U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SAMUEL D. HARRELL, JR., and DEFENSE LOGISTICS AGENCY, DEFENSE DISTRIBUTION DEPOT NORFOLK, Norfolk, VA

Docket No. 01-1711; Submitted on the Record; Issued March 21, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether appellant has more than a 10 percent permanent impairment of each lower extremity, for which he received a schedule award.

On January 14, 1997 appellant, then a 49-year-old motor vehicle operator, sustained an injury while in the performance of his duties when he slipped off the catwalk of a tractor and landed on his back. The Office of Workers' Compensation Programs accepted his claim for contusion of the back, both buttocks and both hips and for acute cervical, dorsal and lumbosacral strains superimposed on a preexisting degenerative joint/disc disease of the lumbosacral spine.

On July 21, 1997 appellant filed a claim for a schedule award. On January 26, 1998 the Office notified appellant that it was his responsibility to ensure that the following information was provided: (1) a narrative medical report from his physician giving clinical findings and explaining how appellant's permanent impairment resulted from the employment injury; and (2) the enclosed impairment evaluation sheet fully completed by his physician. The Office advised that, if all of the necessary medical evidence was not submitted, the Office would have no basis for computing an award and no further action could be taken on his request.

In the meantime, the Office authorized a lumbar decompression at the L4-5 and L5-S1 levels. On May 13, 1998 appellant underwent a decompressive lumbar laminectomy at the L4-5 and L5-S1 levels with bilateral foraminotomies at L4-5 and L5-S1.

When a year had passed since his decompressive surgery, appellant renewed his claim for a schedule award. He submitted a February 24, 1999 report from Dr. Felix M. Kirven, his attending orthopedic surgeon, who reported that appellant's employment injury had aggravated his degenerative lumbar spine, setting off his symptoms of spinal stenosis and resulting in bilateral leg pain and radicular symptoms, for which appellant underwent a decompressive lumbar laminectomy. A lower extremity motor examination on January 8, 1999 showed hip flexion/extension 5/5, hip adduction/abduction 5/5, knee flexion/extension 5/5, ankle dorsiflexion and plantar flexion 5/5 and EHL and FHL 5/5. Sensory examination showed

sensation intact from L1, L2, L3, L4, L5 and S1 bilaterally. Appellant had a full range of motion of the hips, knees and ankles. Dr. Kirven reported:

> "[Appellant] has evidence of bilateral radicular symptoms based on EMG [electromyogram] and nerve conduction studies documented in March 1997. He has a 5 percent disability in the right and left legs for radicular pain. [Appellant's] total disability is, therefore 10 percent based on extremities."

On May 18, 1999 Dr. Kirven reported that appellant was status post posterior lumbar decompression from L4 to S1. He noted that he had previously given appellant an impairment rating of 10 percent for bilateral lower extremity radiculopathy. Dr. Kirven explained that appellant's laminectomy prevented progression of appellant's radiculopathy, but he was still left with bilateral lower extremity numbness. This numbness, he felt was permanent in both legs and, based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.), gave appellant a 10 percent permanent disability in his lower extremities for radiculopathy. In a supplemental report dated July 6, 1999, Dr. Kirven noted that he based his rating on Chapter 3, page 75, of the A.M.A., *Guides*.

On August 5, 1999 an Office medical adviser reviewed Dr. Kirven's reports and determined that for each lower extremity appellant had a 5 percent permanent impairment for the L5 nerve root and a 5 percent permanent impairment for the S1 nerve root. The medical adviser reported that, according to Table 83, page 130, of the A.M.A., *Guides*, appellant had a 10 percent permanent impairment of each lower extremity.

On November 10, 1999 the Office issued a schedule award for a 20 percent permanent loss of use of the lower left/right extremities.[1]

Appellant continued to submit follow-up reports from Dr. Kirven. In a report dated June 12, 2000, Dr. Kirven noted that an electromyography/nerve conduction study showed chronic, permanent nerve damage in the L5 and S1 dermatomes bilaterally. Appellant also had weakness in the right extensor hallucis longus musculature. Dr. Kirven added:

> "According to Table 25, Chapter 4, page 151, [appellant] qualifies for a 25 percent permanent impairment.
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> "I have reviewed Table 19, Chapter 4, page 149 in regards to sexual impairment criteria. [Appellant] has difficulty with erections. According to Table 19, Chapter 4, page 149, he, therefore, qualifies for a 9 percent impairment for sexual dysfunction.
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> "His total impairment rating is now 34 percent."

On June 27, 2000 appellant refiled his claim for a schedule award.

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[1] Because appellant filed his appeal to the Board on June 7, 2001, more than one year after the Office's November 10, 1999 schedule award decision, the Board has no jurisdiction to review that award. 20 C.F.R. §§ 501.3(d), 501.10(d)(2) (time for filing an appeal).

On July 27, 2000 an Office medical adviser reported that the pages and tables to which Dr. Kirven referred were inappropriate, as they related only to "whole person" impairments. The medical adviser referred the Office to his prior review of August 5, 1999. He repeated his determination that appellant had a 10 percent permanent impairment to each lower extremity. Dr. Kirven further noted that there was no weakness reported when appellant reached maximum medical improvement more than a year ago and certainly no erectile dysfunction. The medical adviser reported that these conditions were not related to appellant's employment injury, else they would have presented within a brief period of time after the injury.

On August 11, 2000 the Office issued a notice "in regard to your claim for schedule award, dated June 27, 2000." The Office's discussed the deficiencies of Dr. Kirven's June 12, 2000 report and noted the Office medical adviser's reasons for negating a causal relationship between the July 14, 1997 employment injury and the weakness and sexual dysfunction reported by Dr. Kirven. The Office explained when schedule awards were authorized and advised as follows:

> "Consequently, there is no basis for additional permanent partial impairment to your lower extremities or for a schedule award.
>
> "Therefore, your claim for a schedule award is hereby being *administratively closed*.
>
> "THIS IS NOT A FORMAL DETERMINATION.
>
> "Should you desire a formal decision on this matter, please advise us in writing." (Original emphasis).

The Board finds that appellant has not met his burden of proof to establish that he has more than a 10 percent permanent impairment of each lower extremity, for which he received a schedule award.

Inasmuch as more than one year has elapsed between the issuance of the Office's November 10, 1999 schedule award decision and the filing of this appeal on June 7, 2001, the case must turn on whether the Office's letter of August 11, 2000 constitutes a final decision as contemplated by the regulations.[2] It is the content and not the form of the paper that is significant. This letter was not merely informational: It reviewed the medical opinions of Dr. Kirven and the Office medical adviser; it explained that schedule awards were authorized where there was permanent loss of functioning of one or more body parts as a result of the accepted condition; and, applying the law to the facts of the case, it made a finding that the medical evidence was insufficient to establish an additional permanent impairment to appellant's lower extremities or to establish his claim for a schedule award. Further, rather than leave appellant's June 27, 2000 claim open for the submission of additional evidence to address the deficiencies of his claim, the Office took the definitive action of advising appellant that his claim for a schedule award was being administratively closed, giving the matter an adverse finality

[2] Although appellant indicates that he is also appealing a decision dated May 16, 2001, no such decision appears in the record.

from which appeals are reasonably taken. The Office's statement that it was administratively closing his case without a "formal" determination only confused the administrative process and will not stand as a technicality preventing the Office's determination from being treated as a "final decision."[3]

Appellant's attending physician, Dr. Kirven, consistently reported that appellant had a 10 percent permanent impairment in his lower extremities for radiculopathy. An Office medical adviser reviewed the record and agreed that appellant had a permanent impairment to both the L5 and S1 nerve roots, entitling him to a 10 percent schedule award for each lower extremity. On June 12, 2000 however, Dr. Kirven changed appellant's impairment rating to 34 percent based apparently on weakness in the right extensor hallucis longus musculature and reported erectile dysfunction.

A claimant seeking benefits under the Federal Employees' Compensation Act[4] has the burden of proof to establish the essential elements of his claim by the weight of the evidence,[5] including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.[6]

The Office accepts that on January 14, 1997 appellant, while in the performance of his duties, sustained a contusion of the back, both buttocks and both hips, as well as acute cervical, dorsal and lumbosacral strains superimposed on a preexisting degenerative joint/disc disease of the lumbosacral spine. It remains appellant's burden of proof to establish the weakness in his right extensor hallucis longus musculature or his reported erectile dysfunction is causally related to the incident that occurred on January 14, 1997 or his authorized lumbar decompression.

The evidence generally required to establish causal relationship is rationalized medical opinion evidence. The claimant must submit a rationalized medical opinion that supports a causal connection between his current condition and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury and must explain from a medical perspective how the current condition is related to the injury.[7]

Appellant has submitted no such medical opinion evidence. Dr. Kirven, appellant's attending physician, made no attempt to relate the weakness in the right extensor hallucis longus musculature or the reported erectile dysfunction to the January 14, 1997 employment injury or

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[3] *See generally Irwin Goodman*, 1 ECAB 57 (1947); *Leo A. Wilson*, 1 ECAB 202 (1948); *Anna J. Stokes*, 2 ECAB 104 (1948); *Peter Joseph Crowley*, 2 ECAB 128 (1948); *Herman Anderson*, 4 ECAB 48 (1950); *Paul Goose*, 4 ECAB 216 (1951); *Daris Clem*, 5 ECAB 69 (1952); *Samuel C. Simmons*, 5 ECAB 91 (1952); *Ralph Edmond Zollars*, 5 ECAB 617 (1953); *Wilbur E. Fleming*, 9 ECAB 167 (1956).

[4] 5 U.S.C. §§ 8101-8193.

[5] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[6] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[7] *John A. Ceresoli, Sr.*, 40 ECAB 305 (1988).

his decompressive surgery.[8] Dr. Kirven merely provided impairment ratings without establishing the necessary causal connection. Further, the Office medical adviser explained that these conditions are not related to appellant's employment injury because they would have presented within a brief period of time after the employment, yet there was no weakness and certainly no erectile dysfunction reported when appellant reached maximum medical improvement a year after his May 13, 1998 surgery. Appellant has submitted no reasoned medical opinion to the contrary.

Because the medical evidence fails to establish that the weakness in appellant's right extensor hallucis longus musculature or his reported erectile dysfunction is causally related to his accepted employment injury and because Dr. Kirven has otherwise offered no explanation to show that the permanent impairment due to L5 and S1 nerve root deficits has worsened, appellant has not met his burden of proof to establish his claim for an additional schedule award.

The August 11, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
March 21, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[8] The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). The Board therefore has no jurisdiction to review evidence submitted after the Office's August 11, 2000 decision, including the March 27, 2001 report of Dr. Kirven submitted to the Board on appeal.