

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

LEWIS A. MARCUM, Appellant

and

**U.S. POSTAL SERVICE, CINCINNATI
SERVICE CENTER, Cincinnati, OH, Employer**

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**Docket No. 04-1213
Issued: December 15, 2004**

Appearances:

Alan J. Shapiro, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On April 4, 2004 appellant timely appealed from a February 18, 2004 decision by an Office of Workers' Compensation Programs' hearing representative who found that appellant was not entitled to a schedule award. The Board has jurisdiction over the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether appellant is entitled to a schedule award for his legs, arising from his accepted condition of a herniated lumbar disc.

FACTUAL HISTORY

On April 10, 1995 appellant, then a 36-year-old tractor trailer operator, was stepping down from a truck when he twisted his left ankle and fell, landing on his buttocks and hitting his head on concrete. He attempted to brace himself with his right wrist and elbow. He developed pain in his neck and back shortly thereafter. He was placed on light duty for two weeks and then returned to regular duty but the pain persisted.

On October 12, 1996 appellant was loading a truck when he began to feel sharp pain in his back. At the Bulk Mail Center, appellant was dropping off one trailer and hooking up another trailer when the pain began to extend down his legs to the bottom of his feet. As he drove back to the main post office, the pain in his back became so painful that he would scream in pain whenever he hit a bump or rough road. He reported that loading a truck contributed to his back pain due to pushing the load on the trailer and then twisting the back to put it into the right place to balance the load. He also noted that these activities also contributed to his right elbow pain, as well as shifting gears on the truck. Appellant stopped working that day. He subsequently returned to light-duty work on October 21, 1996. In a May 30, 1997 decision, the Office denied appellant's claim on the grounds that he had not met the requirements for establishing his condition was caused by the employment factors he claimed. In a June 12, 1997 letter, appellant requested a hearing before an Office hearing representative which was conducted on May 28, 1998. In an August 20, 1998 decision, the Office hearing representative found that the case was not in posture for decision and remanded the case for referral of appellant to a Board-certified neurosurgeon. In a March 2, 1999 decision, the Office denied appellant's claim for compensation. Appellant again requested a hearing before an Office hearing representative. In a May 29, 1999 decision, another Office hearing representative remanded the case to seek clarification. In a July 30, 1999 decision, the Office again found that appellant's lumbar disc herniation was not related to the April 10, 1995 injury. Appellant again requested a hearing before an Office hearing representative. In an April 19, 2000 decision, an Office hearing representative set aside the Office's decision and remanded the case for further medical development. In a January 4, 2001 decision, the Office accepted appellant's claim for the herniated discs at L3-4 and L4-5 due to an occupational injury that occurred on October 12, 1996. In a January 5, 2001 decision, the Office again denied appellant's claim on the grounds that the April 10, 1995 injury did not cause his back condition.¹

In a May 22, 2001 report, Dr. Martin Fritzhand, a specialist in occupational medicine and legal medicine, stated that appellant had difficulty bending forward at the waist to 70 degrees and had other limitations in the motion of the back. He noted that appellant could squat only 50 percent of the standard for squatting. He indicated that appellant had no tenderness on palpation of the hips. He reported that the range of motion of the hips with the knees flexed was 90 degrees bilaterally. He commented that muscle strength and sensory modalities were intact. He indicated that appellant's right calf was ¼ inch smaller than the left calf. He graded the right patellar reflex as 1+¼+ while the contralateral reflex was brisk. He stated that the left Achilles tendon reflex was absent while the contralateral reflex was graded as a trace. Dr. Fritzhand commented that appellant's range of motion studies were poor. He concluded that appellant had evidence of nerve root damage as the deep tendon reflexes were poor. He stated that appellant's subjective symptoms of pain in the lumbosacral region corroborated appellant's objective symptoms. He declared that, under the A.M.A., *Guides*,² appellant had a 60 percent permanent

¹ The case record on appeal does not contain an April 19, 2000 decision remanding appellant's case or the Office decision that led to the April 19, 2000 decision. The Board notes that appellant had filed two claims, one for a traumatic injury on April 10, 1995 and one for an occupational injury, occurring on October 12, 1996. It is probable that, on appeal, the Office submitted the complete case record for the October 12, 1996 occupational claim but only incomplete records from the April 10, 1995 claim.

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

impairment of the lumbar spine. On October 4, 2001 appellant filed a claim for a schedule award.

In a January 29, 2003 memorandum, an Office claims examiner requested the Office medical adviser to review the medical reports of record and indicate whether appellant should receive a schedule award. He related that appellant's accepted conditions were displacement of a lumbar intervertebral disc without myelopathy and excision of an intervertebral disc. In a February 5, 2003 note, the Office medical adviser stated that the medical records were not sufficient to show a permanent impairment due to appellant's accepted conditions. He noted that he had reviewed the medical records back to 1998.

In a February 27, 2003 decision, the Office denied appellant's claim for a schedule award on the grounds that the Office medical adviser's report of January 29, 2003 correctly applied the A.M.A., *Guides* to the findings on examination and found that his back condition was not sufficiently severe to be considered ratable.

Appellant requested a hearing before an Office hearing representative. At the November 19, 2003 hearing, appellant's attorney presented another copy of Dr. Fritzhand's May 29, 2001 report and argued that it showed appellant had a permanent impairment. He questioned whether the Office medical adviser had reviewed that report.

In a February 18, 2004 decision, the Office hearing representative stated that the case record did not contain any evidence of a permanent impairment to a scheduled member. He pointed out that the Office medical adviser had reviewed the case on February 5, 2001 and found no permanent impairment based on appellant's accepted conditions. The Office hearing representative stated that Dr. Fritzhand had not offered any evidence to support any nerve root impairment. He concluded that, as appellant had failed to provide medical evidence of a permanent impairment of a scheduled member of the body, the Office properly denied entitlement to a schedule award.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act³ and its implementing regulation⁴ sets 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.

³ 5 U.S.C. § 8107

⁴ 20 C.F.R. § 10.404 (1999).

A schedule award cannot be issued for the back. Section 8101(19) of the Act⁵ specifically excludes the back from the definition of “organ” and, therefore, the back does not come under the provisions for payment of a schedule award.⁶ The 1960 amendments to the Act modified the schedule award provisions to provide for an award of permanent impairment to a member of the body covered by the schedule, regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Thus, a claimant may be entitled to a schedule award for permanent impairment to an arm or leg even though the cause of the impairment originated in the neck, shoulders or spine.⁷

ANALYSIS

In the initial reports on appellant’s back condition, Dr. Braden reported that appellant’s magnetic resonance imaging (MRI) scan showed that he had a small central/left disc herniation which was causing an indentation on the thecal sac and a moderate to large central/right disc herniation which caused an indentation on the thecal sac. Dr. Skidmore stated that appellant had pain extending down his legs a few weeks after the second employment injury. He reported that the pain resolved after two epidural steroid injections. He subsequently stated that appellant’s injuries had caused the disc herniations which led to the right radicular pain in the leg. He noted that appellant’s leg pain had been resolved after the surgery.

Dr. Middendorf stated that appellant complained of severe low back and leg pain. He noted that a recent MRI scan showed progression in the L3-L4 disc herniation which extended into the left neural foramen. He related appellant’s condition to his work activities.

The Office subsequently accepted appellant’s claim for herniated lumbar discs due to the October 12, 1996 occupational injury, based on Dr. Changaris’ report. Appellant then requested a schedule award and submitted a report from Dr. Fritzhand, who noted appellant’s claim of leg pain. He reported that appellant had a decreased right patellar reflex, an absent left Achilles tendon reflex and a trace right Achilles tendon reflex. He concluded from these results that appellant had nerve root damage. He stated that flexion in appellant’s hips was 90 degrees bilaterally. Under the A.M.A., *Guides*, flexion in the hip at less than 100 degrees equals a 5 percent permanent impairment of the leg.⁸

The Office medical adviser, in a short February 5, 2003 memorandum, stated that the medical records were not sufficient to show a permanent impairment due to appellant’s accepted conditions. Dr. Fritzhand, however, showed that appellant had reduced deep tendons reflexes which were probably due to nerve root damage and had a ratable loss of motion in the hips. His report therefore contradicts the report of the Office medical adviser who found no factors that would result in a permanent impairment rating. This conflict in the medical evidence must be resolved. Accordingly, the case will be remanded to the Office for referral of appellant to an

⁵ 5 U.S.C. § 8101(19).

⁶ *Francesco C. Veneziani*, 48 ECAB 572, 574 (1997).

⁷ *Thomas J. Engelhart*, 50 ECAB 319, 320-21 (1999).

⁸ A.M.A., *Guides* at p. 537, Table 17-9.

appropriate impartial medical specialist for an examination. The impartial specialist should be requested to provide a report on whether appellant has any permanent impairment of the legs due to the accepted conditions.

CONCLUSION

The case is remanded for referral of appellant to an impartial medical specialist to resolve the conflict in the medical evidence on whether appellant has any permanent impairment due to the accepted conditions. After further development as it may find necessary, the Office shall issue a *de novo* decision in this case.⁹

ORDER

IT IS HEREBY ORDERED THAT the decision of Office of Workers' Compensation Programs' hearing representative, dated February 18, 2004, be set aside and the case remanded for further development, consistent with this decision.

Issued: December 15, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁹ The Board notes that the case record is missing several items including Dr. Tibbs' reports and transcripts for two hearings. The Office had assigned appellant's claims different file numbers, OWCP File No. 06-425959 for the April 10, 1995 employment injury and OWCP File No. 09-425956 for the October 12, 1996 occupational injury. The Office indicated that the cases would be combined into a master file, OWCP File No. 09-402469. The Office, however, only submitted the record from File No. 09-425956 on appeal. It is quite likely that the missing items are in OWCP File No. 06-425959. On remand, both case records should be combined since they relate to injuries to the same part of the body.