

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

C.W., Appellant

and

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

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**Docket No. 10-450
Issued: October 26, 2010**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 7, 2009 appellant filed a timely appeal of a November 13, 2009 decision of the Office of Workers' Compensation Programs concerning his schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

ISSUES

The issues are: (1) whether appellant established that he sustained any permanent impairment causally related to his accepted employment injury; and (2) whether appellant has established an L5 herniated disc condition causally related to the employment injury.

FACTUAL HISTORY

On May 11, 2005 appellant, then a 55-year-old city carrier, filed an occupational disease and claim for compensation for the acceleration of the degenerative disc disease in his back due to years of carrying and delivering mail. He stopped work on April 7, 2005 and returned to limited duty on April 22, 2005. The Office accepted the condition of temporary aggravation of preexisting lumbar disc with myelopathy.

In a May 18, 2005 report, Dr. William R. Miely, a Board-certified orthopedic surgeon, noted appellant's April 4, 2005 magnetic resonance imaging (MRI) scan demonstrated severe degenerative disease at L5-S1 with L5 foraminal narrowing. He provided an impression of lumbar radiculopathy and opined that appellant's preexisting degenerative disc disease had been aggravated by the prolonged walking and standing of his letter carrier job.

On March 13, 2006 Dr. James H. Rutherford, a Board-certified orthopedic surgeon and Office referral physician, reviewed appellant's medical record along with a statement of accepted facts. He presented findings on physical examination and opined that appellant still had some residual symptoms related to the accepted condition.

On July 16, 2008 appellant filed a request for a schedule award. On August 4, 2008 the Office requested that he have his attending physician address whether he had permanent impairment of the lower extremities as a result of his work-related injury.

In a September 23, 2008 report, Dr. Nancy Renneker, a Board-certified physiatrist, noted the history of injury and reviewed appellant's medical treatment. She opined, based on medical records reviewed and her examination findings, appellant was at maximum medical improvement with respect to the accepted aggravation of lumbar intervertebral disc disease with myelopathy. Based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides* Dr. Renneker opined appellant had 26 percent left lower extremity impairment. She indicated that 18 percent impairment was attributable to an L5 radiculopathy with 3+/5 strength in left extensor hallucis longus and 10 percent impairment was attributable to ongoing left S1 radiculopathy with weakness for a combined total 26 percent left lower extremity impairment.

In a December 30, 2008 report, Dr. Manhal A. Ghanma, a Board-certified orthopedic surgeon and Office referral physician, reviewed appellant's medical record along with a statement of accepted facts and presented his examination findings. He found that appellant had evidence of degenerative disc disease in his low back as documented on the April 4, 2005 MRI scan report; however, there was no objective evidence on examination of disc herniation. Dr. Ghanma noted appellant had evidence of abnormal illness behavior as manifested by the positive four Waddell's signs documented in the physical examination section of his report. He stated there was no clinical evidence to support any residuals of the accepted work condition of temporary aggravation of the lumbar degenerative disc disease. Dr. Ghanma indicated the aggravation was temporary in nature and its resolution date was likely within two to three weeks of the work incident. Thus, he indicated appellant reached maximum medical improvement within three weeks of the work injury or April 19, 2005. Dr. Ghanma stated appellant was capable of returning to his job as a letter carrier without restrictions as there was no evidence to support that the temporary aggravation of lumbar degenerative disc disease continued. He further found that there were no abnormalities with respect to active motion related to his allowed condition. Based on appellant's current examination findings, Dr. Ghanma opined appellant had no lower extremity impairment under the A.M.A., *Guides*. Dr. Ghanma additionally explained that degenerative disc disease without disc herniation would not likely result in any abnormalities of the lower extremities based on medical science. He indicated there was no evidence to support that appellant had disc herniations that could have affected his lower extremities or that such condition was allowed in his claim.

In an April 20, 2009 report, an Office medical adviser reviewed the statement of accepted facts and the medical record. He opined that appellant reached maximum medical improvement on December 30, 2008, the date of Dr. Ghanma's examination. Based on Dr. Ghanma's findings, the Office medical adviser found no ratable deficit for either the right or left lower extremity. He, therefore, opined there was no permanent partial impairment of either leg.

By decision dated April 30, 2009, the Office denied appellant's claim for a schedule award.

On May 5, 2009 appellant's attorney requested a telephonic hearing, which was held August 13, 2009. At the hearing his attorney argued the April 30, 2009 decision was defective because the allowed conditions were not properly stated in the decision. The hearing representative informed him that only a temporary aggravation of appellant's condition was accepted. Appellant's attorney argued that Dr. Ghanma's report was defective because he indicated appellant reached maximum medical improvement in 2005 whereas the Office medical adviser opined it was 2008. He also argued that a conflict in medical opinion existed between Dr. Ghanma and Dr. Renneker concerning appellant's work-related impairment.

In a September 3, 2009 report, Dr. David Pelfrey, a Board-certified family practitioner, indicated appellant had an L5 herniated disc as demonstrated on an April 2005 MRI scan. He noted the herniation was present at the time of the April 2005 MRI scan report and since there was no previous MRI scan before 2005, the herniated disc must be work related. Dr. Pelfrey further opined that herniated disc was caused or aggravated by years of carrying heavy mail, which contributed significantly and possibly totally to his condition.

By decision dated November 13, 2009, the Office hearing representative affirmed the April 30, 2009 decision. The hearing representative determined that the Office properly accepted that appellant had only sustained a temporary aggravation of his preexisting degenerative disc disease and there was no indication that the temporary aggravation continued. The hearing representative further found that the denial of the schedule award was properly based upon the Office medical adviser's review of Dr. Ghanma's report.

LEGAL PRECEDENT -- ISSUE 1

Section 8107 of the Federal Employees' Compensation Act¹ authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.² A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of establishing that his accepted employment injury caused permanent impairment of a scheduled member, organ or function of the body.³

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404. See *Annette M. Dent*, 44 ECAB 403 (1993).

³ See *Veronica Williams*, 56 ECAB 367, 370 (2005); *Annette M. Dent*, *supra* note 2.

Neither the Act nor its regulations provide for a schedule award for loss of use of the back. 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.⁴

ANALYSIS -- ISSUE 1

The Office accepted the claim for temporary aggravation of lumbar degenerative disc disease with myelopathy. Appellant subsequently claimed a schedule award due to this accepted condition. The Office denied appellant's claim for a schedule award based on the report of Dr. Ghanma and an Office medical adviser. The Board finds that the medical record is insufficient to establish that his accepted condition caused any permanent impairment under the A.M.A., *Guides*.

In his December 30, 2008 report, Dr. Ghanma, a Board-certified orthopedic surgeon and Office referral physician, found no clinical evidence to support any residuals of the accepted work condition. He advised that appellant's physical examination revealed symptom magnification in several areas. Dr. Ghanma indicated that the aggravation was temporary in nature and most likely resolved within two to three weeks of the work incident; thus, appellant reached maximum medical improvement within three weeks of the work injury or April 19, 2005. He further found there were no abnormalities with respect to active motion related to the allowed condition and there was no objective evidence on examination of disc herniation. Dr. Ghanma explained that, based on medical science, degenerative disc disease without disc herniation would not likely result in any abnormalities of the lower extremities. Thus, he opined that appellant had no lower extremity impairment under the A.M.A., *Guides*. The Office medical adviser reviewed Dr. Ghanma's report along with the medical evidence of record. He opined that appellant reached maximum medical improvement on December 30, 2008, the date of Dr. Ghanma's examination. Based on Dr. Ghanma's examination findings, he found that appellant had no ratable deficit of the lower extremities and thus had a zero percent permanent impairment of the lower extremities.

The Board finds that Dr. Ghanma's report establishes that appellant's accepted condition did not cause any permanent impairment that extended into his legs. As noted, a schedule award can be paid only for a condition related to an employment injury and the claimant has the burden of proof to show that his accepted employment injury caused permanent impairment of a scheduled member of the body.⁵ Dr. Ghanma explained that appellant's accepted aggravation of his low back condition would have resolved within several weeks and opined that his examination and review of the record indicated that he had no current findings causally related to the accepted condition and, consequently, no impairment causally related to the accepted condition. Although appellant's attorney argued before the Office that Dr. Renneker's September 23, 2008 report created a conflict in the medical evidence regarding appellant's impairment, the Board notes that Dr. Renneker did not provide any medical reasoning, or rationale, to explain why a temporary aggravation of lumbar degenerative disc disease with

⁴ *J.Q.*, 59 ECAB 366 (2008).

⁵ *Supra* note 3.

myelopathy would cause permanent impairment to appellant's legs.⁶ The need for reasoning is particularly important in a case such as this since the Office only accepted a temporary aggravation and because the record indicates that appellant had a degenerative low back condition at the time he claimed his work injury. Thus, Dr. Renneker opinion is of diminished probative value and is insufficient to create a conflict in medical evidence.⁷

Appellant's attorney argued before the Office that Dr. Ghanma's report is defective because he indicated a date of maximum medical improvement in 2005 whereas the Office medical adviser opined it was in 2008. However, the record indicates that Dr. Ghanma was offering an opinion on when the accepted temporary aggravation had ended while the Office medical adviser was offering an opinion on when a schedule award would begin to run if appellant had permanent impairment causally related to his accepted condition.⁸ The discrepancy in the date of maximum medical improvement would only be of consequence if it were found that appellant had a permanent impairment causally related to his accepted employment injury caused permanent impairment of a scheduled member of the body. As explained above, the medical evidence does not establish that appellant's accepted back condition caused permanent impairment of the legs. Thus, it is premature to consider when a schedule award would commence.

The Board finds that appellant has not established that his temporary aggravation of lumbar degenerative disc disease with myelopathy caused a permanent impairment in his legs.

LEGAL PRECEDENT -- ISSUE 2

Where appellant claims that a condition not accepted or approved by the Office was due to his employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence.⁹

ANALYSIS -- ISSUE 2

The Board notes appellant's attorney offered Dr. Pelfrey's September 3, 2009 reports to establish appellant had a L5 herniated disc due to the work injury. He noted that the herniation was present at the time of the April 2005 MRI scan report and since there was no previous MRI scan before 2005, the herniated disc must be work related. The Board has held that the fact that a condition manifests itself during a period of employment does not raise an inference that there

⁶ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

⁷ Regarding a conflict in the medical evidence, see 5 U.S.C. § 8123(a).

⁸ It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from residuals of the employment injury. *A.D.*, 60 ECAB ___ (Docket No. 08-2163, issued May 14, 2009). The date is usually the date of the medical examination which determined the extent of the impairment. *J.H.*, 60 ECAB ___ (Docket No. 08-2432, issued June 15, 2009).

⁹ *T.M.*, 60 ECAB ___ (Docket No. 08-975, issued February 6, 2009); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

is a causal relationship between the two.¹⁰ While Dr. Pelfrey opined that herniated disc was caused or aggravated by years of carrying heavy mail, which contributed significantly or totally to his condition, he did not provide any other medical reasoning to explain why carrying mail would cause such a condition. The need for reasoning is also important since other physicians who reviewed the April 2005 MRI scan, such as Dr. Miely, Dr. Rutherford and Dr. Ghanma, all Board-certified orthopedic surgeons, made no mention that it contained evidence of an L5 herniated disc. Thus, the Board finds that Dr. Pelfrey's report is of diminished probative value and is insufficient to establish that appellant has a herniated disc at L5 causally related to his employment.

CONCLUSION

The Board finds appellant has not established that he is entitled to a schedule award due to his accepted condition. The Board further finds that appellant has not established that he has a herniated disc causally related to the accepted work injury.

ORDER

IT IS HEREBY ORDERED THAT the November 13, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 26, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁰ *D.I.*, 59 ECAB 158 (2007).