

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

KATHLEEN EARLY, Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Fort Wayne, IN, Employer**

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**Docket No. 06-137
Issued: April 6, 2006**

Appearances:
Kathleen Early, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 24, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' July 20, 2005 merit decision concerning her entitlement to schedule award compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained permanent impairment which entitled her to a schedule award.

FACTUAL HISTORY

On May 15, 2000 appellant, then a 39-year-old nursing assistant, filed a traumatic injury claim alleging that she injured her back when she lifted a patient while assisting him to take a shower on May 11, 2000. The Office accepted that appellant sustained a work-related lumbosacral strain. She began working in a limited-duty position and the Office paid appropriate

compensation. Appellant received treatment for her condition from several attending physicians, including Dr. Mark E. Zolman, Board-certified in physical medicine and rehabilitation. In a report dated October 20, 2000, he stated that she reported pain in her low back with occasional pain in her left leg and paresthesias in her right leg. Dr. Zolman noted that appellant had some limited motion of the back, but that the results of testing for leg strength and straight-leg raising were normal. He diagnosed low back pain which was “likely discogenic” and myofascial pain.¹ In a report dated December 7, 2000, Dr. Zolman diagnosed lumbar strain and discogenic low back pain and indicated that appellant had reached maximum medical improvement. He stated that, based on the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, appellant “would be classified as a DRE [diagnosis-related estimate] lumbosacral Category 2 minor impairment which translates to a five percent whole person impairment.”

Dr. Zolman provided periodic reports which contained findings similar to those of his prior reports. In a report dated March 12, 2001, he noted that appellant had 5/5 strength in her lower extremities. In a report dated June 18, 2002, Dr. Zolman stated that she had 5/5 strength in her hamstrings and that she otherwise had 4/5 strength in her lower extremities.

By early 2003, the record contained evidence showing that appellant had nonwork-related degenerative arthritis in her left knee and possibly also in her right knee.² The findings of magnetic resonance imaging (MRI) scan obtained on March 4, 2003 showed mild desiccation and bulges at L4-5 and L5-S1 with no spinal stenosis or neural foraminal narrowing.

Appellant claimed that she was entitled to schedule award compensation due to her work-related lumbosacral strain.

In a report dated August 18, 2003, Dr. Zolman stated that appellant reported that her primary pain was in her lumbar spine, but she also experienced numbness and tingling in her legs with intermittent ankle pain. He indicated that the range of motion of her lumbar spine was moderately limited and that “strength was 4/5 proximally in her bilateral lower extremities, 5/5 distally in the bilateral lower extremities. Dr. Zolman noted that appellant had some pain inhibition on the right primarily with right anterior tibialis muscle testing and that sensation was decreased in the left L5 distribution to light touch. He stated that there was no evidence of joint or ligamentous instability in her lower extremities and that seated straight leg raising at 90 degrees bilaterally resulted in low back pain. Dr. Zolman diagnosed lumbar strain and discogenic low back pain and noted that, based on the fifth edition of the A.M.A., *Guides* appellant would be best classified as a “DRE lumbar Category 2.” He stated, “This translates into a five percent impairment and is based upon the lumbar strain and discogenic pain. I do not believe she has significant radiculopathy.”

¹ In several prior reports, attending physicians indicated that appellant reported experiencing pain which radiated from her low back into her lower extremities.

² In a report dated February 17, 2003, Dr. John N. Lomas, an attending Board-certified physical medicine and rehabilitation physician, indicated that appellant reported experiencing some pain in both knees but, that examination of the lower extremities showed normal range of motion, strength and sensation.

In October 2003, an Office medical adviser reviewed the medical evidence of record and determined that further medical evaluation was necessary to determine whether appellant had any impairment to her lower extremities.³

The Office referred appellant to Dr. Donald Paarlberg, a Board-certified orthopedic surgeon, for a second opinion examination and determination regarding whether she had any impairment of the lower extremities.

In a report dated February 12, 2004, Dr. Paarlberg detailed appellant's factual and medical history, including the findings of diagnostic testing. He stated that upon examination she exhibited subjective limited forward flexion because of reported pain and that testing for straight leg raising was negative with sitting and lying. Dr. Paarlberg noted that appellant could walk on her heels and toes and exhibited no reflex or sensory changes. He indicated that maximum medical improvement had been met, diagnosed "lumbosacral sprain/strain" and stated:

"In answer to your questions, since [appellant's] work-related low back condition does not impair one or both of the lower extremities, there is no permanent (zero percent) impairment as it relates to the lower extremities."

* * *

"There are no objective findings on examination. Subjective complaints are low back pain and limited range of motion secondary to pain. There is no diagnosis or condition that affects the lower extremities at this time."

By decision dated April 5, 2004, the Office determined that appellant did not meet her burden of proof to establish that she sustained any impairment which entitled her to a schedule award.

Appellant requested a hearing before an Office hearing representative which was held on April 21, 2005. She argued that the opinion of Dr. Zolman showed that she had an impairment which entitled her to schedule award compensation.

By decision dated and finalized July 20, 2005, the Office hearing representative affirmed the April 5, 2004 decision.

³ The Office medical adviser suggested that there was a conflict in the medical evidence between Dr. Zolman and Dr. Lomas regarding appellant's lower extremity condition which required an impartial medical examination. However, there was no such conflict in the medical evidence as both physicians were attending physicians. 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." 5 U.S.C. § 8123(a). The Office medical adviser also indicated that appellant did not appear to have a permanent impairment of the lower extremities.

LEGAL PRECEDENT

An employee seeking compensation under the Federal Employees' Compensation Act⁴ has the burden of establishing the essential elements of her claim, including that he or she sustained an injury in the performance of duty as alleged and that an employment injury contributed to the impairment for which schedule award compensation is alleged.⁵

The schedule award provision of the Act⁶ and its implementing regulation⁷ 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.⁸

ANALYSIS

The Office accepted that appellant sustained a work-related lumbosacral strain on May 11, 2005. She claimed that she was entitled to schedule award compensation due to her work-related injury. The Office determined that appellant did not meet her burden of proof to establish her claim.

Appellant submitted an August 18, 2003 report in which Dr. Zolman, Board-certified in physical medicine and rehabilitation, determined that she had a five percent impairment of her back. Dr. Zolman noted that based on the fifth edition of the A.M.A., *Guides* she would be best classified as a "DRE lumbar Category 2."⁹ He stated, "This translates into a fifth percent impairment and is based upon the lumbar strain and discogenic pain. I do not believe [appellant] has significant radiculopathy." Although the A.M.A., *Guides* provide protocols for rating impairment of the back or spine, 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. Rather, the back is specifically excluded from the definition of organ under the Act.¹⁰

⁴ 5 U.S.C. §§ 8101-8193.

⁵ See *Bobbie F. Cowart*, 55 ECAB ____ (Docket No. 04-1416, issued September 30, 2004). In *Cowart*, the employee claimed entitlement to a schedule award for permanent impairment of her left ear due to employment-related hearing loss. The Board determined that appellant did not establish that an employment-related condition contributed to her hearing loss and, therefore, it denied her claim for entitlement to a schedule award for the left ear.

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404 (1999).

⁸ *Id.*

⁹ See A.M.A., *Guides* 384, Table 15-3.

¹⁰ *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

Dr. Zolman indicated that appellant reported that she had some numbness and tingling in her legs with intermittent ankle pain, that “strength was 4/5 proximally in her bilateral lower extremities” and that sensation was decreased in the left L5 distribution to light touch. However, he did not indicate that these complaints and findings were related to the accepted employment injury, a lumbosacral strain and the medical evidence of record does not otherwise support such a conclusion.¹¹ Appellant’s claim has not been accepted for a lower extremity condition or a back condition affecting the lower extremities and it should be noted that she has nonwork-related conditions which could possibly involve the lower extremities.¹² The opinion of Dr. Zolman is of limited probative value in that he failed to provide an explanation of how his assessment of impairment was derived in accordance with the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses.¹³

Moreover, the record contains other evidence which shows that appellant did not sustain an impairment of her lower extremities which entitled her to a schedule award. In a report dated February 12, 2004, Dr. Paarlberg, a Board-certified orthopedic surgeon and second opinion physician, determined that her work-related low back condition did not impair her lower extremities. He concluded that there was no permanent impairment to the lower extremities. Dr. Paarlberg posited that there were no objective findings on examination and, that there was no diagnosis or condition that affected the lower extremities.¹⁴

For these reasons, the medical evidence of record does not show that appellant has an impairment which entitled her to a schedule award.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an impairment which entitled her to a schedule award.

¹¹ In some cases, a claimant may be entitled to a schedule award for permanent impairment to a lower extremity even though the cause of the impairment originated in the spine. *Thomas J. Engelhart*, 50 ECAB 319, 320-21 (1999). Dr. Zolman’s report and the other medical evidence do not show that appellant’s situation represents such a case.

¹² Appellant had nonwork-related degenerative disease of the knees and low back disc.

¹³ See *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant’s impairment).

¹⁴ Dr. Paarlberg indicated that subjective complaints included low back pain and limited range of back motion secondary to pain.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' July 20, 2005 decision is affirmed.

Issued: April 6, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board