

wage loss effective November 30, 2008, the date he elected to retire. On December 23, 2008 appellant filed a claim for a schedule award.

On September 23, 2008 Dr. Kevin Rutz, an attending Board-certified orthopedic surgeon, released appellant to sedentary work as of September 29, 2008. On October 21, 2008 he stated that appellant's work restrictions included no lifting over 20 pounds and standing limited to one hour at a time. Dr. Rutz noted that appellant "was aiming towards retirement in about 40 days." He subsequently released appellant to regular work effective December 23, 2008.

By decision dated January 14, 2009, the Office terminated appellant's wage-loss compensation effective November 30, 2008, the date he retired. It noted that he was medically released to limited duty until December 23, 2008 and regular work as of December 23, 2008.

On January 23, 2009 Dr. Rutz stated that appellant had no permanent work restrictions due to his back condition. Appellant continued to experience some back discomfort that was secondary to his preexisting degenerative spondylolisthesis. Dr. Rutz opined that appellant had five percent impairment to his lumbar spine.

On February 6, 2009 appellant requested a hearing that was held on May 15, 2009.

On February 20 and 25, 2009 Dr. Daniel D. Zimmerman, a Board-certified internist and an Office medical adviser, noted that Dr. Rutz provided an impairment rating for appellant's back. He stated that appellant needed to be examined by a physician skilled in the use of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*, 5th ed.) to determine whether he had any lower extremity impairment causally related to his accepted back conditions.¹

On March 18, 2009 Dr. Richard T. Katz, a Board-certified physiatrist and a professor of clinical neurology, was provided with copies of the medical records and a statement of accepted facts. He reviewed the medical history and provided findings on physical examination. Appellant advised that his pain level was 3 out of 10 and was localized in his right lateral buttock. There was no pain extending to his legs. Dr. Katz noted appellant's course of treatment and medical and surgical history. He included appellant's responses to a disability questionnaire. Dr. Katz noted that he was markedly obese at a height of five feet, eleven inches and weight of 301 pounds. Appellant had normal gait and station, was able to walk on heels and toes and had normal tandem gait. He could perform 10 plantar extensions. There was symmetry at the inferior border of the scapula, iliac crests and popliteal fossa. Kyphotic and lordotic curves were unremarkable. There was no list or scoliosis of the back. Sacroiliac biomechanics were normal. There was pain over the right piriformis muscle in the buttocks. Lumbar range of motion was reduced in flexion, extension, lateral flexion and rotation. Manual examination of lumbar paraspinal musculature was unremarkable. Muscle stretch reflexes were absent at the knee,

¹ See Federal (FECA) Procedural Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002) (after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified, especially when there is more than one evaluation of the impairment present).

ankle and hamstrings. Plantar responses were downgoing. Muscle strength in the hip flexors, abductors and adductors, knee extensors, tibialis anterior, extensor hillocks longs, peroneus longus and gluteus medius was normal. There was normal hip rotation. Straight leg raising was normal. The femoral stretch test was negative. Pulses were good at the tibialis posterior artery bilaterally. Sensory examination was within normal limits in the lower extremities. Dr. Katz advised that there was no radiculopathic pain, numbness, tingling, sensory loss or weakness. He opined that appellant had no permanent impairment causally related to his August 3, 2007 back conditions.

On March 27, 2009 Dr. Zimmerman noted that Dr. Katz found that appellant had no impairment to either lower extremities causally related to his accepted back conditions.

By decision dated April 1, 2009, the Office denied appellant's schedule award claim. It found that the weight of the medical evidence established that he had no impairment causally related to his August 3, 2007 employment injury.

Appellant requested a hearing that was held on July 6, 2009.

By decision dated August 4, 2009, an Office hearing representative affirmed the January 14, 2009 decision.²

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act³ and its implementing regulations⁴ 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* fifth edition has been adopted by the Office as the appropriate standard for evaluating schedule losses.⁵

² Subsequent to the August 4, 2009 Office decision, additional evidence was submitted to the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal. While this appeal was pending, the Office issued a September 24, 2009 decision denying appellant's schedule award claim. The issue in the September 24, 2009 decision is the same issue before the Board in this appeal. Because the September 24, 2009 decision would affect the status of the decision on appeal, the decision is null and void. *See Douglas E. Billings*, 41 ECAB 880 (1990) (holding that the only decisions of the Office which are null and void, because they were issued while the case was on appeal to the Board, are those decisions that change the status of the decision on appeal).

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Id.*

Neither the Act nor the regulations provide for the payment of a schedule award for any impairment of the back.⁶ The Act excludes the back from the definition of “organ.”⁷ A claimant may be entitled to a schedule award for permanent impairment of an extremity even though the cause of the impairment originated in the spine.⁸

ANALYSIS -- ISSUE 1

Dr. Katz provided a second opinion examination for purposes of rating any impairment due to appellant’s accepted lumbar injury. He reviewed the medical history, including the results of tests, and provided findings on physical examination. Appellant advised that he had pain localized in his right buttock. It did not extend to his legs. Dr. Katz noted that appellant was markedly obese at a height of five feet, eleven inches and weight of 301 pounds. Appellant had normal gait and station, was able to walk on heels and toes and had normal tandem gait. There was no list or scoliosis of the back. Sacroiliac biomechanics were normal with lumbar range of motion was reduced in flexion, extension, lateral flexion and rotation. Manual examination of lumbar paraspinal musculature was unremarkable. Muscle strength testing was normal in the hip flexors, abductors and adductors, knee extensors, tibialis anterior, extensor hallucis longus, peroneus longus and gluteus medius. There was normal hip rotation and straight leg raising. The femoral stretch test was negative. Pulses were good at the tibialis posterior artery bilaterally. Sensory examination was also within normal limits in the lower extremities. Dr. Katz advised that there was no radiculopathic pain, numbness, tingling, sensory loss or weakness. He found that appellant had no permanent impairment causally related to the accepted lumbar injury. Dr. Zimmerman reviewed the report of Dr. Katz and found that appellant had no impairment to his extremities causally related to his accepted back conditions. The Board finds that the opinion of Dr. Katz is based on proper review of the medical history and findings on physical examination. Dr. Katz did not support that appellant sustained any impairment causally related to his accepted lumbar conditions.

LEGAL PRECEDENT -- ISSUE 2

An employee has the burden of proving by the preponderance of the reliable, probative and substantial evidence that he was disabled for work as the result of an employment injury.⁹ Monetary compensation benefits are payable to an employee who has sustained wage loss due to disability for employment resulting from the employment injury.¹⁰ Whether a particular employment injury causes disability for employment and the duration of that disability are

⁶ See *Tomas Martinez*, 54 ECAB 623 (2003).

⁷ 5 U.S.C. § 8101(19).

⁸ See *Tomas Martinez*, *supra* note 6.

⁹ *David H. Goss*, 32 ECAB 24 (1980).

¹⁰ *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

medical issues which must be proved by a preponderance of reliable, probative and substantial medical evidence.¹¹

ANALYSIS -- ISSUE 2

The Board finds that appellant had no work-related disability after November 30, 2008.

On September 23, 2008 Dr. Rutz, appellant's attending physician, released him to sedentary work as of September 29, 2008. On October 21, 2008 he stated that appellant's work restrictions included no lifting over 20 pounds and standing limited to one hour at a time. Dr. Rutz noted that appellant "was aiming towards retirement in about 40 days." He subsequently released appellant to return to regular duty work effective December 23, 2008. The medical evidence establishes that appellant was released to perform sedentary work as of September 29, 2008 and to regular duty work as of December 23, 2008. Appellant elected to retire on November 30, 2008. The medical evidence does not establish that he was medically disabled as of that day. Therefore, the Office properly denied his claim for wage-loss compensation.

CONCLUSION

The Board finds that appellant has no impairment causally related to his August 3, 2007 accepted back conditions. The Board further finds that appellant had no work-related disability after November 30, 2008.

¹¹ *Edward H. Horten*, 41 ECAB 301 (1989).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 4 and April 1, 2009 are affirmed.

Issued: June 8, 2010
Washington, DC

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

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

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