

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

R.L., Appellant)	
)	
and)	Docket No. 10-1309
)	Issued: April 8, 2011
U.S. POSTAL SERVICE, DUBLIN POST)	
OFFICE, Dublin, OH, Employer)	
)	

Appearances: *Case Submitted on the Record*
Allan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On April 12, 2010 appellant, through counsel, filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated March 26, 2010 affirming the denial of his recurrence and schedule award claims. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of these decisions.

ISSUES

The issues are: (1) whether appellant has established entitlement to a schedule award; and (2) whether he established that he sustained a recurrence of disability for the period July 11 to 20, 2009.

FACTUAL HISTORY

This case was previously before the Board. In a September 21, 2007 decision, the Board set aside a December 8, 2006 hearing representative's decision affirming an August 31, 2006

¹ 5 U.S.C. § 8101 *et seq.*

Office decision and remanded the case for further development on the issue of whether appellant established a recurrence of disability beginning June 16, 2006 causally related to his accepted aggravation of severe facet arthrosis at L5-S1.² The Board found that the medical evidence warranted further medical development regarding whether his disability for his modified position was due to his accepted condition. The facts and the circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.³

On February 25, 2009 appellant filed a claim for a schedule award.

In a letter dated February 26, 2009, the Office requested Dr. James B. Dunnan, a Board-certified family practitioner, to provide an impairment rating for appellant's lower extremities using the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

In response to the Office's letter, Dr. Dunnan on March 5, 2009 diagnosed chronic low back pain, L5-S1 arthrosis and L4-5 bulging disc and that maximum medical improvement was reached in 2006. A physical examination of the back revealed decreased range of motion with 5 degrees extension, 90 degrees flexion, 15 degrees right bending and 5 degrees left bending.

On July 7, 2009 appellant accepted a modified mail processing clerk position with physical restrictions of two to four hours of standing, four to seven hours of intermittent carrying up to 20 pounds, six to eight hours of simple grasping and two to four hours of reaching above the shoulder. The duties of the position were two to four hours of loading ledge of AFSM 100 machine, two to four hours of sweeping AFSM 100 machine, two to four hours of casing return to sender letters and two hours of netflixs.

On July 23, 2009 appellant filed a claim for a recurrence of disability for the period July 11 to 20, 2009. He submitted an attending physician's report from Dr. Kedar K. Deshpande, an examining Board-certified physiatrist, who diagnosed low back pain and myalgia. Dr. Deshpande indicated that appellant was disabled from working for the period July 13 to 20, 2009.

By letter dated August 11, 2009, the Office informed appellant that the evidence was insufficient to support his recurrence claim and advised him as to the type of medical and factual evidence required to establish his claim.

Following the Office's letter, an August 5, 2009 report from Dr. James H. Rutherford, a second opinion Board-certified orthopedic surgeon, was received. Dr. Rutherford noted that appellant's claim was accepted for aggravation of severe facet arthrosis. A physical examination of the back revealed 60 degrees flexion, 10 degrees extension and 15 degrees lateral flexion and intact lower extremity sensory examination. An electromyograph for the left lower extremity was normal. Using the sixth edition of the A.M.A., *Guides*, Dr. Rutherford concluded that

² Docket No. 07-1245 (issued September 21, 2007).

³ On April 22, 2005 appellant, then a 53-year-old letter carrier, filed an occupational disease claim alleging that his severe facet arthrosis had been aggravated by his employment. The Office accepted the claim for aggravation of preexisting severe facet arthrosis at L5-S1. Appellant accepted a modified-job position in compliance with medical restrictions on December 28, 2005.

appellant had no ratable permanent impairment of his lower extremities due to his accepted aggravation of severe facet arthrosis. He also opined that appellant continued to suffer from residuals of the accepted employment condition.

On September 10, 2009 an Office medical adviser reviewed Dr. Rutherford's report and agreed with his conclusion that appellant had no ratable lower extremity impairment due to his accepted employment injury.

By decision dated September 22, 2009, the Office denied appellant's claim for a schedule award.

In a September 23, 2009 decision, the Office denied appellant's recurrence claim for the period July 11 to 20, 2009.

In letters dated September 25 and 29, 2009, counsel requested a hearing before an Office hearing representative on the denial of appellant's schedule award and recurrence claim, which was held on January 6, 2010.

By decisions dated March 26, 2010, an Office hearing representative affirmed the September 22, 2009 decision denying appellant's schedule award claim and the September 23, 2009 decision denying his recurrence claim for the period July 11 to 20, 2009.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act⁴ and its implementing regulations⁵ 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 A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁶ Effective May 1, 2009, the Office adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.⁷

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.⁸ As neither the Act nor its regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.*

⁷ Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁸ *Thomas J. Engelhart*, 50 ECAB 319 (1999); *S.K.*, Docket No. 08-848 (issued January 26, 2009).

whole, no claimant is entitled to such a schedule award.⁹ The Board notes that section 8101(19) specifically excludes the back from the definition of organ.¹⁰ However, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.¹¹

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained an aggravation of severe facet arthrosis at L5-S1 as a result of his federal employment. Having filed a schedule award claim, appellant carries the burden of proof to establish that this medical condition caused a permanent physical impairment to his upper or lower extremities. Appellant can receive no schedule award for any impairment to his back unless its origin is an impairment affecting the upper or lower extremities.

Dr. Dunnan, a Board-certified family practitioner, reported decreased back range of motion and noted maximum medical improvement was reached in 2006. He provided no opinion as to whether appellant had a ratable permanent impairment of the lower extremities. Dr. Rutherford, the second opinion orthopedic surgeon, found no ratable permanent impairment of the lower extremities. An Office medical adviser reviewed Dr. Rutherford's report and concurred with his opinion that there was no ratable lower extremity impairment.

Without a well-reasoned medical opinion explaining how the 2005 aggravation of severe facet arthrosis at L5-S1 caused permanent physical impairment of appellant's upper or lower limbs under the sixth edition of the A.M.A., *Guides*, the evidence is insufficient to support his schedule award claim. The Board finds that he has not met his burden of proof. The Board will therefore affirm the Office hearing representative's March 26, 2010 decision.

LEGAL PRECEDENT -- ISSUE 2

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.¹² If the disability results from new exposure to work factors, the legal chain of causation from the accepted injury is broken and an appropriate new claim should be filed.¹³

⁹ See *D.N.*, 59 ECAB 576 (2008); *Jay K. Tomokiyo*, 51 ECAB 361 (2000)

¹⁰ 5 U.S.C. § 8101(19).

¹¹ *J.Q.* 59 ECAB 366 (2008); *Thomas J. Engelhart*, *supra* note 8.

¹² 20 C.F.R. § 10.5(x); *Hubert Jones, Jr.*, 57 ECAB 467 (2006). See also *A.M.*, Docket No. 09-1895 (issued April 23, 2010);

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3 (May 1997); *Cecelia M. Corley*, 56 ECAB 662 (2005); *Donald T. Pippin*, 54 ECAB 631 (2003); *K.C.*, Docket No. 08-2222 (issued July 23, 2009).

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 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.¹⁴ 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.¹⁵ In order to establish that his claimed recurrence of the condition was caused by the accepted injury, medical evidence of bridging symptoms between his present condition and the accepted injury must support the physician's conclusion of a causal relationship.¹⁶ While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.¹⁷

For conditions not accepted by the Office as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not the Office's burden to disprove such relationship.¹⁸

ANALYSIS -- ISSUE 2

As noted above the Office accepted that appellant sustained an aggravation of severe facet arthrosis at L5-S1 as a result of his federal employment. Appellant filed a recurrence claim for the period July 11 to 20, 2009. The Board finds that he has not provided sufficient medical reports, based on objective findings, which establish that there has been a change in the nature and extent of his condition such that he can no longer perform his light-duty job and also has provided no evidence to establish that there has been a change in the nature and extent of his light-duty job requirements commencing July 11, 2009.

Appellant has not contended that there was a change in the nature and extent of his permanent light-duty position. He has asserted that he sustained a worsening of his condition and submitted a July 15, 2009 Form CA-20 report from Dr. Deshpande, an examining Board-certified physiatrist, who diagnosed low back pain and myalgia and indicated dates of disability. Dr. Deshpande's report is insufficient to support disability for this period as he does not attribute appellant's disability to his accepted employment injury. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹⁹ Further, Dr. Deshpande provided no findings on examination in

¹⁴ Recurrence of medical condition means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage. Continuous treatment for the original condition or injury is not considered a need for further medical treatment after release from treatment, nor is an examination without treatment. 20 C.F.R. § 10.5(y).

¹⁵ *Terry R. Hedman*, 38 ECAB 222 (1986).

¹⁶ *Ricky S. Storms*, 52 ECAB 349 (2001).

¹⁷ *Id.*

¹⁸ *Alice J. Tysinger*, 51 ECAB 638 (2000).

¹⁹ *Willie M. Miller*, 53 ECAB 697 (2002).

his report. Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled from work.²⁰

Appellant was advised by an August 11, 2009 letter of the medical and factual evidence to establish his claim for recurrence of disability. However, he did not submit such evidence. The Board finds that appellant submitted insufficient evidence to meet his burden of proof in establishing the claimed recurrence of disability for the period July 11 to 20, 2009.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained permanent impairment as a result of his accepted employment injury. The Board further finds that he has not met his burden of proof in establishing that he sustained a recurrence of disability for the period July 11 to 20, 2009 causally related to his accepted employment-related aggravation of severe facet arthrosis at L5-S1.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 26, 2010 is affirmed.

Issued: April 8, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

²⁰ *Laurie S. Swanson*, 53 ECAB 517 (2002).