U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH D. McNEARNEY and U.S. POSTAL SERVICE,
POST OFFICE, Bakersfield, CA

Docket No. 01-1234; Submitted on the Record;
Issued January 8, 2002

DECISION and ORDER

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

The issue is whether appellant is entitled to a schedule award.

The Office of Workers' Compensation Programs accepted appellant's claim for internal derangement of the left knee. On March 27, 1999 he filed a claim for a schedule award.

In a report dated December 21, 1998, Dr. James C. Zmolek, a Board-certified orthopedic surgeon, considered appellant's history of injury and reviewed x-rays and a magnetic resonance imaging (MRI) scan. He performed a physical examination showing, among other findings, that appellant's dorsalis pedis and tibialis posterior pulses were 2+/4 intact, that the deep tendon reflexes were 1+4 intact, the left knee lacked 10 degrees of active extension but had full passive extension, that the knee flexed to 125 degrees and appellant had 1+ laxity to lateral collateral ligament stress testing. He diagnosed moderate to severe post-traumatic arthritis, no definite meniscal tears and ligamentous laxity of the left knee.

In a report dated June 21, 1999, appellant's treating physician, Dr. John Miyakawa, a Board-certified family practitioner, considered appellant's history of injury and noted that appellant currently had Grade III laxity of medial and lateral collateral ligaments. He reviewed the MRI scan which showed attenuation of both cruciate ligaments, osteochondritis dessiccants, subchondral bone cysts, post-traumatic arthritis and degenerative changes of both mensci. Dr. Miyakawa stated that appellant was in chronic pain, 3-4/10, which was aggravated by standing, had very little muscle atrophy and was permanently unable to climb ladders, could only do minimal stairs and could stand no longer than 2 to 3 hours. He opined that appellant had a 50 percent impairment.

In a report dated June 11, 1999, a referral physician, Dr. Geoffrey M. Miller, a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination and reviewed x-rays and the MRI scan. He diagnosed post-traumatic arthritis. Dr. Miller stated that appellant's symptoms were over the proximal tibial region and he had 8/10 pain. On physical examination he found that appellant had a symmetrical gait, that he had no

obvious varus or valgus deformity and both knees had approximately the same range with 0 to 140 on the right and 0 to 130 on the left. Dr. Miller found that appellant had a well-healed 10 centimeter transverse scar of the right knee where he had a patellar fracture repaired. He found that in his left knee appellant had an "8 cm. curvilinear incision, just parapatellar, where he had the open fracture, over the proximal tibial plateau." Dr. Miller stated that on both sides the patellofemoral compression, the ligament testing and the joint line tenderness were negative. In his conclusion, he opined that he agreed with Dr. Miyakawa that some restrictions were appropriate, but he stated that "the evidence did not support a work-related injury, but rather the natural progression of an underlying problem."

In a report dated July 19, 1999, the district medical adviser reviewed Drs. Miyakawa's, Zmolek's and Miller's reports. He concluded that appellant's medical records showed that appellant had no current subjective complaints nor objective finds related to "any specific work-related injury on May 24, 1998, or to any work-cumulative trauma." He stated:

> "The records would support that this individual's current left knee symptomatology -- his subjective complaints and objective findings are due to the nonindustrial late 1977 open tibia-fibular fractures and not the result of work-related activities. There is no evidence of any current "internal derangement." The family physician appears to document ligament laxity, but the evaluating orthopedic surgeon in the June 11, 1999 report indicates negative ligamentous testing, and this reviewer would comment that more weight would be given to an examining orthopedic surgeon than a family physician in evaluating joint pathology."

The district medical adviser found that appellant had a zero percent impairment of the left lower extremity as a result of the work-related condition and that he had no internal derangement but had post-traumatic osteoarthritis related to a nonindustrial injury.

By decision dated January 19, 2000, the Office denied the claim, stating that the evidence established that appellant had no impairment to his left leg causally related to factors of his federal employment.

Appellant requested a hearing before an Office hearing representative which was held on June 27, 2000. At the hearing, appellant described the history of his knee injury and described his current symptoms. He stated that he could not stand on his feet more than two hours a day, he could not go up and down stairs, he could not "walk and play golf," play sports or do "anything that [put] a whole lot of strain on [his] knee." Appellant said that his knee was "doing better" than it use to. He described his working conditions and his medical treatment. Appellant stated that his knee pain while sitting at the hearing was "not too bad" because he was not on his knee.

In a report dated August 3, 2000, Dr. Miller reiterated that appellant had 8/10 pain and that he had pain in the proximal tibia usually with prolonged weightbearing. He stated that appellant also had pain in his anteromedial joint line after prolonged weightbearing. Dr. Miller stated that appellant had a hyperextensibility of his knee and tended to walk with his knee flexed to protect it. He reviewed the same diagnostic tests of record and diagnosed tricompartmental

post-traumatic arthritis of the left knee. He stated that based upon appellant's history that he was able to perform "much more vigorous standing and walking when he initially came to the [employing establishment], it is more likely than not that [appellant] already had a preexisting condition that would inevitably go on to an arthritic process, but that has been markedly accelerated by the nature of his occupation at the [employing establishment]." Dr. Miller stated that the fact that the progress of appellant's symptoms dramatically changed with the job modification confirms that the postal work itself was "unfortunately a significant contributing factor to his current disability and the progression of his arthritis."

He stated that "half of the responsibility of the knee disability should certainly be to the initial injury, absent which he would have no problems at all at this time regardless of his postal employment[,] and 50 percent to the postal activity which has caused an acceleration or aggravation of his disability." In assessing appellant's impairment, he stated that the MRI scan showed evidence of multiple abnormalities from appellant's prior injury but stable ligaments and menisci. Using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1994), Table 64, page 85, "including the tibial plateau damage and the attenuation of the menisci and cruciates," appellant had a 29 percent impairment to his left lower extremity.

By decision dated September 15, 2000, the Office hearing representative affirmed the Office's January 19, 2000 decision.

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

The schedule award provision of the Federal Employees' Compensation Act[1] provides for compensation to employees sustaining permanent impairment from loss or loss of use of specified members of the body. The Act's compensation schedule specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act does not, however, specify the manner by which the percentage loss of a member, function or organ shall be determined. The method used in making such a determination is a matter that rests in the sound discretion of the Office.[2] For consistent results and to ensure equal justice under the law to 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.[3]

In this case, Dr. Mikayawa's June 21, 1999 opinion that appellant had a 50 percent permanent impairment to his left knee is not probative because he did not use the A.M.A., *Guides* (4th ed. 1994) in rating appellant and did not explain how he obtained that rating.[4] In finding that appellant had a 0 percent impairment, in his July 19, 1999 report, the district medical adviser stated that Dr. Miller's June 11, 1999 report was entitled to more weight than

[1] 5 U.S.C. § 8107 *et seq.*

[2] *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Danniel C. Goings*, 37 ECAB 781, 783 (1986).

[3] *Arthur E. Anderson, supra* note 2 at 697; *Henry L. King*, 25 ECAB 39, 44 (1973).

[4] *See Paul R. Evans*, 44 ECAB 646, 651 (1993); *Thomas P. Gauthier*, 34 ECAB 1060, 1063 (1983).

Dr. Mikayawa's report because Dr. Miller was an orthopedic surgeon and Dr. Mikayawa was a family practitioner. Dr. Miller's submission of his second report, dated August 3, 2000, however, rendered his first report illogical and inconsistent. In the June 11, 1999 report, Dr. Miller stated that appellant had no work-related injury but was suffering from an underlying problem that had progressed. In his August 3, 2000 report, he found that based on the fact that appellant's knee symptoms significantly improved upon his performing modified work at the employing establishment, appellant's knee disability was due 50 percent to an underlying condition and 50 percent to aggravation of his disability. Based on the same MRI scan findings that he previously reviewed and using Table 64 of the A.M.A., *Guides* (4th ed. 1994), Dr. Miller concluded that appellant had a 29 percent impairment to his left lower extremity. His opinion is not probative, however, because he did not clearly explain the change in his opinion and he did not correlate his findings to specific sections of Table 64 so as to enable the reviewer to determine if his findings were proper. Since the district medical adviser relied on Dr. Miller's opinion in concluding appellant had a 0 percent impairment, his opinion is also not probative.

The Board has held that proceedings under the Act are not adversarial in nature and the Office is not a disinterested arbiter.[5] The Board has held that while appellant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence and has the obligation to see that justice is done.[6]

The case must be remanded for the Office to send appellant with a statement of accepted facts and the medical record to another referral physician to determine whether appellant is entitled to a schedule award. The physician should address all the relevant medical findings made by him and the other doctors in the record including whether appellant's laxity of ligaments is causing him any disability. The physician should use the A.M.A., *Guides* (4th ed. 1994) to assess the degree of disability and correlate his physical findings to specific sections of a table or figure and provide a rationalized medical opinion on how he obtains his conclusion. After further development of the evidence as the Office deems necessary, the Office shall issue a *de novo* decision.

[5] *Lauramae Heard*, 42 ECAB 688, 692 n.9 (1991); *Elaine K. Kreymborg*, 41 ECAB 256, 258 (1989).

[6] *Heard*, *supra* note 5.

The Office's September 15 and January 19, 2000 decisions are set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
January 8, 2002

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member