, the ankle extensors or the ankle flexors. He stated that Dr. Stout needed to provide the grade of weakness in all the groups of muscles. Dr. Angley also noted that Dr. Stout did not mention any range of motion deficit in the joints of the legs.

In an April 20, 1999 memorandum, an Office claims examiner indicated that appellant had discussed the examination of appellant with Dr. Stout. She related that Dr. Stout insisted he had followed the A.M.A., *Guides* and felt that if he answered the questions posed by Dr. Angley, he would be going against the A.M.A., *Guides* in an evaluation of the back. The claims examiner noted that the back injury was not at issue but the information was needed to determine the permanent impairment of the legs. She indicated that Dr. Stout disagreed and requested clarification from the Office medical adviser. The claims examiner concluded that Dr. Stout was being uncooperative and stated that a second opinion examination might be needed to determine any permanent impairment of the legs.

The Office referred appellant to Dr. Stephen N. Buffington, an osteopath, for an examination. In a June 23, 1999 report, Dr. Buffington indicated that deep tendon reflexes at the patella were symmetrical while the Achilles reflex on the left was absent. He reported appellant had slight weakness on the great toe extensor on the left leg when compared to the right leg. Dr. Buffington noted pain in the sitting sciatica stretch on the left when compared to the right. He found evidence of atrophy of the left calf with a measurement of 16¼ inches on the left and 17½ inches on the right. Dr. Buffington reported appellant very slight hypothesia over the S1 nerve root distribution on the left as compared to the right, which was most notable along the lateral aspect of the foot on the left. He concluded appellant continued to have symptoms and signs consistent with a S1 radiculopathy with atrophy of the left leg with absence of the Achilles reflex on the left and hypesthesia noted involving the S1 nerve distribution on the left. Dr. Buffington related appellant's condition to a herniated disc. He noted that a recent myelogram with computerized tomography (CT) scan showed continued encroachment on the S1 nerve root either from scar tissue or recurrent disc hernia. Dr. Buffington concluded that appellant, under the A.M.A., *Guides*, was under the lumbosacral category III of radiculopathy which equaled a 10 percent permanent impairment of the whole man due to the unilateral atrophy greater than 2 cm and loss of the Achilles reflex and sensation on the left. In a June 28, 1999 addendum, Dr. Buffington indicated that he was awarding a 10 percent permanent impairment because appellant's back condition had resulted in an impairment of the left leg. He noted appellant had a significant loss of sensation in the left leg a loss of reflex and atrophy. In a July 7, 1999 addendum, Dr. Buffington stated that the 10 percent permanent impairment of the whole body equaled a 25 percent permanent impairment of the left leg as a result of the loss of sensation, loss of reflex and atrophy.

In a July 21, 1999 memorandum, Dr. Angley stated that appellant had an eight percent permanent impairment of the left leg due to atrophy of the left calf. He indicated appellant had a Grade III sensory deficit of the S1 nerve root, which equaled a 60 percent impairment of the S1 nerve root. Dr. Angley multiplied the 60 percent by the 5 percent maximum permanent impairment for sensory deficit of the S1 nerve root to conclude that appellant had a 3 percent

permanent impairment of the left leg due to sensory deficit of the left S1 nerve root. Dr. Angley combined the 8 percent permanent impairment for atrophy of the left calf with the 3 percent permanent impairment for sensory deficit to conclude appellant had an 11 percent permanent impairment of the left leg.

Dr. Stout discussed appellant's permanent impairment in relation to his back and based on an impairment of the whole. Under the Act, however, a schedule award is payable only for scheduled members of the body listed in the Act and not payable for any permanent impairment of the back or for an impairment of the whole man.[8] Therefore, appellant's permanent impairment must be based on the effects of his back condition on his leg. Dr. Stout's findings regarding appellant's left leg therefore are relevant to review of the permanent impairment evaluation of appellant's leg even though Dr. Stout's insistence that appellant should be evaluated on the permanent impairment of the back was irrelevant under the Act.

Dr. Buffington noted that appellant had atrophy of the left calf which was used in the calculation of appellant's permanent impairment. However, Dr. Stout had reported atrophy of the left thigh, which would also form a part of a permanent impairment calculation. Dr. Buffington did not make any findings on whether appellant had atrophy of the left thigh. Dr. Stout noted appellant had loss of strength in two muscle groups in the left leg. Dr. Angley commented that Dr. Stout's report was deficient in part because he did not comment on any weakness in any of the other muscle groups of the left leg. Dr. Buffington, however, reported on muscle weakness in the left great toe extensor without comment on the other muscle groups of the leg. Dr. Angley did not comment on the fact that Dr. Buffington's report did not contain the detail included in Dr. Stout's report, which he found deficit in this respect. In addition, neither Dr. Buffington nor Dr. Angley discussed whether appellant had any permanent impairment due to muscle weakness in the left leg.

Dr. Angley, on the basis of Dr. Buffington's report, concluded that appellant had a Grade III sensory deficit of the S1 nerve root. He did not provide any explanation, however, on how he concluded appellant had a Grade III sensory deficit in light of the absence of the Achilles deep tendon reflex and the loss of sensation in the lateral aspect of the left leg and foot. Both Drs. Stout and Buffington concluded that appellant had a diagnosis related estimate of a 10 percent permanent impairment of the whole man based on a category III lumbosacral radiculopathy. Dr. Angley did not discuss whether a category III radiculopathy automatically equaled a Grade III sensory deficit under the A.M.A., *Guides*. Dr. Angley, therefore, did not justify his grading of appellant's S1 nerve root sensory deficit based on the findings of sensory deficit made by Dr. Buffington.

As the examination of Dr. Buffington did not provide a thorough set of findings of appellant's left leg on which to base a schedule award evaluation, appellant must be referred to another appropriate specialist for an examination. The specialist should be requested to discuss all aspects of appellant's left leg, including range of motion, atrophy of the thigh and calf, weakness in any or all muscles groups in the leg, and sensory deficit of the leg including loss or absence of reflexes. The specialist should then be requested to give an estimate of the permanent

[8] *Ann L. Tague*, 49 ECAB 453 (1998); *Pamela J. Darling*, 49 ECAB 286 (1998).

impairment of appellant's left leg in accordance with the A.M.A., *Guides*. After further development as it may find necessary, the Office should issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs, dated August 10, 1999 is hereby set aside and the case remanded for further action as set forth in this decision.

Dated, Washington, DC
March 14, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member