

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD TRUDELL, JR. and U.S. POSTAL SERVICE,
BULK MAIL CENTER, Springfield, MA

*Docket No. 02-1491; Submitted on the Record;
Issued May 12, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant was entitled to wage-loss compensation from June 6 through October 20, 1997; and (2) whether appellant sustained any impairment of his lower extremities causally related to his February 22, 1993 employment-related injury.

On February 23, 1993 appellant, then a 41-year-old bulk mail technician, filed a claim alleging that he sustained an injury on February 22, 1993 while in the performance of duty. On June 16, 1993 the Office of Workers' Compensation Programs accepted appellant's back strain as causally related to his employment on February 22, 1993.

By letter dated November 21, 1995, the Office noted that appellant had returned to light duty as a modified clerk with no loss of wages effective August 7, 1995.

By letter dated March 10, 1997, appellant's counsel noted that he had returned "in a rehabilitation position which [the Office] had offered him by letter dated June 16, 1995."

On April 9, 1998 appellant filed a claim for wage loss from June 6 to October 20, 1997.

By letter dated April 20, 1998, the Office advised appellant regarding the type of evidence he needed to support his claim.

On May 22, 1998 appellant filed a claim for a schedule award. In support of his claim, appellant submitted a June 2, 1997 report from Dr. Paul L. Filippini, a general practitioner with a specialty in orthopedic medicine, who noted appellant's conditions as degenerative disc disease at L5-S1, bilateral radiculopathy and significant weakness in both lower extremities. He stated:

"Using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) Table 39, Impairments from Lower Extremity Muscle Weakness, I would consider [appellant] to have demonstrated on manual muscle testing weakness of flexion/extension in the hips and knees

bilaterally, closely approaching Grade IV and it is my judgment that using those [A.M.A.] [G]uides this individual has a combined impairment of the whole person in the 15 to 20 percent range.”

In a report dated June 18, 1998, Dr. Filippini stated:

“[Appellant’s] weakness approaches Grade IV based on flexion and extension in the hips and knees bilaterally. Grade IV percentage disability for the lower extremities due to Grade IV manual for muscle weakness for hip flexion is 5 percent; for hip extension 17 percent; for knee flexion 12 percent; for knee extension 12 percent. Totaling these in accordance with [C]ombined [V]alues [C]hart would amount to 38 percent per leg.”

By letter dated November 1, 1999, the Office referred the case to Dr. David M. Kruger, a second opinion physician and a Board-certified orthopedic surgeon, to determine if there was any impairment of appellant’s lower extremities as a result of his accepted back strain.

In a report dated November 18, 1999, Dr. Kruger, noted that he had examined appellant and reviewed his medical files. Dr. Kruger found that degenerative disc disease L5-S1 with central disc protrusion and other nonspecific weaknesses in both lower extremities. He found discogenic back pain and a probable internal disruption of the L5-S1 disc. However, Dr. Kruger also noted that appellant “has no significant disability of his lower extremities.” He added: “[Appellant] can continue working in his limited capacity as a mail technician. Apparently, he has been doing this for an extended period of time. He has been able to tolerate this. I would continue him at his current job.”

In a decision dated October 12, 2000, the Office found that appellant had no impairment of his lower extremities. In a second decision dated October 12, 2000, the Office denied appellant’s April 9, 1998 claim for wage loss finding that he presented insufficient evidence to support his claim that he was disabled from his light-duty position from June 6 to October 20, 1997.

By letter dated October 18, 2000, appellant, through counsel, requested an oral hearing. A hearing was held on January 23, 2001. In a decision dated April 18, 2001 and finalized on April 19, 2001, the hearing representative affirmed the Office’s October 12, 2000 decisions that denied appellant’s claim for a schedule award and denied his claim for wage-loss compensation from June 6 to October 20, 1997.

The Board finds that appellant has not established a recurrence of disability from June 6 to October 20, 1997 due to his accepted back strain.¹

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes

¹ Appellant’s appeal to the Board was submitted in an envelope postmarked April 18, 2002. As this date is exactly one year after the hearing representative’s April 18, 2001 merit decision, the Board has jurisdiction over that decision. 20 C.F.R. § 501.3(d).

that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.²

The Board notes initially that appellant has not alleged a change in the nature and extent of the light-duty job requirements.

The Office, in an April 20, 1998 letter, advised appellant regarding the type of evidence he needed to support his claim for wage-loss compensation and provided 30 days to submit such evidence. Appellant failed to submit medical evidence to support his claim that he was disabled from his light-duty position as a result of his back strain from June 6 to October 20, 1997. The Board affirms part of the Office's April 18, 2001 decision denying appellant's claim for wage-loss compensation.

With respect to appellant's claim for a schedule award, the Board finds that this case is not in posture for a decision.

The case file reflects disagreement between appellant's treating physician, Dr. Filippini, and the Office's referral physician, Dr. Kruger, regarding whether appellant had any lower extremity impairment as a result of his work-related injury. When a conflict in medical opinion is created, section 8123(a) requires the Office to appoint a third or "referee" physician, also known as an impartial medical specialist.³

Because the Office did not refer the case to an impartial medical specialist, there remains an unresolved conflict in medical opinion.

Accordingly, the issue of appellant's schedule award is remanded to the Office for referral of appellant, the case record and a statement of accepted facts to an appropriate impartial medical specialist to resolve whether appellant has any impairment of the lower extremities as a result of his work-related injury and, if so, what is the appropriate percentage of impairment of the lower extremities. After any further development, the Office should issue a decision on appellant's entitlement to a schedule award.

² *Mary G. Allen*, 50 ECAB 103 (1998).

³ Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part, "[i]f there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." See *Dallas E. Mopps*, 44 ECAB 454 (1993).

The April 18, 2001 decision of the Office of Workers' Compensation Programs is affirmed, in part, and remanded, in part, for further development on the issue of appellant's schedule award claim.

Dated, Washington, DC
May 12, 2003

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member