

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

E.G., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
IMMIGRATION & CUSTOMS ENFORCEMENT,)
El Paso, TX, Employer)

) **Docket No. 09-2257**

) **Issued: July 9, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 9, 2009 appellant filed a timely appeal from the March 12, 2009 decision of the Office of Workers' Compensation Programs affirming the August 15, 2008 denial of appellant's claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant established permanent impairment as a result of his October 5, 2007 accepted employment injury.

On appeal, appellant argues that his treating physician found a permanent condition as a result of his work-related injury.

FACTUAL HISTORY

On October 5, 2007 appellant, then a 35-year-old attorney, sustained injury when he fell while exiting from an elevator. He tripped and fell on his right knee and hand. An October 11,

2007 magnetic resonance imaging (MRI) scan of appellant's lumbar spine was interpreted by Dr. Joseph Furlong, a Board-certified radiologist, as showing mild broad right central to right subarticular herniation (protrusion type) that abuts the anterior thecal sac and the traversing right S1 nerve root. On October 12, 2007 Dr. Andrew J. Palafox, a treating Board-certified orthopedic surgeon, diagnosed a lumbar herniated disc. On November 7, 2007 the Office accepted the claim for unspecified internal derangement of right knee and displacement of a lumbar intervertebral disc without myelopathy. Dr. Palafox completed a duty status report on October 18, 2007, advising that appellant could return to work with limitations and allowing for frequent breaks and alternate positions. Appellant returned to full-time limited duty on October 24, 2007. On November 27, 2007 he filed a claim for a schedule award.

On December 28, 2007 the Office asked Dr. Palafox to submit a report addressing whether appellant had any permanent impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*). In a February 26, 2008 report, Dr. Palafox diagnosed lumbar strain/sprain and discogenic pain. He did not address the issue of whether appellant sustained any permanent impairment due to the accepted back injury.

On June 16, 2008 the Office referred appellant to Dr. Zvi Kalisky, a Board-certified physiatrist, for a second opinion examination on the nature and extent of any permanent impairment pursuant to the A.M.A., *Guides*. In a July 11, 2008 report, Dr. Kalisky diagnosed status post lumbar sprain and post right knee contusion/sprain. He found no evidence of radiculopathy or internal derangement of the right knee. Dr. Kalisky opined that appellant's current symptoms were related to the October 5, 2007 employment injury, but there were no objective findings identified that could explain physiologically the persistence of symptoms at this time, nine months post injury. Appellant had no objective physical findings in the lower extremities and therefore had no impairment to either lower extremity under Chapter 17 of the A.M.A., *Guides*. Dr. Kalisky found no objective evidence of lumbar radiculopathy, no evidence of pain/paresthesias in any specific dermatomal distribution and no motor sensory loss, muscle atrophy or loss of deep tendon reflexes to the lower extremities. Therefore, appellant had no impairment to either lower extremity. Dr. Kalisky noted that appellant did not fit into any of the criteria of the A.M.A., *Guides* for nerve root and or spinal cord lesions pursuant to section 15.12 at page 423. He advised that appellant reached maximum medical improvement on July 11, 2008 without permanent impairment.

On July 21, 2008 the Office forwarded Dr. Kalisky's report to an Office medical adviser for comment. In an August 9, 2008 report, the Office medical adviser noted that the A.M.A., *Guides*, did not provide any impairment for strains or sprains. He concurred with Dr. Kalisky that appellant did not sustain any permanent impairment to either lower extremity based on the accepted conditions.

In an August 15, 2008 decision, the Office denied appellant's claim for a schedule award. It found that the medical evidence did not support any permanent impairment to a member or function of the body due to the October 5, 2007 injury.

On September 1, 2008 appellant requested an oral hearing that was held on December 15, 2008. He stated that he was still on work restrictions that mandated he have

frequent breaks because prolonged sitting made his back hurt. Appellant also noted getting decreased sleep due to back pain. He disagreed with the finding that his back injury did not cause permanent impairment. The hearing representative provided appellant 30 days to submit new medical evidence.

In a December 30, 2008 report, Dr. Palafox stated that he disagreed with Dr. Kalisky that the L5-S1 herniated disc was a preexisting unrelated condition. He opined that the accepted injury caused the L5-S1 herniated disc, noting that prior to this incident appellant did not have any back problems. Dr. Palafox indicated that this was a permanent condition.

By decision dated March 12, 2009, the Office hearing representative affirmed the August 15, 2008 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulations 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. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized 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 Office for evaluating schedule losses and the Board has concurred in such adoption.²

Not all medical conditions accepted by the Office result in permanent impairment to a scheduled member.³ It is the claimant's burden to establish that he or she sustained permanent impairment of a scheduled member or function as a result of an employment injury.⁴ It is well established that the back or spine is not listed as a scheduled member under the Act or implementing regulations; therefore, a schedule award is not payable for impairment of the spine.⁵

Office procedures provide that, to support a schedule award, the file must contain medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of maximum medical improvement), describes the impairment sufficient detail to include, where applicable, the loss in degrees of active and

¹ 5 U.S.C. §§ 8101-8193. See 5 U.S.C. § 8107.

² See 20 C.F.R. § 10.404; *R.D.*, 59 ECAB ____ (Docket No. 07-379, issued October 2, 2007).

³ *Thomas P. Lavin*, 57 ECAB 353 (2006).

⁴ See *J.Q.*, 59 ECAB ____ (Docket No. 06-2152, issued March 5, 2008) (the schedule award provisions of the Act include the extremities and a claimant may be entitled to a schedule award for permanent impairment to a lower extremity even though the cause of such impairment originates in the spine).

⁵ See 5 U.S.C. § 8107; 20 C.F.R. § 10.404. See also *Jesse Mendoza*, 54 ECAB 802 (2003); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent description of the impairment and the percentage of impairment should be computed in accordance with the A.M.A., *Guides*.⁶

ANALYSIS

The Office accepted that appellant sustained internal derangement of the right knee and displacement of a lumbar intervertebral disc without myelopathy. The issue is whether appellant established that either of these conditions resulted in permanent impairment to a scheduled member under the Act.

As noted, the back is not listed as a scheduled member under the Act.⁷ While an injury to the spine or back may cause impairment to a lower extremity, the Board finds that the medical evidence is insufficient to establish that appellant's accepted lumbar condition caused any permanent impairment to either leg or that his right knee condition resulted in impairment of that member.

On examination, Dr. Kalisky found that appellant's right knee had no findings of internal derangement such that he did not sustain impairment to the right knee. He also found there was no impairment to either the right or left lower extremities due to the accepted lumbar condition. Dr. Kalisky found no evidence of pain/paresthesias in the specific dermatomal distributions and no motor or sensory loss, muscle atrophy or loss of deep tendon reflexes to the lower extremities. He noted that appellant did not fit the criteria for nerve root and/or spinal cord lesions pursuant to the A.M.A., *Guides* 423. Dr. Kalisky concluded that appellant had no permanent impairment to the right or left lower extremities. The Office medical adviser agreed with Dr. Kalisky, specifically noting that there was no medical evidence supporting any impairment of the lower extremities. Although Dr. Palafox was provided an opportunity to assess appellant's impairment under the A.M.A., *Guides*, he presented no such evaluation. Rather, he noted that appellant had sustained a permanent condition as it pertained to the accepted L5-S1 disc. As noted a schedule award is not provided under the terms of the Act for impairment of the back or spine. Accordingly, appellant has not met his burden to establish that he sustained permanent impairment to a scheduled member causally related to the accepted October 5, 2007 employment injury.

CONCLUSION

The Board finds that appellant is not entitled to a schedule award as a result of his October 5, 2007 employment injury.

⁶ *J.P.*, 60 ECAB ___ (Docket No. 08-832, issued November 13, 2008); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (August 2002).

⁷ *See* 5 U.S.C. § 8101(19); *see also* *George E. Williams*, 44 ECAB 530 (1993) (finding that as neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back, no claimant is entitled to such an award).

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: July 9, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board