

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

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**J.B., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Newark, NJ, Employer**

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**Docket No. 13-786  
Issued: July 18, 2013**

*Appearances:*

*Thomas Uliase, Esq., for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On February 19, 2013 appellant filed a timely appeal from a September 26, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUE**

The issue is whether appellant has established that he has an injury-related permanent impairment which would entitle him to a schedule award.

**FACTUAL HISTORY**

This case has previously been before the Board. In an August 24, 2009 decision, the Board affirmed OWCP's February 5 and July 28, 2008 decisions which terminated appellant's wage-loss benefits effective March 31, 2004 and medical benefits effective October 3, 2006 on

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

the grounds that he no longer had any residuals or disability causally related to his November 2, 2000 employment injury.<sup>2</sup> With regard to the termination of medical benefits, the Board accorded weight to the June 22, 2006 medical opinion of Dr. Avrill Berkman, a Board-certified orthopedic surgeon serving as the impartial medical examiner, who found that appellant no longer had any residuals due to the November 2, 2000 work injury and that any work restrictions would be attributable to appellant's nonwork-related preexisting degenerative condition of the lumbar spine. The Board further found that appellant had not established that he had any continuing residuals or disability of the November 2, 2000 work injury after the wage-loss and medical benefits had been terminated. The facts of the case as set forth in the prior decision are incorporated herein by reference.<sup>3</sup>

On December 2, 2011 appellant filed a claim for a schedule award. In a June 22, 2011 report, Dr. Nicholas Diamond, an attending osteopath, noted the history of appellant's November 2, 2000 work injury and discussed his course of treatment, including objective testing. He provided his examination findings and diagnosed: L4-5, L5-S1 discogenic disease with disc herniation, spinal stenosis and spinal instability; status post surgical procedures. Dr. Diamond noted that the work-related injury of November 2, 2000 was the competent producing factor for appellant's current subjective and objective findings. He further opined that appellant reached maximum medical improvement on June 22, 2011. Pursuant to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. Diamond opined that appellant had 38 percent right lower extremity impairment and 9 percent left lower extremity impairment due to lumbar discogenic disease and status post lumbar discectomy and fusion surgeries of March 22, 2007. He included references to the A.M.A., *Guides* and set forth his impairment calculations.

In a January 2, 2012 report, OWCP's medical adviser noted that the accepted condition was a lumbosacral strain. He utilized Dr. Diamond's examination findings and confirmed that Dr. Diamond correctly calculated 38 percent right lower extremity impairment and 9 percent left lower extremity impairment.

By decision dated May 3, 2012, OWCP denied schedule award compensation on the basis the evidence was insufficient to establish a permanent impairment to a scheduled member due to the accepted work-related injury. It found that Dr. Diamond had not provided well-reasoned opinion as to whether there was any permanent impairment due to the accepted lumbosacral strain and his impairment ratings were based on medical conditions that have not been accepted as being causally related to or caused by the accepted work injury and surgical procedures that had not been authorized.

On May 8, 2012 appellant, through his attorney, disagreed with OWCP's decision and requested an oral hearing, which took place on August 13, 2012. By decision dated September 26, 2012, OWCP's hearing representative affirmed OWCP's May 3, 2012 decision.

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<sup>2</sup> Docket No. 08-2450 (issued August 24, 2009).

<sup>3</sup> OWCP accepted that appellant, a 44-year-old truck driver, sustained a low back strain on November 2, 2000 and paid appropriate benefits. Appellant has been a supervisor, customer service since June 2001. He has been off work since June 18, 2003 and underwent nonwork-related low back surgery on March 22, 2007.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>4</sup> and its implementing federal regulations<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, functions and organs of the body. FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.<sup>6</sup> The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>7</sup> For decisions issued after May 1, 2009, the sixth edition will be used.<sup>8</sup> It is well established that, in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.<sup>9</sup>

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.<sup>10</sup> The Board notes that, before applying the A.M.A., *Guides*, OWCP must determine whether the claimed impairment of a scheduled member is causally related to the accepted work injury.<sup>11</sup>

### **ANALYSIS**

OWCP accepted appellant's claim for a low back strain and paid benefits. The Board previously affirmed OWCP's termination of appellant's wage-loss benefits effective March 31, 2004 and medical benefits effective October 3, 2006 on the grounds that he no longer had any residuals or disability causally related to his November 2, 2000 employment injury. With regard to the termination of medical benefits, the Board found the weight of the medical evidence, as represented by the impartial medical examiner, reflected that the accepted low back strain had resolved and appellant's continuing symptomatology and disability were due to his preexisting degenerative condition.

Appellant thereafter requested schedule award compensation.

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> *Ausbon N. Johnson*, 50 ECAB 304 (1999).

<sup>7</sup> *Supra* note 4.

<sup>8</sup> FECA Bulletin No. 09-03 (issued March 15, 2009).

<sup>9</sup> See *Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.b. (June 1993). This portion of OWCP's procedures provide that the impairment rating of a given scheduled member should include any preexisting permanent impairment of the same member or function.

<sup>10</sup> *Veronica Williams*, 56 ECAB 367, 370 (2005).

<sup>11</sup> *Michael S. Mina*, 57 ECAB 379, 385 (2006).

Dr. Diamond opined in his June 22, 2011 report that appellant's work injury was causally related to his current conditions of L4-L5, L5-S1 discogenic disease with disc herniation and surgery. However, he provided no medical explanation or medical rationale as to how any of these conditions were causally related to or caused by the accepted employment injury of lumbar strain. Rather, these conditions were related to his preexisting degenerative disease conditions.<sup>12</sup>

For a preexisting condition to be considered in a schedule award there must first be a connection between the accepted conditions and those being considered for a schedule award.<sup>13</sup> Dr. Diamond's opinion is insufficient to establish permanent impairment due to the accepted condition of lumbar strain. While OWCP's medical adviser agreed with Dr. Diamond's impairment calculations, the medical adviser also did not reference any permanent impairment due to the November 2, 2000 accepted lumbar strain.

On appeal, appellant's counsel argues that Dr. Diamond's report relates a preexisting sensory deficit in the lower extremities as identified on February 11, 2003 electromyogram testing and, even though appellant underwent subsequent low back surgery that was not authorized by OWCP, the sensory deficit predated the low back surgery and resulted in an impairment, which was in conformity with the A.M.A., *Guides*. While his attorney properly notes that OWCP's medical adviser agreed with Dr. Diamond's impairment rating, neither Dr. Diamond nor the medical adviser provided a reasoned opinion that the accepted condition caused or was related to appellant's preexisting conditions.

The medical evidence does not establish that appellant has permanent impairment to a scheduled member of the body causally related to his accepted injury. Consequently, appellant has not established entitlement to a schedule award.

Appellant may request a schedule award or an increased schedule award based on evidence of a new exposure or medical evidence showing a progression of an employment-related condition resulting in permanent impairment or increased impairment.

### **CONCLUSION**

The Board finds that appellant not established entitlement to a schedule award.

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<sup>12</sup> *Alice J. Tysinger*, 51 ECAB 638 (2000).

<sup>13</sup> See generally *Thomas P. Lavin*, 57 ECAB 353 (2006). See also *M.J.*, Docket No. 13-598 (issued May 8, 2013).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 26, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 18, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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