U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LOUIS NARDIELLO and U.S. POSTAL SERVICE,
POST OFFICE, Newark, NJ

Docket No. 03-1142; Submitted on the Record;
Issued October 17, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has more than a two percent permanent impairment to his right lower extremity, for which he received a schedule award.

The Office of Workers' Compensation Programs accepted appellant's claim for a laceration of the left knee, right leg and knee contusions, a tear of the right anterior cruciate ligament and a tear of the right medial meniscus on March 16, 1994. He performed limited-duty work following his injury and surgery and retired in 1997, because he could not perform his full duties at work. Appellant underwent a partial medial meniscectomy on the right on January 15, 1996 which was authorized by the Office. In 1997, he filed a claim for a schedule award.

By decision dated April 24, 2000, the Office denied appellant's claim, stating that he had not yet reached maximum medical improvement from the residuals of the March 16, 1994 employment injury. By letter dated May 4, 2000, appellant requested an oral hearing before an Office hearing representative. By decision dated August 15, 2000, the Office hearing representative remanded the case for appellant to be referred to a physician to determine whether he had reached maximum medical improvement, whether his preexisting degenerative joint disease was aggravated by the March 16, 1994 employment injury, whether a total right knee replacement would be work related and what percentage of permanent impairment resulted from the injury.

In a report dated November 28, 2000, Dr. David Rubinfeld, a Board-certified orthopedic surgeon, stated that appellant reached maximum medical improvement and had a two percent permanent impairment to his right lower extremity based on his partial medial meniscectomy. In a report dated December 18, 2000, Dr. Rubinfeld opined that appellant's degenerative joint disease was not caused or aggravated by the March 16, 1994 employment injury and, therefore, the total right knee replacement would not be work related.

By decision dated December 22, 2000, the Office determined that appellant's degenerative joint disease and total right knee replacement surgery was not related to the

March 16, 1994 employment injury. By letter dated June 13, 2001, appellant requested an oral hearing before an Office hearing representative, which was held on December 5, 2001.

By decision dated February 25, 2002, the Office hearing representative found that there was a conflict in the medical evidence between appellant's treating physicians, Dr. William Vonroth, a Board-certified orthopedic surgeon, and Dr. Michael P. Wujciak, a Board-certified orthopedic surgeon, who opined that appellant's March 16, 1994 employment injury aggravated the osteoarthritis in his right knee and Dr. Rubinfield, who opined that appellant's degenerative joint disease was not work related. There was also a conflict between Dr. Vonroth, who opined that a total right knee replacement would be work related and Dr. Rubinfeld, who opined that it was not. The Office hearing representative remanded the case for the Office to refer appellant to an impartial medical specialist.

The Office referred appellant to Dr. Carl F. Mercurio, Board-certified orthopedic surgeon, selected as the impartial medical specialist. In a report dated April 26, 2002, Dr. Mercurio considered appellant's history of injury, performed a physical examination and diagnosed internal derangement of the right knee, status post arthroscopy and status post laceration of the left knee. He stated that appellant's degenerative joint disease of the right knee was not exacerbated by the March 16, 1994 employment injury based on the report Dr. David J. Greifinger, a Board-certified orthopedic surgeon, who examined appellant on March 21, 1994. He stated that appellant's right leg had a mid-shaft contusion, the knee itself had a good arc of motion, there was no evidence of an effusion, the ligaments were stable and the ankle had physiologic motions. Dr. Mercurio also considered that under "Impression," Dr. Greifinger stated that appellant sustained a contusion of the right leg, which should resolve spontaneously. He stated that it was "apparent several days after the injury there [were] no specific objective findings" regarding appellant's knee. Dr. Mercurio stated that if there had been an exacerbation several days after the injury, there would have been more significant subjective complaints and objective findings. He stated that appellant's first complaints regarding the right knee were to Dr. Wujciak on October 18, 1985 approximately a year after the original injury. Dr. Mercurio stated that if there was an exacerbation of the underlying problem, it would have been within the first few days.

Dr. Mercurio opined that, since there was no aggravation of appellant's degenerative joint disease by his employment, the total right knee replacement would not be necessary. Applying the (5th ed. 2001) of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, Table 17-33, page 546, he determined that appellant had a two percent permanent impairment to his right leg due to a partial medial meniscectomy surgery. He stated that he could not apply Table 17-31, page 544, to determine arthritis impairment based on cartilage intervals because he did not have any x-rays of the knee to determine cartilage interval.

In reports dated May 9 and 15, 2002, the district medical adviser reviewed Dr. Mercurio's April 26, 2002 report and adopted his conclusions, stating that appellant's degenerative joint disease was not aggravated by the March 16, 1994 employment injury, the total right knee replacement was not medically necessary and appellant was entitled to a two percent permanent impairment to his right lower extremity pursuant to the (5th ed. 2001) of the A.M.A., *Guides*, Table 17-33, page 546.

By decision dated May 22, 2002, the Office granted appellant a schedule award for a two percent impairment to the right lower extremity. The Office based its award on the opinion of the impartial medical specialist, Dr. Mercurio. The Office also found that his opinion established that appellant's degenerative joint disease of the right knee was not related to the March 16, 1994 employment injury and a total right knee replacement would not be work related. The Office determined that the third-party surplus appellant had received for his injury for $15,939.15, would be offset by the projected schedule award of $3,058.55 to yield an adjusted surplus of $12,880.60.

By letter dated June 11, 2002, appellant requested an oral hearing before an Office hearing representative.

By decision dated November 25, 2002, the Office hearing representative found that the issuance of the schedule award was premature because Dr. Mercurio's opinion required clarification. The Office hearing representative stated that, if appellant's arthritis preexisted the March 16, 1994 employment injury or the arthritis was worsened by the authorized January 15, 1996 surgery, it was a factor to be included in the schedule award determination. He also stated that if appellant's degenerative joint disease in the right knee was worsened by the January 15, 1996 surgery, appellant would be entitled to compensation for treatment of his condition. The Office hearing representative found that Dr. Mercurio did not address these particular issues. He remanded the case for the Office to obtain a supplemental report from Dr. Mercurio regarding whether appellant's arthritis preexisted the March 16, 1994 employment injury or was worsened by the January 15, 1996 surgery. Further, the Office hearing representative stated that if either question was answered in the affirmative, Dr. Mercurio should obtain x-rays of appellant's right knee so that he could address whether appellant had an impairment pursuant to Table 17-31, page 544, of the (5th ed. 2001) of the A.M.A., *Guides*.

In a report dated January 2, 2003, Dr. Mercurio opined that appellant's arthritis in his right knee was present prior to the March 16, 1994 employment injury, but was asymptomatic. He based his conclusion "on the fact" that appellant had no preexisting complaints and no previous injuries to the right lower extremity, particularly to the right knee. Dr. Mercurio stated:

> "[O]ne would expect a person 56 years of age to have age-related degenerative changes as described by Dr. Wujciak in his operative report of January 15, 1996. It is my opinion just as one can look at an oak tree and know that it was not planted yesterday. One could look at these types of diagnostic studies, that is, the MRI [magnetic resonance imaging scan] and x-rays (as done by Dr. Wujciak on October 18, 1995) and know that it takes years for these changes to develop and are not caused by an acute trauma."[1]

Dr. Mercurio reiterated that the arthritis was not caused by the accident "for reasons stated in [his] previous report" and referred to Dr. Grefinger's examination, the MRI scan, the preoperative x-ray findings and Dr. Wujciak's operative report. Dr. Mercurio stated that the

[1] An MRI scan dated September 18, 1995 showed joint effusion, probable chronic "acl" tear, Grade III tear, posterior horn, medial meniscus and meniscocapsular separation medially. No x-ray reports around that time are in the record.

authorized January 15, 1996 right knee surgery did not worsen the underlying arthritic disease of the right knee, noting that after surgery, Dr. Wujciak returned appellant to light duty in March 1996 and regular duty in May 1996. Dr. Mercurio stated that, if there was a worsening of appellant's underlying degenerative condition, Dr. Wujciak would not have cleared him to return to work. Dr. Mercurio stated that appellant's recovery would be the normal progression following an arthroscopy medial meniscectomy. Regarding the use of x-rays, Dr. Mercurio stated that current x-rays would represent an ongoing age-related degenerative process and one would need to utilize x-rays that were done postoperatively or near the time of appellant's release to return to normal duties, to establish impairment secondary to arthritic changes.

By decision dated March 7, 2003, the Office found that Dr. Mercurio's January 2, 2003 opinion established that appellant's degenerative joint disease was neither exacerbated by the March 16, 1994 employment injury, nor worsened by the January 15, 1996 employment injury and that, therefore, appellant was not entitled to compensation for degenerative joint disease of the right knee. The Office also found that he was not entitled to more than two percent impairment to his right knee.

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

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulations[3] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. 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. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[4]

The Office erroneously approved the schedule award for a two percent permanent impairment because it did not include appellant's preexisting arthritis condition. It is well established that, in determining entitlement to a schedule award, preexisting impairments to the schedule member are to be included.[5] As noted by Larson, this is "sometimes expressed by

[2] 5 U.S.C. § 8107 *et seq.*

[3] 20 C.F.R. § 10.404.

[4] *See id*.; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

[5] *Michael C. Milner*, 53 ___ (Docket No. 01-620, issued March 13, 2002); *Lela M. Shaw*, 51 ECAB 372, 374 n. 7 (2000).

saying that the employer takes the employee as he finds him."[6] The Office referred appellant to Dr. Mercurio and he provided an assessment of appellant's schedule award impairment.[7] In his dated April 26, 2002 report, Dr. Mercurio opined that appellant's degenerative joint disease was not exacerbated by the March 16, 1994 employment injury, based on Dr. Greifinger's notes in March 1994, that the physical examination showed good arc of motion, no effusion and stable ligaments. Dr. Mercurio found that the total right knee replacement would not be necessary since the March 1994 employment injury did not aggravate appellant's degenerative joint disease. In his January 2, 2003 report, Dr. Mercurio stated that appellant's arthritis in the right knee was present prior to the March 16, 1994 employment injury but was asymptomatic. He stated that appellant did not have preexisting complaints and no previous injuries and that one would expect a person 56 years of age to have age-related degenerative changes as described by Dr. Wujciak in his January 15, 1996 report.

Dr. Mercurio, however, did not follow the Office hearing representative's instructions. The Office hearing representative stated that if the answer to appellant having a preexisting impairment to the schedule award was affirmative; he should obtain current x-rays to assess the additional impairment. He clearly stated that appellant had arthritis prior to the March 16, 1994 employment injury albeit asymptomatic, and stated that appellant currently had degenerative joint disease. Dr. Mercurio should have obtained current x-rays to assess appellant's additional degree of permanent impairment, if any, under the (5th ed. 2001) of the A.M.A., *Guides* due to the degenerative disc disease. The case will, therefore, be remanded for the Office to obtain current x-rays and determine the degree of appellant's impairment based his preexisting condition of arthritis and his residuals from the March 16, 1994 employment injury. After such development as the Office deems necessary, it should issue an appropriate decision regarding appellant's schedule award entitlement.

[6] A. Larson, *The Law of Workers' Compensation* §§ 9.02, 87.02 (2000). "Nothing is better established in compensation law than the rule that, when industrial injury precipitates disability from a latent prior condition … the entire disability is compensable and … no attempt is made to weight the relative contribution of the accident and the preexisting condition to the final disability or death." Larson, § 90.04.

[7] The Office indicated that Dr. Mercurio served as an impartial medical specialist. However, there was no conflict regarding appellant's schedule award entitlement at the time of the referral and, therefore, Dr. Mercurio served as an Office referral physician.

The March 7, 2003 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded for further action consistent with this decision.

Dated, Washington, DC
October 17, 2003

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member