

**United States Department of Labor
Employees' Compensation Appeals Board**

ALBERT C. BROWN, Appellant

and

**DEPARTMENT OF THE ARMY, NEW JERSEY
NATIONAL GUARD, Fort Dix, NJ, Employer**

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**Docket No. 05-1201
Issued: September 7, 2005**

Appearances:
Thomas R. Uliase, Esq. for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge

JURISDICTION

On May 4, 2005 appellant filed a timely appeal of a December 6, 2004 merit decision of the Office of Workers' Compensation Programs that denied his claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the Office's decision on appellant's claim for a schedule award.

ISSUE

The issue is whether appellant has a permanent impairment of the legs that is causally related to his May 1, 1992 employment injury.

FACTUAL HISTORY

On May 4, 1992 appellant, then a 40-year-old mechanic, filed a claim for compensation for a traumatic injury to his back sustained on May 1, 1992 when he slipped and struck his low back on the edge of a fender. The Office accepted that he sustained a lumbosacral sprain.

On March 29, 2003 appellant underwent a magnetic resonance imaging (MRI) scan, which revealed no disc herniations or bulges. The test was recommended by appellant's

attending Board-certified surgeon, Dr. Honesto N. Poblete, for a positive straight leg raising test on the right and numbness of the right leg. Dr. Ariel F. Abud, a Board-certified neurosurgeon to whom Dr. Poblete referred appellant, also recommended this testing for low back pain radiating down appellant's right lower extremity and numbness of his right foot and leg. On October 15, 1993 Dr. Arnold S. Witte, a Board-certified neurologist, performed electromyogram (EMG) and nerve conduction studies, which he reported were normal for the right lower extremity and paraspinous muscles, with no evidence for radiculopathy. In a May 18, 1994 report, Dr. Alexander Fasulo, a Board-certified orthopedic surgeon, resolving a conflict of medical opinion on appellant's ability to work, noted that appellant had no clinical findings of the right leg on examination, stated that he found "no objectivable (sic) clinical sign of physical impairment which could be considered for a possible permanency and irrefutably caused by the accident in question," and concluded that appellant could perform work with enumerated restrictions.

Appellant returned to limited duty at the employing establishment on July 24, 1994 and worked in this capacity until his employment was terminated on June 18, 1996. On March 26, 1997 he filed a claim for a recurrence of disability beginning June 18, 1996. The Office's denial of this claim was affirmed by the Board in a November 29, 2000 decision.¹

On July 29, 2001 appellant filed a claim for a schedule award. He submitted a June 13, 2001 report from Dr. Nicholas P. Diamond, an osteopath, that diagnosed chronic lumbar strain and sprain, right lumbar radiculitis (clinically), L5-S1 retrolisthesis per x-ray, L5 wedging and facet arthropathy per x-ray and chronic pain syndrome. Dr. Diamond noted that appellant complained of intermittent low back pain and of numbness and pain of his right leg and foot, that he ambulated with an antalgic gait with a right lower extremity limp, and that motor strength testing revealed a grade of 4/5 involving the right hip flexors and extensors and 4-4+/5 involving the left hip flexors and extensors. Dr. Diamond stated that appellant's May 1, 1992 injury was the competent producing factor for his subjective and objective findings, and rated appellant's impairment, using the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* at 5 percent each for motor strength deficits of the hip flexors and extensors for each leg, which he combined for a total of 21 percent permanent impairment of each lower extremity.

An Office medical adviser reviewed Dr. Diamond's report on September 6, 2001 and stated that it did not show a permanent impairment of the legs, as the accepted condition of lumbosacral strain was never amended to include radiculopathy or a herniated disc, and an EMG of the lower extremities was normal.

On July 15, 2002 the Office referred appellant, his medical records and a statement of accepted facts to Dr. David Rubinfeld, a Board-certified orthopedic surgeon, for a second opinion evaluation of any permanent impairment of his lower extremities. In an August 7, 2002 report, Dr. Rubinfeld set forth appellant's history and noted his complaints of pain in the back and both legs, numbness of the right leg, and difficulty walking and moving his legs. Examination revealed a limp to the right, inability to toe or heel walk or squat, normal motion of

¹ Docket No. 98-2320 (issued November 29, 2000).

the hips, knees and ankles,² decreased sensation in the right lateral thigh, equal circumferences of the thighs and legs, and normal motor strength of the quadriceps, hamstrings, calf muscles and extensor hallucis longus muscles bilaterally. After reviewing appellant's medical records, Dr. Rubinfeld concluded:

“There is no evidence of a permanent impairment of [appellant's] lower extremities resulting from the accepted work-related back condition. My examination not only yielded no objective findings but yielded several nonphysiologic findings. There is no active, ongoing orthopedic condition.

“[Appellant] has fully recovered from the effect of the injury on the job. The presence of nonphysiologic findings on examination is suggestive of symptom magnification as an explanation of the delay in recovery.”

By decision dated December 24, 2003, the Office found that appellant had no permanent impairment and was not entitled to a schedule award. Appellant requested a hearing, at which he testified that he had numbness and tingling from the right hip to the knee, and that he was not seeing any doctor. By decision dated December 6, 2004, an Office hearing representative found that there was no basis to expand the accepted condition beyond a lumbar strain, as the EMG was normal, and that appellant was not entitled to a schedule award.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act³ and its implementing regulation⁴ provide for payment of compensation to employees sustaining loss, or loss of use, of specified members of the body, and set forth the number of weeks of compensation payable to employees sustaining such permanent impairment. No schedule award is payable for an impairment of the back, but a schedule award is payable for an employment-related permanent impairment to an extremity if the cause of the impairment originated in the spine.⁵

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.⁶

² Appellant's ranges of motion in degrees were compared to normal motions from the A.M.A., *Guides*.

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

⁵ *John Litwinka*, 41 ECAB 956 (1990).

⁶ *Veronica Williams*, 56 ECAB ____ (Docket No. 04-2120, issued February 23, 2005).

ANALYSIS

In the present case, appellant sustained an injury to his back on May 1, 1992, which the Office accepted for a lumbosacral sprain. A March 29, 2003 MRI scan showed no disc herniations or bulges, and an EMG on October 15, 1993 was interpreted as showing no radiculopathy for the symptomatic right lower extremity. Dr. Fasulo, a Board-certified orthopedic surgeon, concluded in a May 18, 1994 report that appellant had no clinical findings of the right leg and no permanent impairment related to his May 1, 1992 injury.

Given this evidence that the employment injury did not cause a permanent impairment of the leg, appellant cannot establish entitlement to a schedule award for the leg without rationalized medical evidence establishing that the leg impairment is causally related to the accepted back injury. The statement from Dr. Diamond in his June 13, 2001 report that the work injury was a competent producing factor for appellant's findings nine years after the injury is not sufficient to meet this burden.⁷ In addition, Dr. Rubinfeld, a Board-certified orthopedic surgeon, concluded in an August 7, 2002 report that appellant did not have a permanent impairment of the lower extremities from his accepted condition.

CONCLUSION

The Board finds that appellant has not established that he has a permanent impairment of the right leg that is causally related to his May 1, 1992 employment injury.

⁷ Medical reports not containing rationale on causal relation are entitled to little probative value and are generally insufficient to meet an employee's burden of proof. *Ceferino L. Gonzales*, 32 ECAB 1591 (1981).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 6, 2004 is affirmed.

Issued: September 7, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board