

<b>PABLO APARICIO, Appellant</b>	)	
	)	
<b>and</b>	)	
	)	<b>Docket No. 03-2206</b>
	)	<b>Issued: February 4, 2004</b>
<b>U.S. POSTAL SERVICE, BAKERSFIELD</b>	)	
<b>PROCESSING &amp; DISTRIBUTION CENTER,</b>	)	
<b>Bakersfield, CA, Employer</b>	)	
	)	

### Case Submitted on the Record

Before:  
DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member  
MICHAEL E. GROOM, Alternate Member

On September 5, 2003 appellant filed a timely appeal from the August 14, 2003 decision of the Office of Workers' Compensation Programs denying his claim for a schedule award. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award issue.

The issue is whether appellant is entitled to a schedule award for an impairment of his lower extremities.

On May 3, 2002 appellant, then a 53-year-old distribution clerk, filed a traumatic injury claim alleging that on April 25, 2002 he hurt his lower back and felt numbness in both legs while lifting a box of flats from a cage. He stated that something snapped in his tailbone.

Appellant submitted an April 25, 2002 statement from a coworker, Shenitha Ragsdale, who indicated that, on that date appellant told her that he sprained his back and his feet felt

numb. Ms. Ragsdale stated that she supported appellant while they were walking. In a note of the same date appellant reiterated the description of the injury that he provided on his claim form.

Appellant received medical treatment from Dr. Richard Sall, Board-certified in occupational medicine, on April 25 and 30, 2002, May 7, 15, 17, 24, 25, 29 and 30, 2002 and June 3, 14 and 28, 2002 for acute lumbar muscle strain, disc protrusion at L3 and L4 and herniated nucleus pulposus. His work status reports dated April 30, 2002, May 15, 17 and 24, 2002 and June 3, 14 and 28, 2002 revealed that appellant could work with certain physical restrictions.

Appellant submitted treatment notes from his physical therapists covering the period April 29 through May 29, 2002. A May 20, 2002 radiological report of Dr. Brian S. Grossman, a Board-certified orthopedic surgeon, revealed a diagnosis of disc space narrowing at L5-S1 and mild lumbar scoliosis. His narrative report of the same date provided a history of appellant's April 25, 2002 injury and medical treatment, his findings on physical and objective examination and a diagnosis of foraminal disc extrusion at left L3-4. Dr. Grossman opined that appellant was not yet permanent and stationary from the April 25, 2002 injury. He stated that appellant could return to work with certain physical restrictions.

The April 25, 2002 report of Kent Simmons, a field nurse practitioner, indicated that appellant sustained a back strain on that date and his physical restrictions. His work status reports dated April 25 and May 24, 2002 revealed that appellant could work with certain physical restrictions.

In an April 25, 2002 report, Dr. Frank Archibeque, a Board-certified radiologist, provided computerized tomography (CT) findings regarding appellant's lumbar spine. At the L3-4 level there was a left neuroforaminal/lateral seven millimeter disc protrusion which narrowed the left neuroforamina. Mild facet hypertrophy was present at other levels but there was no spinal stenosis. There was vacuum disc phenomenon at L5-S1. Appellant submitted employment records.

By decision dated July 16, 2002, the Office accepted appellant's claim for an acute lumbar strain and appellant received appropriate compensation benefits.

The Office received duplicate copies of Dr. Sall's June 14 and 28, 2002 reports. The Office also received Dr. Sall's July 12, 16 and 26, 2002, August 2 and 30, 2002 and September 13, 2002 reports indicating that appellant received medical treatment for his back conditions. Dr. Sall's July 12, 16 and 26, 2002, August 2, 16 and 30, 2002 and September 13, 2002 work status reports revealed that appellant could work with certain physical restrictions.

Dr. Grossman's November 18, 2002 report provided a history of appellant's April 25, 2002 employment injury, medical treatment, employment and social background. On physical examination, Dr. Grossman noted his findings regarding appellant's lumbar spine. Motor testing of the hip flexors, quadriceps, tibialis anterior, extensor hallucis longus and ankle

plantar flexors revealed grade 5/5 function bilaterally. Sensory examination of the lower extremities revealed intact light touch throughout. Patellar and Achilles reflexes were one and equal bilaterally and a straight leg raising test was negative in the seated position. Dr. Grossman provided findings on magnetic resonance imaging (MRI) scans of the lumbar spine. He diagnosed a three millimeter left posterior disc protrusion at L2-3. Dr. Grossman opined that appellant's complaints were caused by the April 25, 2002 employment injury. He stated that appellant reached maximum medical improvement on November 18, 2002 and that appellant had permanent work restrictions which precluded heavy work.

A September 13, 2002 work status report of Dr. Luis Cousin, a Board-certified family practitioner, indicated that appellant could work with certain physical restrictions. An August 20, 2002 MRI scan of Dr. David P. Schale, a Board-certified radiologist, revealed a diagnosis of a three millimeter left posterior protrusion where there was small extrusion of nuclear material at the L2-3 level with slight deviation of the existing nerve root, small nonsignificant three millimeter left posterior protrusion of nuclear material at the T11-12 level, probable Schmorl's node involving the superior end plate of the L5 vertebral body and generalized spondylosis with desiccation of discs sparing at the T12-L1 and L1-2 levels. The Office received treatment notes from appellant's physical therapists dated June 19, 24, 26 and 28, 2002 and July 1, 3 and 22, 2002.

On January 7, 2003 appellant filed a claim for a schedule award. In a letter dated January 10, 2003, the Office advised him that the medical evidence currently on file indicated that his condition was permanent and stationary. The Office further advised appellant that an appointment would be made for him to determine whether he had sustained a permanent impairment due to his employment injury. The Office deferred appellant's schedule award claim because it was not payable at that time.

By letter dated January 21, 2003, the Office referred appellant along with a statement of accepted facts, a list of specific questions and medical records to Dr. Rajeswari Kumar, a Board-certified psychiatrist, for a second opinion medical examination.

The Office received a January 10, 2003 report from a physician whose signature is illegible revealing April 25, 2002 as the date of injury and appellant's physical restrictions due to a right shoulder injury.

Dr. Kumar submitted a February 8, 2003 report indicating that appellant experienced right upper extremity and lower back pain. He noted a history of appellant's April 25, 2002 employment injury, medical treatment and family and social background. Dr. Kumar stated that on physical examination appellant's gait was nonantalgic and he was able to walk without any assistive device. He further stated that lumbar spine range of motion was restricted but, there was no clinical evidence of lumbar radiculopathy. Appellant's hips, knees and ankles showed full range of motion, there was no joint tenderness and no neurological deficit. Dr. Kumar diagnosed lumbar strain without radiculopathy. He stated that appellant reached maximum medical improvement on June 10, 2002, six weeks from the date of injury since appellant did not remember the date. Dr. Kumar further stated that the date that appellant reached maximum medical improvement was unclear. He noted that appellant informed him that the April 25, 2002

employment injury caused pain in his right upper extremity and not in the left upper extremity. Dr. Kumar stated that appellant could lift 20 pounds occasionally and 10 pounds frequently, that he could stand continuously for about 1/2 hour with a 10-minute break and he could sit for 1/2 hour with a subsequent 10-minute break. He concluded that with intermittent sitting and standing, appellant could work eight hours a day.

On March 4, 2003 an Office medical adviser reviewed appellant's medical records including Dr. Kumar's report. He stated that these records supported a zero percent impairment of each lower extremity due to appellant's April 25, 2002 employment injury and that appellant reached maximum medical improvement by June 10, 2002.

By decision dated March 13, 2002, the Office found the evidence of record insufficient to establish that appellant was entitled to a schedule award based on the Office medical adviser, who found that appellant's accepted condition did not result in any ratable impairment to his lower extremities.

The Office received Dr. Grossman's April 28, 2003 report providing a history of appellant's April 25, 2002 employment injury, medical and social background. On physical examination, Dr. Grossman noted his findings regarding appellant's lumbar spine. Regarding appellant's lower extremities, Dr. Grossman stated that sensation was intact, the straight leg raising test was negative seated to 90 degrees bilaterally and patellar and Achilles reflexes were brisk and equally bilaterally. He reviewed the most recent lumbar MRI scan which demonstrated decreased disc height at the L5-S1 disc space and a small left foraminal disc protrusion at L2-3. Dr. Grossman diagnosed a three millimeter left posterior disc protrusion at L2-3. He noted his findings, in his November 18, 2002 report, and stated that the date appellant reached maximum medical improvement and work restrictions remained appropriate. Dr. Grossman reviewed appellant's position description and opined that appellant was able to perform all the duties of a distribution clerk with certain physical restrictions.

By letter dated May 9, 2003, appellant requested reconsideration. In support of his request, appellant resubmitted Dr. Grossman's November 18, 2002 report and the work status reports of Mr. Simmons dated June 14 and 28, 2002 and August 2, 16, 30, 2002 work status reports. Appellant submitted Mr. Simmons' July 2 and September 13, 2002 work status reports indicating that appellant could work with restrictions and Dr. Grossman's April 28, 2003 report.

In an August 14, 2003 decision, the Office denied appellant's request for modification based on a merit review of his claim. The Office found that the weight of the medical evidence rested with Dr. Kumar and the Office medical adviser who opined that appellant had no ratable impairment of the lower extremities due to the April 25, 2002 employment injury. The Office further found Dr. Grossman's April 28, 2003 report cumulative in nature and the diagnostic test results and Dr. Grossman's November 18, 2002 report repetitious in nature because they had been previously submitted and considered by the Office medical adviser. The Office concluded that appellant had failed to submit any new evidence or argument that the Office's decision was erroneous.

## **LEGAL PRECEDENT**

An employee seeking compensation under the Federal Employees' Compensation Act<sup>1</sup> has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,<sup>2</sup> including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.<sup>3</sup>

The schedule award provisions of the Act<sup>4</sup> and its implementing regulation<sup>5</sup> 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* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>6</sup>

## **ANALYSIS**

Although appellant had an accepted lumbar strain from the work injury, he is not entitled to a schedule award for this condition. 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 the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under the Act.<sup>7</sup> Accordingly, no award is payable to appellant for the accepted lumbar strain.

Appellant has not submitted sufficient evidence establishing that he sustained a ratable permanent impairment of his lower extremities. The November 18, 2002 and April 28, 2003 reports of Dr. Grossman, appellant's treating physician, found that appellant reached maximum medical improvement on November 18, 2002. Appellant had normal findings regarding his lower extremities and he could perform the duties of his distribution clerk position. Dr. Grossman, however, failed to provide an impairment rating utilizing the A.M.A., *Guides*. Similarly, the work status reports of Dr. Sall and the CT and MRI scans of Drs. Grossman and Archibeque failed to provide an impairment rating utilizing the A.M.A., *Guides*. The reports of Mr. Simmons are of no probative medical value inasmuch as a nurse practitioner is not

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<sup>1</sup> U.S.C. §§ 8101-8193.

<sup>2</sup> *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

<sup>3</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404 (1999).

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

<sup>7</sup> *George E. Williams*, 44 ECAB 530 (1993); *James E. Mills*, 43 ECAB 215 (1991).

considered a “physician” within the meaning of the Act.<sup>8</sup> Similarly, the treatment notes of appellant’s physical therapists are of no probative medical value because a physical therapist is not a “physician” under the Act.<sup>9</sup> Thus, the Board finds that appellant has failed to satisfy his burden of proof in this case.

The February 8, 2003 report of Dr. Kumar, the Office referral physician, indicated normal findings on physical examination of appellant’s back and lower extremities. Dr. Kumar found no clinical evidence of lumbar radiculopathy resulting from the April 25, 2002 employment injury. Similarly, the Office medical adviser reviewed appellant’s medical records including Dr. Kumar’s report, and found that appellant had a zero percent impairment of each lower extremity. The Board finds that the opinions of Dr. Kumar and the Office medical adviser are well rationalized and based on an accurate factual and medical background. Therefore, their reports constitute the weight of the medical evidence in this claim.

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish entitlement to a schedule award for an impairment of his lower extremities.

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<sup>8</sup> 5 U.S.C. § 8101(2) which defines “physician” as including surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law; *see also Joseph N. Fassi*, 42 ECAB 231 (1991) (medical evidence signed only by a registered nurse or nurse practitioner is generally not probative evidence).

<sup>9</sup> 5 U.S.C. § 8101(2); *see also Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jane A. White*, 34 ECAB 515 (1983).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 14, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 4, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member