U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA T. BROWN and DEPARTMENT OF THE ARMY, DWIGHT DAVID EISENHOWER ARMY MEDICAL CENTER, Fort Gordon, GA

Docket No. 03-1068 and 03-1342; Submitted on the Record;
Issued September 17, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant met her burden of proof in establishing that she sustained a recurrence of disability on November 15, 1993, causally related to her August 20, 1992 accepted employment injury; (2) whether the Office of Workers' Compensation Programs met its burden of proof to rescind a 12 percent schedule award for the left lower extremity, and instead grant a schedule award for 5 percent; and (3) whether appellant is entitled to more than a 25 percent permanent impairment of her right lower extremity for which she received a schedule award.

On August 23, 1992 appellant, then a 46-year-old food service worker, filed a traumatic injury claim alleging that on August 20, 1992 she injured her back while picking up a large mixing bowl. The Office accepted that she sustained sciatica in the performance of duty on August 20, 1992; she returned to light-duty work in September 1992. Appellant filed a claim for a schedule award, which the Office denied on August 2, 1995. She requested reconsideration but, the Office denied her request on September 24, 1997 as untimely. By decision dated October 1, 1999, the Board found that the Office improperly refused to reopen appellant's claim for a merit review and remanded the case to the Office.[1] By decision dated November 16, 1999, the Office denied appellant's claim for a schedule award based on the weight of the medical evidence of record. By decision issued on March 1, 2001, the Board affirmed the Office's decision.[2] Appellant requested reconsideration with the Office and the Office denied her request on May 25, 2001. She requested reconsideration again, but by decision dated October 25, 2001, the Office denied modification of its prior decision.

On January 20, 2002 appellant filed a Form CA-2a alleging that she sustained a recurrence of disability causally related to her August 20, 1992 accepted work injury. Since she

[1] Docket No. 98-498 (issued October 1, 1999).

[2] Docket No. 00-845 (March 1, 2001).

did not list a date of recurrence on her CA-2a form, the claims examiner determined that the date of recurrence was November 15, 1993, the date that appellant stopped work and also the beginning date for which appellant claimed wage-loss compensation. By letter dated January 29, 2002, the Office informed appellant that, in order to establish a recurrence of disability, she must either submit evidence showing that her light-duty assignment changed such that it no longer met the restrictions by her physician or a narrative medical report indicating that she stopped work because of a worsening in her employment-related condition. Appellant submitted medical reports identifying various medical conditions dated from 1992 to 1997. By decision dated March 8, 2002, the Office denied appellant's claim for recurrence of disability on the grounds that the medical evidence of record failed to support a recurrence as alleged. Appellant disagreed with the Office's decision and requested a review of the written record. By decision dated October 24, 2002, the Office hearing representative affirmed the prior decision on the grounds that the record did not contain medical evidence demonstrating that appellant's total disability beginning November 15, 1993 was due to the accepted work injury.

By decision dated May 21, 2002, the Office awarded appellant a 12 percent permanent impairment of the left lower extremity. By decision dated January 16, 2003, the Office awarded her a 25 percent permanent impairment of the right lower extremity. By decision dated March 7, 2003, the Office issued an amended award of compensation issuing appellant a five percent permanent impairment of the left lower extremity. The Office noted that the Office medical adviser improperly calculated the 12 percent permanent impairment rating for the left leg based on the attending physician's report and subsequently recalculated the impairment rating.

The Board finds that appellant did not meet her burden of proof in establishing that she sustained a recurrence of disability on November 15, 1993, causally related to her August 20, 1992 accepted employment injury.

When an employee, who is disabled from the job that he or she held when injured on the account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee 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 to show that he or she 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 job requirements.[3]

In this case, appellant alleged that she never completely recovered from her August 20, 1992 work injury and that her condition worsened. She returned to light-duty work in September 1992 at two hours per day; she returned to full-time light duty on December 14, 1992. Appellant took intermittent time off work due to various medical problems and stopped work completely on November 15, 1993. In support of her claim for recurrence of disability, she submitted numerous medical reports and treatment notes. In reports discussing appellant's back condition; however, the physicians of record diagnosed chronic pain syndrome and degenerative disc disease but did not provide a rationalized medical opinion, supported by objective medical

[3] *Fallon Bush*, 48 ECAB 594 (1997).

evidence, indicating a worsening of appellant's work-related back condition such that she had become totally disabled for work.

Dr. Guy C. Heyl, a Board-certified orthopedic surgeon, stated in an October 26, 1993 report:

> "[Appellant] does have objective disability in the back. She has MRI [magnetic resonance imaging] [scan] evidence of degeneration at the L4-5 disc. [Appellant] has significant reduction in motion in her lumbar spine.… I feel that this is the result of the lifting injury that started her problems in August 1992. [Appellant] has had an injury followed by a period which has been a continuation of back problems. The findings on the MRI [scan] of degeneration of the lumbar disc can begin with a specific injury which I believe has happened in [appellant's] case. I believe that [appellant's] August 20, 1992 injury is continuing to cause her problems. I do not think [that] she has reached maximum medical improvement."

Even though Dr. Heyl opined that appellant's August 1992 back injury symptoms had continued and indicated that an MRI scan showed the existence of degenerative disc disease, he did not opine that there was a change in the nature or extent of appellant's original accepted condition of sciatica, nor did he explain the causal relationship between the condition and the degenerative disc disease. Also, Dr. Heyl treated appellant before her alleged date of recurrence of disability on November 15, 1993 and, as such, his report is of little probative value in establishing that appellant was totally disabled for work as of that date and could no longer perform her light-duty job requirements.

In a report dated February 17, 1995, Dr. George R. Dawson, a Board-certified orthopedic surgeon, indicated that he examined appellant and the medical evidence of record and diagnosed "moderate degenerative disc disease at multiple levels lumbar and lower thoracic spine" and "history of low back injury with some left leg pain 'sciatica' in 1992." He did not opine, however, that there was a change in the nature and extent of appellant's accepted work-related condition or that her current condition was the result of the low back injury in 1992. Further, he did not mention the alleged date of total disability beginning November 15, 1993 or opine that appellant was totally disabled as of that date and unable to perform her limited-duty work. He also noted: "[Appellant's] impairment[,] at this time[,] is mainly related to her degenerative disc disease." For these reasons, Dr. Dawson's report is of little probative value in establishing that appellant sustained a recurrence of disability beginning November 15, 1993.

Appellant also submitted reports from Dr. James D. McInnis dated December 17, 1997 and June 16, 1999. He indicated that objective studies showed abnormalities in the cervical, thoracic and lumbosacral regions and suggested that these were traumatically induced conditions as opposed to just a degenerative process. He stated: "This review of [appellant's] records, in my opinion, does show a direct cause or relationship of the on-the-job injury." Even though Dr. McInnis opined that appellant's current condition was a result of her on-the-job injury, he did not support his opinion with medical rationale or explain the relationship between the accepted work-related condition and the current abnormalities in the cervical, thoracic and lumbosacral regions. He also did not indicate that appellant was totally disabled for work or mention the date of her alleged recurrence of total disability. In his second report, he noted that appellant was on

total and permanent disability but did not indicate when she became totally disabled and did not opine that her disability was due to the accepted work injury. As such, Dr. McInnis' reports are of little probative value in establishing appellant's alleged recurrence of disability beginning November 15, 1993. Appellant also submitted a Social Security Administration decision finding that she was totally disabled beginning August 19, 1992; however, the Social Security Administration decisions are not dispositive in this case, as the Board has held that entitlement to benefits under one Act does not establish entitlement to the other.[4] The findings of other administrative agencies are not determinative on proceedings under the Federal Employees' Compensation Act[5] which is administered by the Office and the Board and a determination made for disability retirement purposes is not determinative of the extent of physical impairment or loss of wage-earning capacity for compensation purposes.[6] The two relevant statutes (Social Security Act and the Federal Employees' Compensation Act) have different standards of medical proof on the question of disability; disability under one statute does not prove disability under the other. Furthermore, under the Federal Employees' Compensation Act, for a disability determination, appellant's conditions must be shown to be causally related to his federal employment. Under the Social Security Act, conditions, which are not employment related, may be taken into consideration in rendering a disability determination.[7]

Because appellant has failed to submit rationalized medical evidence establishing that disability on or after November 15, 1993 was causally related to the August 20, 1992 accepted employment injury, the Board finds that appellant has not satisfied her burden of proof.[8]

The Board also finds that the Office met its burden of proof in rescinding the 12 percent schedule award for the left lower extremity and instead granting an award of 5 percent.

The Board has upheld the Office's authority to reopen a claim where supported by the evidence on its own motion under section 8128(a) of the Act[9] and set aside or modify a prior decision and issue a new decision.[10] The Board has noted; however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[11] It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[12] In

[4] *Hazelee K. Anderson*, 37 ECAB 277 (1986).

[5] 5 U.S.C. §§ 8101-8193.

[6] *Hazelee K. Anderson, supra* note 4.

[7] *John P. Hurley*, 34 ECAB 494 (1982).

[8] Appellant did not allege that there was a change in the nature and extent of her light-duty job requirements in this case. She returned to light-duty work with restricted lifting requirements and a reduced workday and also had intermittent time off work until she stopped work in November 1993.

[9] 5 U.S.C. § 8128(a); *see also* 20 C.F.R. § 10.610.

[10] *Eli Jacobs*, 32 ECAB 1147 (1981).

[11] *Doris J. Wright*, 49 ECAB 320 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

[12] *Carolyn F. Allen* 47 ECAB 240, 247 (1995).

establishing that its prior issuance of a schedule award was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.[13]

The schedule award provisions of the Act[14] and its implementing regulation[15] 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment*[16] has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[17]

Before the A.M.A., *Guides* may be utilized, however, a description of appellant's impairment must be obtained from appellant's attending physician. The Federal (FECA) Procedure Manual provides that, in obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a "detailed description of the impairment which includes, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent description of the impairment."[18] This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its restrictions and limitations.[19]

In this case, the Office requested that appellant's attending physician and Board-certified orthopedic surgeon, Dr. Jeff N. Gheraibeh, determine the extent of permanent partial impairment of appellant's left and right lower extremities. He stated in a November 30, 2001 report:

> "[Appellant] was examined by me again on November 26th. She has hypothesia of the posterior aspect of the calf on the left leg. This indicates sensory loss of the S1 nerve root; which equals to five percent impairment of the lower extremity. [Appellant] has Grade 1 muscle weakness 3/5 of the right ankle and dorsiflexors, planter flexors (extensors) which amount to 25 percent impairment of the lower extremity on the right. The motor nerves involved are L5-S1 nerve roots. She

[13] *Alice M. Roberts,* 42 ECAB 747 (1991).

[14] 5 U.S.C. § 8107.

[15] 20 C.F.R. § 10.404 (1999).

[16] A.M.A., *Guides*, (5th ed. 2001).

[17] *Supra* note 12.

[18] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(c) (March 1995).

[19] *Noe L. Flores*, 49 ECAB 344 (1998).

has reached maximum medical benefit of the lower extremities as of December 20, 2001."

The Office referred Dr. Gheraibeh's report to the Office medical adviser for calculation of appellant's permanent impairments. In a report dated December 18, 2002, the Office medical adviser stated:

> "Left leg hypoesthesia, portion of calf equals sensory loss of S1 nerve root. This is a [five] percent permanent impairment of the left lower extremity, per Table 15-18, page 424 of the A.M.A., *Guides*, [fifth] edition. Right ankle weakness of 3/5 of ankle dorsiflexors and plantar flexors. Maximum for these nerves is 57 percent of lower extremity per Table 15-18, page 424, Grade 3 weakness is 38 percent of maximum per Table 15-16, page 424. Thus 38 percent of 57 percent is 20 percent. I recommend allowing 25 percent permanent impairment of the right lower extremity, the same as Dr. Gheraibeh has provided."

Regarding the rescission of the schedule award for the left leg, the Office explained, in the March 7, 2003 decision, that the Office medical adviser improperly calculated the percentage of impairment based on Dr. Gheraibeh's report. The medical adviser initially submitted a report dated March 13, 2002, finding a 12 percent impairment to the left leg. A review of this report, however, indicates that the Office medical adviser had taken the description of muscle weakness for the right ankle and erroneously calculated an impairment to the left leg based on the reported muscle weakness. Subsequently, the Office medical adviser recalculated the percentage of impairment based on the same report and, in a report dated December 18, 2002, found that appellant was only entitled to a five percent permanent impairment of the left lower extremity. These calculations were based on the attending physician's findings and used the fifth edition of the A.M.A., *Guides*. The Office medical adviser indicated that he agreed with the findings of appellant's attending physician and based on the findings and the A.M.A., *Guides*, that appellant was only entitled to a five percent permanent impairment of the left lower extremity. In applying Table 15-18, page 424, of the A.M.A., *Guides* to measure the unilateral spinal nerve root impairment affecting the lower extremity for loss of function due to sensory deficit, the maximum percentage loss of function for the S1 nerve is five percent. Both Dr. Gheraibeh and the Office medical adviser agreed that appellant was entitled to the maximum five percent loss of function for the S1 nerve. Considering that the Office provided a clear explanation of its rationale for rescinding the 12 percent schedule award and Office medical adviser and appellant's attending physician agreed on the findings, the Board finds that the Office met its burden in rescinding the 12 percent schedule award.

The Board also finds that appellant is not entitled to more than a 25 percent permanent impairment of the right lower extremity for which she received a schedule award.

In determining the impairment due to loss of power and motor deficit for the L5 and S1 nerve root in the right lower extremity, appellant's attending physician determined that appellant had a Grade 3 out of 5 severity for loss of muscle function, according to Table 15-16, page 424 of the A.M.A., *Guides*. The physical findings of record seem to indicate that Grade 3 may be appropriate, as various physicians indicated that appellant had lower extremity pain and weakness from nerve root irritation, along with weakness and pain as a result of the compression

of the nerve roots and had difficulty ambulating. In using Grade 3 weakness according to Table 15-16, the percentage of motor deficit ranges from 26 to 50 percent. The Office medical adviser determined that appellant's Grade 3 weakness was 38 percent or the difference between 26 and 50 percent. Next, by using Table 15-18, he determined that the maximum percentage of loss of function due to strength for both nerves combined (L5 and S1) was 57 percent or 37 percent for the L5 nerve root plus 20 percent for the S1 root. He then multiplied 38 percent by 57 percent to equal 20 percent, although he recommended that appellant be allowed 25 percent permanent impairment of the right lower extremity, the same as Dr. Gheraibeh provided.[20] The Board finds that, according to the findings and calculations of the Office medical adviser and the attending physician, appellant is not entitled to more than a 25 percent permanent impairment of the right lower extremity.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated March 7 and January 16, 2003 and October 24, 2002 are hereby affirmed.

Dated, Washington, DC
September 17, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[20] The Board notes that 38 percent of 57 percent is actually 21.66, not 20 as determined by the Office medical adviser.