

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LEON de los REYES and DEPARTMENT OF THE NAVY,  
NAVAL SUBMARINE BASE, Groton, CT

*Docket No. 03-251; Submitted on the Record;  
Issued April 2, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,  
DAVID S. GERSON

The issue is whether appellant is entitled to a schedule award as a result of an employment-related lumbar spine injury.

This is the third appeal in this case.<sup>1</sup> On the first appeal, the Board reviewed a July 17, 1995 decision, by which the Office denied appellant's claim for a recurrence of disability on or around November 27, 1993. The Board set aside the case on the grounds that there was insufficient evidence in the record upon which to make a determination.<sup>2</sup> On remand, following further development of the medical evidence, on June 16, 1999, the Office accepted appellant's claim for a recurrence of disability on or around November 23, 1993. On the second appeal, the Board reviewed decision the dated January 2, 2001 and finalized January 8, 2001, by which the Office denied appellant's claim for a schedule award. In a decision dated April 12, 2002,<sup>3</sup> the Board set aside the case on the grounds that there was a conflict in medical opinion between appellant's attending physician, Dr. Maletz, and the Office referral physician, Dr. Sella, as to whether appellant has a permanent impairment due to gait derangement causally related to his accepted back conditions.

On remand, following further development of the medical evidence, in a decision dated June 16, 1999, the Office denied appellant's claim for a schedule award. The Office found that

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<sup>1</sup> In the present case, on October 19, 1989, the Office of Workers' Compensation Programs accepted that appellant sustained a herniated disc at L4-5 and L5-S1, contusions and a low back sprain as a result of an August 14, 1989 employment injury. The Office has also accepted that appellant sustained recurrences of disability on December 11, 1989 and July 23, 1990 as a result of the accepted injury. The Office further accepted that back surgery undergone by appellant on May 9, 1994 was causally related to the accepted employment injury and thus authorized payment of the bills relating to this surgery. Finally, on June 16, 1999 the Office accepted appellant's claim for recurrence of disability on November 27, 1993.

<sup>2</sup> Docket No. 96-1722 (issued December 24, 1998).

<sup>3</sup> Docket No. 01-1167 (issued April 12, 2002),

the weight of the medical evidence, represented by the opinion of the Office medical examiner, established that appellant had no work-related impairment to any scheduled member of his body which would entitle him to a schedule award. The complete facts of this case are set forth in the Board's April 12, 2002 decision and are herein incorporated by reference.

The Board finds that the Office properly denied appellant's claim for a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act<sup>4</sup> and its implementing regulation<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 or functions of the body. No schedule award is payable for a member, function or organ of the body not specified in the Act or in the regulations.<sup>6</sup> As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or cervical spine, or for the whole person,<sup>7</sup> no claimant is entitled to such an award.<sup>8</sup> However, amendments to the Act in 1960 modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originates in a scheduled or nonscheduled member. As the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originates in the spine, if the medical evidence establishes impairment as a result of the employment injury.<sup>9</sup> 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

In the prior appeal, the Board found that a conflict in medical opinion existed between Dr. Maletz, appellant's attending Board-certified orthopedic surgeon, who found that appellant had a marked gait abnormality as a result of his accepted back condition, and Dr. Sella, an Office referral physician and also a Board-certified orthopedic surgeon, who found that appellant's grossly abnormal gait was "unexplainable" and "inappropriate" for his injury.

On remand on May 17, 2002 the Office referred appellant, together with a statement of accepted facts, a list of questions to be addressed and copies of the medical record, to Dr. Michael J. Halperin, a Board-certified orthopedic surgeon, to resolve the conflict as to

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404 (1999).

<sup>6</sup> *Thomas E. Stubbs*, 40 ECAB 647 (1989).

<sup>7</sup> *Gary L. Loser*, 38 ECAB 673 (1987).

<sup>8</sup> *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

<sup>9</sup> *Rozella L. Skinner*, 37 ECAB 398 (1986).

whether appellant has a permanent impairment due to gait derangement causally related to his accepted back conditions.<sup>10</sup>

In a report dated June 18, 2002, Dr. Halperin noted that appellant ambulated with a cane in a somewhat modified Trendelenburg gait. He noted that appellant's range of motion of the lumbar spine was limited in flexion and extension due to pain, with appellant able to forward flex with fingertips to the superior pole of the patella and extend to about neutral, or slightly past neutral. Sitting root testing demonstrated some stiffness in the hamstrings, but was otherwise normal, manual motor testing revealed good overall strength and normal sensation was noted in both lower extremities. Knee jerks and ankle jerks were symmetrically normal, plantars were found to be down-going and there was no clonus. In addition, there was good range of motion of both hips and knees, supine straight leg raising demonstrated tightness of the hamstrings, and reverse straight leg raising was negative. Dr. Halperin further noted that x-rays of the lumbar spine revealed status post L5 laminectomy and partial L4 inferior laminotomy. There was an L5-S1 noninstrumented fusion with the remnants of an old bone growth stimulator still in place and some of the fusion bone was seen to extend almost up to L4 bilaterally. On flexion and extension views, there was no discernable motion at L5-S1 and normal flexion and extension rocking at L4-5. The L5-S1 disc space was moderately narrowed, but the remaining discs had normal height, although some degenerative changes at L4-5 were noted. In addition, x-rays showed degenerative arthritis of the left hip. Dr. Halperin diagnosed prior L5-S1 laminectomy and fusion, solid and degenerative arthritis of the left hip and possibly the right hip. He stated that appellant had reached maximum medical improvement, and found that he did have a permanent impairment with regard to his lumbar spine, estimated at about 26.6 percent pursuant to the A.M.A., *Guides*. Dr. Halperin concluded that while appellant "also probably has a permanent impairment of his hips from degenerative arthritis, this, however, has nothing to do with his work-related injury."

Where there exists a conflict in medical opinion 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, is entitled to special weight.<sup>11</sup> The Board finds that Dr. Halperin's opinion is sufficiently probative to merit the special weight accorded a referee examiner. While Dr. Halperin found that appellant has a permanent impairment of his spine, due to his accepted employment injuries, as noted above, neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or cervical spine.<sup>12</sup> In addition, while he further noted that appellant also had permanent impairment of his hips due to degenerative arthritis, he specifically stated that this was not related to appellant's accepted employment injuries. Therefore, the Office properly relied on the opinion of Dr. Halperin in finding that as appellant has no

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<sup>10</sup> Section 8123(a) of the Act provides that, when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict. When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence. See *Robert D. Reynolds*, 49 ECAB 561, 565-66 (1998).

<sup>11</sup> *Mary A. Moultry*, 48 ECAB 566 (1997).

<sup>12</sup> *Gary L. Loser*, 38 ECAB 673 (1987).

permanent impairment of any scheduled members or functions of his body, causally related to his employment, he is not entitled to receive a schedule award.

Accordingly, the June 16, 1999 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
April 2, 2003

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member