

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PAUL W. HARDING and DEPARTMENT OF VETERANS AFFAIRS,  
BRONX VETERANS HOSPITAL, Bronx, NY

*Docket No. 03-1229; Submitted on the Record;  
Issued October 30, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether appellant met her burden of proof to establish entitlement to a schedule award for a permanent partial impairment to the lower extremities resulting from the February 8, 1980, April 5, 1981 and June 21, 1995 employment injuries.

The case is on appeal to the Board for the third time. On the first appeal,<sup>1</sup> the Board found that appellant failed to establish that he sustained a recurrence of disability, due to his April 5, 1981 employment injury, commencing June 21, 1995. The Board also found that appellant received an overpayment of compensation in the amount of \$4,728.75, that the Office of Workers' Compensation Programs properly determined that appellant was not entitled to waiver of recovery of the overpayment, and that the Office properly denied appellant's request for a hearing. The Board therefore affirmed the Office's May 28 and October 1, 1996 decisions. Subsequently, the Office accepted that appellant sustained a work-related injury consisting of cervical and lumbosacral sprains on June 21, 1995. On the second appeal,<sup>2</sup> the Board found that appellant failed to establish that he sustained a recurrence of disability, due to his June 21, 1995 employment injury, commencing January 10, 1996. The Board affirmed the Office's December 21, 1999 and June 9, 2000 decisions. The facts and history surrounding the prior appeals are set forth in the prior decisions and are hereby incorporated by reference.

On August 27, 2002 appellant filed a claim for a schedule award. In an accompanying letter dated November 19, 2002, appellant's attorney, Jeffrey P. Zeelander, requested that the Office, for the purposes of evaluating the degree of appellant's impairment, authorize appellant to see Dr. Paul L. Liebert, a Board-certified orthopedic surgeon.

By letter dated November 22, 2002, the Office told appellant, "As you are aware, the Office has issued a decision disallowing compensation benefits and terminating medical

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<sup>1</sup> Docket No. 97-377 (issued November 24, 1998).

<sup>2</sup> Docket No. 00-2527 (issued March 27, 2002).

treatment. The decision has been upheld on appeal. Therefore I cannot authorize a medical examination. If you have medical evidence to submit in support of the schedule award, you may do so.” By letter dated November 22, 2002, Mr. Zeelander explained that the Office’s concern regarding the denial of the recurrences was misplaced because the recurrences addressed only whether appellant had become partially or totally disabled. By letter dated November 29, 2002, the Office reiterated that it was unable to authorize the examination with Dr. Liebert since the Office had issued a decision disallowing benefits and terminating medical treatment, and the decision was upheld on appeal.

By letter December 3, 2002, Mr. Zeelander stated that the denials of the recurrences alleged an increase in the level of impairment, and he failed to see how they addressed the underlying accepted claim for a herniated disc at L4-5. He reiterated his request for appellant to receive authorization to see Dr. Liebert or in the alternative, for the Office to provide a formal decision explaining which decision terminated his claim, along with his appeal rights.

By decision dated December 5, 2002, the Office denied appellant’s claim for a schedule award, stating that the evidence of record failed to demonstrate that he sustained a permanent impairment as a result of the work injury. By letter dated December 8, 2002, appellant requested a written review of the record. By decision dated April 2, 2003, the Office hearing representative affirmed the Office’s December 5, 2002 decision.

The Board finds that appellant did not meet her burden of proof to establish entitlement to a schedule award for a permanent partial impairment to the lower extremities resulting from the February 8, 1980, April 5, 1981 and June 21, 1995 employment injuries.

The schedule award provisions of the Federal Employees’ Compensation Act<sup>3</sup> and its implementing regulations<sup>4</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. 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 to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>5</sup> Appellant has the burden of submitting the evidence necessary for establishing his entitlement to a schedule award.<sup>6</sup>

In this case, despite the Office’s informing appellant that he must submit evidence to establish his claim, appellant did not submit any evidence. Appellant contended that the Office was obligated to authorize appellant’s treatment by a medical doctor for purposes of evaluating his schedule injury. Appellant contended that, despite the Board’s and the Office’s decisions

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<sup>3</sup> 5 U.S.C. § 8107 *et seq.*

<sup>4</sup> 20 C.F.R. § 10.404.

<sup>5</sup> *See id.*; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

<sup>6</sup> *See* 20 C.F.R. § 10.115(f).

denying his alleged recurrences of disability commencing on January 10, 1996 or June 2, 1995, the Office did not issue a decision terminating medical expenses for the original accepted injury of a herniated disc and therefore he was entitled to have the Office authorize his examination by a doctor. While it is true that the Office did not issue a decision indicating that the initial accepted condition of a herniated disc had terminated, appellant nonetheless bears the burden of submitting medical evidence to establish his schedule award.<sup>7</sup> Appellant did not submit any evidence. He therefore has failed to establish his entitlement to a schedule award.

The April 2, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
October 30, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>7</sup> Appellant's entitlement to a schedule award for a permanent partial impairment resulting from the April 5, 1981 employment injury is a separate issue from his entitlement to compensation or medical expenses for the alleged recurrences of disability; *see* 20 C.F.R. §§ 10.103, 10.104; *see also generally Orlando Vivens*, 42 ECAB 303, 308-09 (1991).