

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

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**GARY L. HAND, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Dayton, OH, Employer**

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**Docket No. 04-549  
Issued: May 7, 2004**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
MICHAEL E. GROOM, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On December 22, 2003 appellant, through counsel, filed a timely appeal of the Office of Workers' Compensation Programs' decision dated November 20, 2003 denying his claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award denial in this case.

**ISSUE**

The issue on appeal is whether appellant sustained any permanent impairment as a result of his accepted right hip and lumbosacral strains.

## **FACTUAL HISTORY**

On January 14, 1999 appellant, then a 44-year-old casual clerk, filed a traumatic injury claim alleging that on January 5, 1999 he turned over a gaylord to retrieve mail while at work and fell on his tailbone. Within two days he experienced sharp pain from his hip which radiated down his right side. On February 19, 1999 the Office accepted the claim for a lumbosacral strain and right hip strain.<sup>1</sup> Appellant was terminated from the employing establishment approximately March 1999 because of an employment violation unrelated to this injury.

A March 12, 1999 magnetic resonance imaging (MRI) scan report showed effacement of the S1 nerve root through the thecal sac with essential and right paracentral disc protrusion.

On December 9, 1999 appellant filed a Form CA-7 claim for a schedule award. On December 22, 1999 the Office requested that he submit medical evidence to establish that he sustained permanent impairment of his lower extremities or right hip as a result of his accepted injury.

At the request of appellant's attorney, appellant was examined by Dr. Martin Fritzhand, a Board-certified urologist with the American Board of Independent Medical Examiners. On September 11, 2001 the Office received a medical report from Dr. Fritzhand, dated June 5, 2000, who opined that appellant sustained a 50 percent impairment of the lower extremities as a result of the accepted work injury based on Tables 40, 75, 81, 82 and 83 from the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

The Office referred appellant to Dr. Rudolf Hofmann, a Board-certified orthopedic surgeon, for a second opinion to determine if appellant had any residuals or impairment from the accepted lumbar strain and right hip strain. In a report dated October 26, 2001, Dr. Hofmann reviewed the history of injury, appellant's medical records and reported findings on his examination of appellant. Dr. Hofmann opined that appellant continued to have residuals of the lumbar strain but had recovered from the right hip strain. Dr. Hofmann found that appellant had reached maximum medical improvement, required work restrictions and had a 10 percent impairment of the right lower extremity causally related to the work injury.

On February 8, 2002 the Office requested additional information from Dr. Hofmann including a medical opinion as to whether the January 5, 1999 work injury aggravated appellant's preexisting herniated disc condition and, if so, when the aggravation ceased.

On February 18, 2002 an Office medical adviser completed a schedule award worksheet finding that appellant had not reached maximum medical improvement but, based on the sciatic nerve involvement, he had a 10 percent impairment of the right lower extremity.

In an addendum report dated February 12, 2002, Dr. Hofmann stated that, based on appellant's prior herniated disc and two lumbar laminectomies, he did not believe that the work

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<sup>1</sup> The record reflects that appellant had a previous nonwork-related right herniated nucleus pulposus at L5-6 for which he underwent two laminectomies in 1985 and 1986 and a prior hernia surgery.

injury aggravated his preexisting conditions or caused any neurologic deficit supporting a diagnosis of a right L4 radiculopathy. He stated that appellant's prior back surgery in 1985 likely accounted for his MRI findings rather than the January 5, 1999 injury and that there was no objective neurologic deficit of the right lower extremity or objective change in MRI findings following January 5, 1999.

The Office found a conflict in medical opinion between Dr. Hofmann and Dr. Fritzhand.

The Office referred appellant to Dr. Ronald Moser, a Board-certified orthopedic surgeon. The Office requested that Dr. Moser determine whether or not appellant had any remaining residuals causally related to the accepted January 5, 1999 work injury, whether or not the accepted January 5, 1999 work injury aggravated the preexisting nonwork-related right herniated nucleus pulposus (HNP) at L5-6 and whether or not appellant had any impairment to his lower extremities as a result of any aggravation of the January 5, 1999 work injury.

In a report dated December 13, 2002, Dr. Moser reviewed appellant's complaints, employment and medical history and set forth findings on physical examination, which he found unremarkable. He indicated that most of the problems exhibited by appellant during the examination were a result of arachnoiditis secondary to his previous laminectomies and did not pertain to any type of accepted lumbar strain or hip strain. Dr. Moser further indicated that there was no objective evidence on examination to support a chronic lumbar strain, or a right hip strain. He diagnosed "S/P laminectomy in 1985; S/P laminectomy in 1986, lumbar strain from the injury on January 5, 1999, resolved, hip strain from the injury on January 5, 1999, resolved." In response to questions posed by the Office, Dr. Moser stated:

"It is my medical opinion that the January 5, 1999 work injury did not aggravate [appellant's] preexisting nonwork-related right herniated nucleus pulposus L5-6 condition. The rationale for this opinion stems primarily from the history as given by the patient and also by the results of the physical examination which did not reveal any objective evidence to support an opinion of an aggravation.

"It is my opinion that [appellant] does not have any remaining residuals causally related to the accepted factor of employment for the January 5, 1999 work injury. I feel that the injuries that he sustained on that particular occasion have resolved. There was no objective evidence to support the diagnosis of a lumbosacral strain. There was tenderness to palpation and there was a slight decreased range of motion noted, but no muscle atrophy and no muscle spasm were noted during the examination.

"Based solely on the diagnosis of lumbosacral strain and hip strain, [appellant] is medically capable of returning to gainful employment without restrictions. Again, I could not find objective evidence to support the fact that his lumbosacral strain or hip strain was causing his current problems. This opinion is based solely as a result of the January 5, 1999 injury.

“In my opinion, [appellant] does not require any restrictions due to the allowed conditions of a lumbosacral strain and hip strain. I feel that these problems have resolved.

“It is my opinion that his work-related lower back condition of lumbosacral strain has resolved and consequently it is not impairing one or both of his lower extremities as a direct result of the accepted January 5, 1999 work injury.

“It is my opinion that maximum medical improvement from the January 5, 1999 injury has occurred effective December 12, 2002.”

By decision dated February 25, 2003, the Office denied appellant’s claim for a schedule award for his lower extremities.

In a letter dated February 28, 2003 appellant, through counsel, requested an oral hearing which was held on August 18, 2003. Appellant’s counsel contended that a conflict of medical opinion was not created in this case between Dr. Fritzhand, appellant’s physician, and Dr. Hofmann, the second opinion physician. He argued that Dr. Fritzhand and Dr. Hofmann both agreed that, there was an impairment of the right lower extremity and, although they disagreed as to the percentage of impairment, their disagreement did not create a conflict in medical opinion. Appellant’s counsel also argued that the Office medical adviser agreed with Dr. Hofmann that appellant had a 10 percent impairment of the right lower extremity and that no further examinations were necessary as Dr. Hofmann’s report represented the weight of the medical evidence.

By decision dated November 20, 2003, the Office hearing representative found that the Office properly found a conflict in medical evidence between the report of Dr. Fritzhand and Dr. Hofmann. She found that the weight of medical evidence rested with Dr. Moser, the impartial medical specialist, on whether appellant had residuals of the work injury or preexisting condition and whether appellant had any permanent impairment. The Office hearing representative affirmed the February 25, 2003 decision.

### **LEGAL PRECEDENT**

Section 8107 of the Federal Employees’ Compensation Act<sup>2</sup> sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act, 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 under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The Act’s implementing regulation has adopted the A.M.A., *Guides*, as the appropriate standard for evaluating schedule losses.<sup>3</sup>

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<sup>2</sup> 5 U.S.C. § 8107.

<sup>3</sup> 20 C.F.R. § 10.404 (1999).

## ANALYSIS

The Office properly determined that there was a conflict in the medical opinion evidence between Dr. Fritzhand, appellant's treating physician, and Dr. Hofmann, the Office referral physician, as to whether or not appellant had any remaining residuals causally related to the accepted January 5, 1999 injury, whether or not the accepted January 5, 1999 work injury aggravated his preexisting L5-6 herniated disc condition and whether or not appellant had any impairment to his lower extremities.<sup>4</sup> The Office determined that both physicians were appropriate specialists and provided detailed reports with regards to their findings on examination such that an impartial specialist was required. Dr. Fritzhand found that appellant had a 50 percent impairment of the right lower extremity based on the A.M.A., *Guides* and opined that appellant's impairment was due to a herniated disc that resulted from the 1999 work injury. Dr. Hofmann determined that appellant had a 10 percent impairment of the right lower extremity and later, in an addendum report, found no objective documentation that appellant's work injury had aggravated his preexisting herniated disc. Dr. Hofmann also found no objective neurologic deficit that supported a diagnosis of right L4 radiculopathy as rated under the A.M.A., *Guides*. For these reasons, the Board finds that Dr. Hofmann's opinion created a conflict with that provided by Dr. Fritzhand as Dr. Hofmann concluded there was no basis to support any lumbar radiculopathy.<sup>5</sup> Section 8123(a) of the Act provides, in pertinent part, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."<sup>6</sup>

Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>7</sup>

In a report dated December 13, 2003, Dr. Moser reviewed a history of appellant's condition and detailed his findings on examination. He noted that most of appellant's complaints at the time of his examination resulted from a condition due to his previous lumbar laminectomies and did not pertain to either the hip or lumbar strains accepted by the Office. Dr. Moser stated that there was no objective evidence on examination which supported a hip or lumbar strain and opined that the accepted conditions had resolved. He indicated that appellant

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<sup>4</sup> The Board notes that appellant's initial treating physician, Dr. John Moore, noted that appellant had not yet reached maximum medical improvement and therefore did not submit an impairment rating. The record reflects that appellant's counsel thereafter called upon Dr. Fritzhand to offer his opinion regarding appellant's condition and level of impairment.

<sup>5</sup> Although the district medical adviser reviewed Dr. Hofmann's initial report and agreed with the percentage of impairment, this report is not controlling in any way as it was not based on a thorough medical report addressing all the issues including aggravation of the preexisting injury and residuals at that time. *See Robert D. Reynolds*, 49 ECAB 52 (1998).

<sup>6</sup> 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB \_\_\_\_ (Docket No. 01-1599, issued June 26, 2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207, 210 (1993).

<sup>7</sup> *See Roger Dingess*, 47 ECAB 123, 126 (1995); *Juanita H. Christoph*, 40 ECAB 354, 360 (1988); *Nathaniel Milton*, 37 ECAB 712, 723-24 (1986).

had no residuals of the accepted injury and that he did not require physical restrictions associated with the accepted conditions. Dr. Moser further opined that the January 5, 1999 work injury did not aggravate appellant's preexisting herniated disc, explaining that appellant's history and examination did not reveal any objective evidence to support any aggravation. He found that, since the accepted lumbosacral and hip strains had resolved, the conditions did not cause impairment of appellant's lower extremities.

As noted above, Dr. Moser, the impartial medical specialist selected to resolve the conflict in the medical opinion evidence, indicated that appellant's ongoing complaints were related to his previous laminectomies and were not caused or aggravated by his employment. He was provided with the case record and a statement of accepted facts and his opinion that appellant's accepted conditions had resolved causing no impairment to either lower extremity was based upon a complete and accurate factual background and explained with medical rationale. The weight of the medical evidence rests with the opinion of Dr. Moser in this case.

**CONCLUSION**

The Board finds that appellant has not established that he sustained a permanent impairment as a result of the accepted right hip and lumbosacral strain.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 20, 2003 is affirmed.

Issued: May 7, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member