



## **FACTUAL HISTORY**

On April 22, 2005 appellant, then a 57-year-old nurse, filed a claim alleging that her increasing back pain over the prior two weeks was a result of having to push more stretchers and move and lift more patients and oxygen tanks due to a reduction in staff. The Office accepted her claim for lumbar radiculopathy, but not for an underlying herniated lumbar disc.<sup>1</sup>

On March 28, 2007 the Office granted a schedule award for a four percent permanent impairment of appellant's right lower extremity. An Office hearing representative set aside this decision and remanded the case to resolve a conflict in medical opinion. The Office referred appellant, together with the case file and a statement of accepted facts, to Dr. Ronald B. Greene, a Board-certified orthopedic surgeon, for an impartial medical evaluation of the extent of impairment.

Dr. Greene evaluated appellant on December 3, 2007. He related her history and complaints. Dr. Greene described his findings on physical examination and reviewed appellant's medical record, including imaging studies. He diagnosed a right-sided herniated disc at L5-S1 with right S1 radiculopathy. Straight leg raising and sciatic stretch testing were negative. Motor function of the right and left lower extremities was completely normal from the hips to the toes in all muscle groups. Muscle functioning was normal and equal bilaterally in all muscle groups. Reflexes were normal and equal bilaterally for the knee and ankles. The only neurologic abnormality was a slight decrease in sensation in the right L5 dermatome compared to the normal left L5 dermatome. Right and left S1 dermatomes were normal. Dr. Greene noted: "My examination is certainly consistent with other examination by orthopedic surgeons, noting that her motor evaluation is completely normal." He pointed that there was no motor impairment, no loss of motion and no other abnormalities to the right lower extremity.

Dr. Greene graded the severity of the S1 sensory loss at 25 percent, representing a one percent impairment of the right lower extremity. He added a three percent pain-related impairment for a total impairment of four percent.

An Office medical adviser reviewed Dr. Greene calculations and determined that appellant had a one percent permanent impairment of her right lower extremity. He found that the additional pain-related impairment amounted to a duplicative rating and was not allowed.

In a decision dated February 14, 2008, the Office denied an additional schedule award.

At a June 25, 2008 oral hearing before an Office hearing representative, appellant's representative contended that there was insufficient evidence that the Office properly selected Dr. Greene to serve as the impartial medical specialist. He asserted that Dr. Greene did not indicate that he performed knee extension strength testing and did not state what grade he assigned for the sensory deficit.

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<sup>1</sup> Appellant injured her back at work on April 4, 1996 when she jumped over a side rail to keep a patient from pulling out his endotracheal tube. The OWCP File No. xxxxxx463.

In a decision dated August 27, 2008, the Office hearing representative affirmed the February 14, 2008 decision. He found that the weight of the medical evidence rested with the impartial medical specialist, Dr. Greene, and established no more than a four percent permanent impairment of the right lower extremity.

On February 1, 2007 appellant filed a claim for compensation for leave buyback from April 27 to August 18, 2005. She used sick leave from April 27 to May 11, 2005 and annual leave from August 2 to 18, 2005 for a total of 192 hours.

The Office informed appellant that she had to substantiate all time away from work with medical documentation supporting that her physician found her disabled as a result of her work-related medical condition. It noted that she saw a physician on April 28, 2005 and another on May 11, 2005, but neither indicated that she was unable to work. A third physician noted that appellant stopped work on April 28, 2005 but did not indicate that she was disabled. The Office gave appellant 30 days to submit a physician's well-reasoned opinion on why she was unable to work as a result of her accepted work injury.

On September 19, 2005 Dr. Herbert N. Avart, a Board-certified physiatrist, advised appellant's representative that appellant was out of work from April 27 to August 19, 2005 due to her right lumbar radiculopathy and back pain. On July 17, 2006 Dr. Ronald N. Rosenfeld, a Board-certified orthopedic surgeon, reported that appellant was first treated at the employee health unit on April 22, 2005. Appellant was treated with medication and continued to work. "Approximately, one week later she first noted the onset of 'severe' pain radiating down her right leg and related that this was the first time she had any such symptoms in her lower extremities. [Appellant] stated that the pain became so severe that she went out of work." Indeed, she stated on July 7, 2005 that when the pain started to go down the front of her right leg with the act of sitting down, "that's when I felt the need to go out on sick leave."

In a decision dated April 17, 2007, the Office denied appellant's February 1, 2007 claim for compensation. It found that the evidence failed to establish her disability for work for the period claimed. There was no evidence that any of her physicians had taken her off work.

At an August 8, 2007 oral hearing before an Office hearing representative, counsel argued that Dr. Avart's September 19, 2005 report and Dr. Rosenfeld's July 17, 2006 report provided *prima facie* evidence of injury-related disability.

Appellant's representative later submitted additional medical evidence and requested reconsideration. In a report dated May 14, 2008, Dr. Avart clarified his August 18, 2005 electrodiagnostic report that appellant's electromyogram (EMG) and nerve conduction study was consistent with right S1 radiculopathy. Omitted from this report, Dr. Avart stated, was that the EMG was completed as appellant was having right leg pain and her magnetic resonance imaging scan demonstrated right and midline posterior disc herniations compromising the right S1 root.

Also omitted from his initial dictation was the fact that the study was completed for radicular symptomatology. Dr. Avart stated:

“The reason this study was completed was low back and right leg pain worsened. I want to confirm that [appellant’s] absence from work from April 27 through August 17, 2005 was directly related to the initial work injury.

“The reason for this opinion, being after the fact that on her initial evaluation, she had right sciatic nerve tension sign, positive EMG with objective findings involving the right S1 root.”

In a decision dated September 8, 2008, the Office reviewed the merits of appellant’s claim and denied modification of its prior decision. It found significant that none of the contemporaneous medical evidence mentioned total disability for work due to lumbar radiculopathy. Instead, it mentioned that appellant was able to return to work with restrictions. The Office found Dr. Avart’s opinion of injury-related disability not well reasoned.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8107 of the Federal Employees’ Compensation Act<sup>2</sup> authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>3</sup>

If there is 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.<sup>4</sup> When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

On appeal, appellant’s representative questioned the selection of the impartial medical specialist, but the Board finds that he did not make a timely challenge.<sup>6</sup> He repeated that the

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<sup>2</sup> 5 U.S.C. § 8107.

<sup>3</sup> 20 C.F.R. § 10.404.

<sup>4</sup> 5 U.S.C. § 8123(a).

<sup>5</sup> *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>6</sup> *M.A.*, 59 ECAB \_\_\_ (Docket No. 07-1344, issued February 19, 2008) (claimant raised a timely objection to the selection of the impartial medical specialist prior to the scheduled examination and provided sufficient reason to require the Office to demonstrate that it properly followed its selection procedures).

impartial medical specialist did not properly apply the A.M.A., *Guides* “since he did not state the grade that he was assigning for the sensory deficit at the S1 nerve root.”

Dr. Greene, a Board-certified orthopedic surgeon and impartial medical specialist, examined appellant on December 3, 2007 and diagnosed a right-sided herniated disc at L5-S1 with right S1 radiculopathy. He found only a very slight reduction in sensation in the affected dermatome.<sup>7</sup> Following the procedure and grading scheme set out in Table 15-15, page 424 of the A.M.A., *Guides*, Dr. Greene correctly noted that the maximum lower extremity impairment due to sensory deficit or pain in the S1 spinal nerve root is five percent. Contrary to the assertion of appellant’s representative, he specifically graded the severity of that sensory deficit or pain at 25 percent. Multiplying the maximum impairment value by the severity of the sensory deficit or pain gives a lower extremity impairment of 1.25 percent, which is rounded to 1 percent.

Dr. Greene added a three percent pain-related impairment, which the Office awarded. The Board finds such a rating unwarranted. Table 15-15, page 424 of the A.M.A., *Guides*, already accounts for pain and the chapter devoted to pain-related impairment should not be redundant of or inconsistent with principles of impairment rating described in other chapters. If an examining physician determines that an individual has pain-related impairment, he or she will have the additional task of deciding whether or not that impairment has already been adequately incorporated into the rating the person has received on the basis of other chapters of the A.M.A., *Guides*.<sup>8</sup> Without a sound explanation for incorporating an additional pain-related impairment,<sup>9</sup> Dr. Greene did not justify a three percent increase in appellant’s rating. This matter does not require clarification from the impartial medical specialist, because even if an additional three percent for pain is added to the impairment caused by sensory deficit or pain in the S1 spinal nerve root, Dr. Greene’s report does not establish that appellant has more than a four percent permanent impairment of her right lower extremity, for which she has already received compensation.

The Board finds that Dr. Greene’s report is based on a proper history and is sufficiently well reasoned that it must be given special weight in resolving the conflict on the extent of appellant’s impairment. Because the weight of the evidence establishes that appellant has no more than a four percent impairment of her right lower extremity, the Board will affirm the Office’s February 14 and August 27, 2008 decisions.

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<sup>7</sup> When reporting his findings on physical examination, Dr. Greene stated that the only neurologic abnormality was a very slight reduction in the right L5 dermatome and that right and left S1 dermatomes were normal. Given his diagnosis of right S1 radiculopathy, which was consistent with studies and other examinations in the record and his rating of impairment, based on sensory deficit or pain in the S1 spinal nerve root, it would appear that he confused the dermatomes in his findings. For purposes of this appeal, it does not matter whether one bases appellant’s impairment on the S1 or L5 dermatome. The result is the same.

<sup>8</sup> A.M.A., *Guides* 570.

<sup>9</sup> *See id.*, (“When This Chapter Should Be Used to Evaluate Pain-Related Impairment”).

## LEGAL PRECEDENT -- ISSUE 2

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>10</sup> A claimant seeking benefits under the Act has the burden of proof to establish the essential elements of her claim by the weight of the evidence,<sup>11</sup> including that she sustained an injury in the performance of duty and that any specific condition or disability for work for which she claims compensation is causally related to that employment injury.<sup>12</sup>

As used in the Act, the term “disability” means incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>13</sup> When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in her employment, she is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.<sup>14</sup>

For each period of disability claimed, appellant has the burden of proving that she was disabled for work as a result of her accepted employment injury.<sup>15</sup> Whether a particular injury causes an employee to become disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial evidence.<sup>16</sup>

Generally, findings on examination are needed to justify a physician’s opinion that an employee is disabled for work.<sup>17</sup> The Board has held that when a physician’s statements regarding an employee’s ability to work consist only of a repetition of the employee’s complaints that she hurt too much to work, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.<sup>18</sup>

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<sup>10</sup> 5 U.S.C. § 8102(a).

<sup>11</sup> *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

<sup>12</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>13</sup> *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17).

<sup>14</sup> *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

<sup>15</sup> *David H. Goss*, 32 ECAB 24 (1980).

<sup>16</sup> *Edward H. Horton*, 41 ECAB 301 (1989).

<sup>17</sup> *See Dean E. Pierce*, 40 ECAB 1249 (1989); *Paul D. Weiss*, 36 ECAB 720 (1985).

<sup>18</sup> *John L. Clark*, 32 ECAB 1618 (1981).

## ANALYSIS -- ISSUE 2

On appeal, appellant's representative argues that Dr. Avart's May 14, 2008 report provides *prima facie* evidence to establish a "recurrence of injury" from April 27 through August 18, 2005.<sup>19</sup>

The Office correctly observed that none of the contemporary medical evidence took appellant off work for lumbar radiculopathy. Appellant was first seen at the employee health unit on April 22, 2005, where she was given medications and restrictions, but she did not stop work at that time. It was about a week later, when the pain started going down the front of her right leg with the act of sitting that she felt the need to go out on sick leave. Appellant took herself off work and saw Dr. Robert E. Muroff on April 28, 2005. Dr. Muroff's report that date did not mention disability for work.

It was September 19, 2005 when Dr. Avart stated that appellant was out of work from April 27 to August 19, 2005. He related this simply as a part of her history and did not advise that he had actually taken her off work. On May 14, 2008 Dr. Avart attempted to clarify that appellant was having right leg pain when she underwent electrodiagnostic testing on August 18, 2005 and that her testing was consistent with right S1 radiculopathy. He stated the reason for the study was worsened low back and right leg pain.

Dr. Avart did not explain why he never took appellant off work. If the reason for the study was worsened low back and right leg pain, he did not explain why, after reviewing the study, he found that appellant was not totally disabled for work. This tends to support that although appellant had objective findings of right S1 radiculopathy and a worsened low back and right leg pain, her radiculopathy was not totally disabling.

It appears that appellant took herself off work and that her physicians simply accepted her self-certification of disability. That left the medical record devoid of any medical finding or opinion that her accepted lumbar radiculopathy totally disabled her for work from April 27 to August 18, 2005. Dr. Avart's attempt to clarify his August 18, 2005 report does not support appellant's claim that her right S1 radiculopathy was totally disabling. Because the preponderance of the reliable, probative and substantial medical evidence does not establish that appellant's disability from April 27 to August 18, 2005 was causally related to her accepted lumbar radiculopathy, the Board will affirm the Office's September 8, 2008 merit decision denying compensation for wage loss for that period. The Board notes that appellant has covered 192 hours of that period with sick and annual leave at no wage loss.

## CONCLUSION

The Board finds that appellant has no more than a four percent permanent impairment of her right lower extremity. The Board also finds that she has not met her burden of proof to

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<sup>19</sup> Because she first stopped work on April 27, 2005 and was not previously disabled, appellant's claim for compensation beginning April 27, 2005 is not a claim of "recurrence" of disability. It is a straight claim of disability causally related to the accepted employment injury.

establish that her disability from April 27 to August 18, 2005 was causally related to her accepted lumbar radiculopathy.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 8, August 27 and February 14, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 22, 2009  
Washington, DC

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

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board