

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RAYMOND D. CANAVAN and U.S. POSTAL SERVICE,  
POST OFFICE, Rumson, N. J.

*Docket No. 96-1025; Submitted on the Record;  
Issued March 13, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,  
A. PETER KANJORSKI

The issue is whether appellant had any permanent partial impairment of his legs causally related to his November 30 and December 15, 1989 work-related injuries.

On November 30, 1989 appellant, then a 39-year-old regular clerk, filed a claim for compensation alleging that on that day he fell, breaking his fall with his hands, causing upper and lower back muscle tightness.

In a medical report dated November 30, 1989, Dr. Glenn M. Morgenstern, Board-certified in internal medicine, stated that appellant had lumbar muscle strain causally related to his November 30, 1989 work-related injury.

In a medical report dated December 4, 1989, Dr. Arthur H. Phair, a Board-certified orthopedic surgeon, stated that appellant had lumbar strain but could return to regular work on December 8, 1989.

On December 15, 1989 appellant filed a claim for compensation alleging that on that day he strained his back after he tripped while carrying a tub of parcels.

In a medical report dated December 19, 1989, Dr. Phair stated that appellant alleged that he had recently tripped at work and twisted his back resulting in pain to the lower back and buttocks.

On January 5, 1990 the Office of Workers' Compensation Programs notified appellant that it had accepted his November 30, 1989 claim for lumbar muscle strain and paid appropriate benefits.

In a medical report dated January 5, 1990, Dr. Ferris Ginsburg, an osteopath, stated that a magnetic resonance imaging (MRI) scan taken that day revealed degenerative disc disease and focal herniation central and to the left of the L5-S1 level.

In a medical report dated February 5, 1990, Dr. Phair stated that appellant had lumbar strain causally related to his December 15, 1989 injury and was totally disabled as a result.

On February 20, 1990 the Office accepted appellant's December 15, 1989 claim for lumbar strain.

In a medical report dated April 16, 1990, Dr. Phair stated that appellant could return to full-time duty without restriction. However, in a medical report dated May 7, 1990, he indicated that appellant could return to limited full-time duty.

Appellant received continuation of pay through January 29, 1990 and disability compensation for intermittent time lost from January 30 through May 7, 1990.

In a medical report dated August 9, 1990, Dr. Alfred D. Greisman, a Board-certified orthopedic surgeon, stated that appellant injured himself at work on November 30, 1989, and that he provided an epidural steroid injection in April 1990 for left lower extremity relief. He noted that appellant complained of lower back discomfort in May 1990 and that appellant still had residuals and findings consistent with herniated disc at L5-S1 on the left.

In a treatment note dated June 28, 1991, Dr. Greisman stated that appellant "had a flare-up of his low back problem" radiating into right lower extremity. He also noted that appellant had complained about pain in his right hip and that he had back problems with calcific bursitis.

In a treatment note dated September 30, 1991, Dr. Greisman stated that he was treating appellant for pain in his left hip, left knee, and left ankle-foot area which appellant believed was "a separate discrete pain."

In a medical report dated December 11, 1991, Dr. Greisman stated that appellant complained of "aching extending into both lower extremities" and that he had an elevated uric acid level and a disc problem at the lumbosacral juncture.

In a medical report dated September 11, 1992, Dr. Greisman stated that appellant had recurrent aches in both hips and knees although hip x-rays and a left knee x-ray were unremarkable. He diagnosed arthritis and recommended a rheumatological evaluation.

In a medical report dated March 11, 1994, Dr. David Weiss, a Diplomate, American Board of Orthopedic Medicine, reviewed appellant's injury history and stated that a physical examination of appellant's lumbosacral spine revealed range of motion of forward flexion of 65/90 degrees, backward extension of 10/20 degrees, left lateral flexion of 15/25 degrees, and right lateral flexion of 20/25 degrees. He noted that range of motion exercises were carried out in extreme pain. Appellant's straight leg raising testing was positive at 75 degrees above the horizontal. Neurological examination was intact. Dr. Weiss diagnosed herniated nucleus pulposus, L5-S1, chronic post-traumatic lumbosacral strain and sprain, lumbar radiculitis and status post-epidural block. He noted that appellant sustained residuals of low back pain, radiating bilateral pain in both extremities, and stated that he had rated appellant in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup>

ed. 1993) at 12 percent for dysesthesia for right lower extremity and 12 percent for dysesthesia lower left extremity.

On May 16, 1994 appellant filed a claim for recurrence of disability alleging that on March 20, 1994 he had a recurrence of disability of his November 30, 1989 employment-related injury, noting that his condition had gradually worsened since the initial date of injury.

On June 2, 1994 the Office requested additional information from appellant including evidence which demonstrated that he could not perform the light- or limited-duty work to which he had been assigned at the time of the alleged recurrence of disability as well as a medical report from his treating physician as to whether and how the claimed condition was causally related to the employment-related injury.

On August 1, 1994 appellant filed a claim for schedule award.

On August 15, 1994 the Office referred appellant's medical records and a statement of accepted facts to Dr. Henry J. Magliato, a Board-certified orthopedic surgeon and an Office consultant, to determine appellant's entitlement to a schedule award based on his permanent partial disability of the lower extremities.

In a medical report dated August 15, 1994, Dr. Magliato stated that he had reviewed appellant's medical records including Dr. Weiss' report, and concluded that appellant's only accepted injury was lumbar strain. Dr. Magliato noted that Dr. Weiss' examination failed to support his recommendation for a schedule award noting that he failed to document any sensory impairment. Dr. Magliato also noted that Dr. Weiss described bilateral radiating pain but made no objective findings to support his conclusion. He also noted that the A.M.A., *Guides* required two examiners to agree to a rating for dysesthesia, a condition not met in this instance.<sup>1</sup>

By decision dated October 18, 1994, the Office denied appellant's claim for recurrence of disability alleged to have occurred on March 20, 1994, finding that a causal relationship between the employment-related injury and the claimed recurrence of disability had not been established.

In a medical report dated October 13, 1994 and received by the Office on November 8, 1994, Dr. Greisman stated that appellant was initially seen in August 1990 with a history of low back pain since 1989, but that a December 1990 neurological examination was unremarkable. He stated that he had seen appellant in 1991 for intermittent back problems, and that he was also walking with a limp and had pain in lower right extremity. However, his neurological examination was unremarkable. Dr. Greisman stated that he last treated appellant in March 1994 for what appellant described as a recurrence of low back pain with radiation more on the right side than the left. Neurological examination was again unremarkable. He concluded that appellant had chronic lower back problem with distal herniation and nerve root involvement. Dr. Greisman stated that appellant's conditions were causally related to his employment-related injury on November 30, 1989.

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<sup>1</sup> The A.M.A., *Guides* at p. 88 provide that "[D]ysesthesias are subjective and must be carefully evaluated. Ideally, two examiners should agree."

By decision dated November 10, 1994, the Office denied appellant's claim for a schedule award on the grounds that the evidence of record failed to establish that appellant had a permanent partial impairment causally related to his employment-related injury.

By letter dated November 17, 1994, appellant requested a hearing on the Office's November 10, 1994 decision denying his claim for a schedule award. Appellant testified at the May 4, 1995 oral hearing that he had had no medical history of back problems prior to his employment-related injury and that he had new low back pain after the injury. Appellant's counsel argued that a December 8, 1994 electromyogram revealed nerve damage and thus undermined Dr. Magliato's medical report.

A medical report dated December 8, 1994 with an illegible signature stated that nerve conduction studies suggested the presence of an L5-S1 polyradiculopathy with subacute features.

By decision dated June 19, 1995, the Office's hearing representative affirmed the Office's November 10, 1994 decision on the grounds that the evidence of record failed to establish that appellant had sustained a permanent partial impairment based on his employment-related injury of November 30, 1989.

On July 18, 1995 appellant requested reconsideration and submitted additional evidence in support of his request. In a July 12, 1995 medical report, Dr. Greisman stated that he believed that appellant's chronic back problems with distal herniation and gout were all causally related to his employment-related injury on November 30, 1989. Further, appellant submitted an April 29, 1993 medical report from Dr. Mark H. Pillor, Board-certified in family practice, who stated that appellant had low back pain with degenerative arthritis and herniated disc of the lumbar spine.

In a nonmerit decision dated November 3, 1995, the Office denied appellant's reconsideration on the grounds that the evidence submitted was irrelevant to the claim.

The Board finds that appellant has failed to meet his burden of proof to establish that he sustained any permanent impairment to a body member which entitles him to a schedule award.

An employee seeking compensation under the Federal Employees' Compensation Act<sup>2</sup> has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,<sup>3</sup> including that he sustained an injury in the performance of duty as alleged and that his alleged condition or disability, if any, were causally related to the employment injury.<sup>4</sup>

Section 8107 of the Act provides that if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for

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<sup>2</sup> 5 U.S.C. § 8107.

<sup>3</sup> *Donna Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

<sup>4</sup> *See generally Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

the permanent impairment of the scheduled member or function.<sup>5</sup> Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the A.M.A., *Guides* as a standard for evaluating schedule losses and the Board has concurred in such adoption.<sup>6</sup>

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 of function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent description of the impairment."<sup>7</sup> 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.<sup>8</sup>

In this case, appellant alleged that he sustained a permanent impairment to his lower extremities which entitled him to receive a schedule award. In his March 11, 1994 medical report, Dr. Weiss, a Board-certified orthopedic surgeon, stated that he had rated appellant in accordance with the A.M.A., *Guides* (4<sup>th</sup> ed. 1993) at 12 percent for dysesthesia for right lower extremity and 12 percent for dysesthesia lower left extremity. Although Dr. Weiss reported findings based on his physical examination of the lumbosacral spine and neurological examination, he merely noted that appellant sustained residuals of low back pain and bilateral pain in both extremities without supporting that conclusion with a rationalized medical opinion. Furthermore, while Dr. Weiss concluded that appellant had a 12 percent impairment of each lower extremity due to dysesthesia, he did not provide any examination finding which supported a sensory impairment upon neurological evaluation. Dr. Weiss also did not explain how, pursuant to the A.M.A., *Guides*, he calculated the degree of appellant's impairment. As Dr. Weiss' report lacked physical examination findings to support an impairment, and as Dr. Weiss did not explain appellant's impairment rating pursuant to the A.M.A., *Guides*, his medical report is of limited probative value.

Further, Dr. Greisman's October 13, 1994 medical report stated that he had been treating appellant since 1989 for low back pain radiating to his lower extremities which were causally related to his employment-related injury on November 30, 1989. However, Dr. Greisman stated that appellant had a normal neurological evaluation and did not describe a permanent impairment of his lower extremities or how such would be rated pursuant to the A.M.A., *Guides*. Therefore, his report is not sufficient to establish that appellant sustained a permanent partial impairment to

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<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(c) (March 1995). See *John H. Smith*, 41 ECAB 444, 448 (1990).

<sup>8</sup> *Alvin C. Lewis*, 36 ECAB 595, 596 (1985).

his lower extremities causally related to his accepted lumbar strain which entitles him to a schedule award.

The remainder of the medical reports of record address appellant's back problems. A schedule award is not payable for the loss, or loss of use, of a part of the body that is not specifically enumerated under the Act. Neither the Act nor its implementing regulations provides for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under the Act.<sup>9</sup> Appellant has therefore not established that his accepted lumbar strain caused any permanent impairment which would be compensable pursuant to the schedule award provisions of the Act.

The decisions of the Office of Workers' Compensation Programs dated November 3 and June 19, 1995 are affirmed.

Dated, Washington, D.C.  
March 13, 1998

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>9</sup> *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).