U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY F. RICCIO and U.S. POSTAL SERVICE,
POST OFFICE, Kalamazoo, MI

Docket No. 03-1099; Submitted on the Record;
Issued August 28, 2003

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant is entitled to a schedule award.

On February 24, 1997 appellant, then a 55-year-old letterbox mechanic, slipped on ice, fell backwards onto his buttocks, back, left hip and elbow. He filed a claim for a traumatic injury that was accepted by the Office of Workers' Compensation Programs for aggravation of preexisting cervical and lumbar strains, aggravation of a bulging disc at C3-4 and aggravation of cervical spondylosis. Appellant's relevant medical history also includes a nonwork-related cervical fusion performed in July 1996. He missed work intermittently until he stopped entirely on May 23, 1997. On December 19, 1999 appellant returned to work four hours a day, light duty.

On December 11, 2000 appellant filed for a schedule award and submitted a December 11, 2000 report from Dr. Eric Born, who assessed appellant's lower extremity disability to be somewhere in the range of 65 to 80 percent, but noted that the extent of appellant's disability was hard to determine due to appellant's lack of effort when performing the functional capacity tasks.

On July 19, 2001 the District Medical Adviser found the medical evidence vague and not sufficient to provide an impairment rating. In an August 14, 2001 letter, the Office informed appellant that he needed to submit additional medical information. In a February 6, 2002 report, Dr. Charles Guernsey wrote that appellant described total body discomfort with pain in the neck that radiated into both upper extremities. Appellant also described pain that radiated down into both lower extremities and had pain along his spine. Dr. Guernsey opined that appellant's pain was secondary to myofascial pain syndrome and paravertebral irritation at the disc and nerve root level in both his neck and low back. He also diagnosed fibromyalgia.

In a February 25, 2002 letter, the Office referred appellant for a second opinion. In an April 1, 2002 report, Dr. Ronald Rook, a Board-certified orthopedic surgeon, reviewed appellant's medical records and conducted a physical examination. Regarding appellant's

physical impairment, Dr. Rook noted that he applied Table 15-12, page 418, of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 5th ed., and found appellant's loss of motion in the cervical spine constituted two percent of the whole person. Dr. Rook stated:

> "If the decreased sensation within the hands along with the decreased grip strength is due to the cervical spine, and I question whether this is true, then [appellant] would be entitled to another 15 percent impairment of the whole person because of the involvement of both hands. Even though true numbness is not present, decreased sensation is and it would fall under the radicular classification, Table 15-5, DRE Cervical Category III. At this time, I cannot find any symptoms of a radiculopathy present from his herniated disc at the L3-4 level. [Appellant] does have some symptoms of his spondylolysis in various movements and has Grade I spondylolisthesis and this would give him a 7 percent impairment of the whole body, Table 15-7 page 404."

In an undated memorandum, Dr. Douglass C. Allen, an Office medical adviser stated:

> "Schedule awards may not be paid for impairment to the back; such awards can be paid for impairment of the upper and lower extremities due to the accepted work-related [back] conditions. Per Dr. Rook's evaluation, he found no evidence of upper or lower extremity radiculopathy. Since there are no radicular symptoms, per Dr. Rook, no impairment should be awarded for the extremities."

In a May 2, 2002 decision, the Office denied appellant's claim for a schedule award, finding the weight of the medical evidence rested with Dr. Rook, who found that appellant's accepted conditions did not result in any ratable impairment to his extremities.

In a May 29, 2002 letter, appellant requested a hearing that was held on December 17, 2002. Appellant's representative argued that Dr. Rook did not properly apply the A.M.A., *Guides* to appellant's accepted conditions and, therefore, his report was invalid.

Appellant submitted a September 17, 2002 report from Dr. Harris Russo, a neurological surgeon, and two reports from Dr. Kenneth Highhouse, an orthopedist. Dr. Harris wrote that he did not use the A.M.A., *Guides* because it was simplistic and did not fully explain the problem. Neither of Dr. Highhouse's reports discussed appellant's permanent impairment.

In a March 5, 2003 decision, the hearing representative affirmed the May 2, 2002 schedule award denial finding that the weight of the medical opinion rested with Drs. Rook and Allen.[1]

The Board finds that appellant has not met his burden of proof to establish entitlement to a schedule award.

[1] The Board notes the appellant submitted new medical evidence subsequent to Office's decision. However, the Board cannot consider that evidence for the first time on appeal; see 20 C.F.R. § 501.2(c).

An employee seeking compensation under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[3] including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.[4]

The schedule award provisions of the Act[5] and its implementing regulation[6] 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 regulation as the appropriate standard for evaluating schedule losses.[7]

In the present case, appellant has not demonstrated that he sustained a ratable permanent impairment to either his upper or lower extremities. The medical evidence from Drs. Russo and Highhouse does not discuss appellant's impairment in terms consistent with the A.M.A., *Guides.* Dr. Rook's February 25, 2002 report clearly identified the source of impairment as appellant's back and provided a whole body impairment of the back. Dr. Rook found no radiculopathy from the accepted herniation at L3-4 level. A schedule award is not payable for the loss or loss of use, of a part of the body that is not specifically enumerated under the Act. Neither the Act nor its implementing regulations provides for a schedule award for impairment to the back or to the body as a whole. Moreover, the back is specifically excluded from the definition of an organ under the Act.[8] The Board finds that there is no rationalized medical evidence that establishes any permanent impairment to appellant's upper or lower extremities. Dr. Rook also noted a decreased sensation in appellant's hands, though he questioned if that were actually the case. Dr. Born also questioned appellant's efforts in trying to assess his lower extremity disability. Dr. Allen specifically noted that no radicular symptoms were clearly identified and without radicular symptoms, there is no basis for a schedule award for the impairment extremities.

[2] 5 U.S.C. §§ 8101-8193.

[3] *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

[4] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404 (1999).

[7] *See id.*; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

[8] *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

The decisions of the Office of Workers' Compensation Program's dated March 5, 2003 and May 2, 2002 are affirmed.

Dated, Washington, DC
August 28, 2003

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member