

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

L.N., Appellant

and

**U.S. POSTAL SERVICE, KING OF PRUSSIA
BRANCH, King of Prussia, PA, Employer**

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**Docket No. 11-1412
Issued: January 17, 2012**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 24, 2011 appellant, through her attorney, filed a timely appeal from a January 25, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) finding that she did not establish a recurrence of disability. She also appealed from a February 23, 2011 merit decision denying her schedule award claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has a permanent impairment to a scheduled member entitling her to a schedule award; and (2) whether she sustained a recurrence of disability on March 30, 2010 causally related to her March 16, 1993 employment injury.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 16, 1993 appellant, then a 42-year-old letter carrier, filed a claim alleging that she injured her low back on that date when she slipped and fell on ice. OWCP accepted the claim for a sprain of the lumbosacral joint, fibromyositis/myalgia and a sciatic nerve lesion. Appellant worked in a limited-duty capacity following her injury.

In an impairment evaluation dated April 3, 2008, Dr. Nicholas P. Diamond, an osteopath, applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*) and found that appellant had a 15 percent permanent impairment of the right lower extremity due to loss of range of motion of the hip. He further determined that she had an additional 3 percent impairment due to pain, for a total right lower extremity impairment of 18 percent.

In a report dated April 16, 2008, Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon and OWCP referral physician, diagnosed lumbar radicular syndrome with piriformis syndrome. He advised that appellant could perform limited-duty employment and provided work restrictions.

On December 31, 2008 appellant filed a claim for a schedule award. OWCP referred her to Dr. Zohar Stark, a Board-certified orthopedic surgeon, for a second opinion impairment evaluation. In a report dated March 3, 2009, Dr. Stark found that appellant had no permanent impairment due to her March 16, 1993 work injury.

By decision dated March 13, 2009, OWCP denied appellant's claim for a schedule award.

On March 18, 2009 appellant's attorney requested an oral hearing. In a decision dated October 14, 2009, the hearing representative set aside the March 13, 2009 decision. She found that the statement of accepted facts provided to Dr. Stark did not include all accepted conditions. The hearing representative remanded the case for OWCP to obtain an impairment evaluation based on an accurate statement of accepted facts under the sixth edition of the A.M.A., *Guides*.

On October 19, 2009 OWCP referred appellant, together with an updated statement of accepted facts, to Dr. Noubar Didizian, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated November 12, 2009, Dr. Didizian found that appellant had recovered from the accepted work injuries and had no permanent impairment.

OWCP determined that a conflict in medical opinion existed between Dr. Diamond and Dr. Didizian regarding the extent of appellant's permanent impairment. It referred appellant to Dr. Ellicott Menkowitz, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated January 28, 2010, Dr. Menkowitz reviewed the accepted conditions of lumbosacral joint sprain, myalgia and myositis and a sciatic nerve lesion and discussed appellant's complaints of pain radiating through the right leg to the toe and soreness of the piriformis area.² He measured full range of motion of the upper extremities with no

² The piriformis is a muscle in the gluteal region of the lower limb. Piriformis syndrome occurs when the sciatic nerve is compressed and causes pain descending into the thigh and leg.

neurologic or sensory deficits. Dr. Menkowitz found that appellant had a negative straight leg raising test. He stated, “The examination of the hips show full range of motion bilaterally without any reproduction of pain. Palpation over the sciatic notch bilaterally does not reproduce her subjective complaint.” Dr. Menkowitz concluded that appellant had no permanent impairment under the sixth edition of the A.M.A., *Guides*.

On February 18, 2010 an OWCP medical adviser reviewed the evidence and concurred with Dr. Menkowitz’ opinion that appellant had no impairment.

By decision dated March 4, 2010, OWCP denied appellant’s claim for a schedule award. It found that Dr. Menkowitz’ opinion represented the weight of the evidence and established that she had no permanent impairment.

On March 9, 2010 appellant, through her attorney, requested an oral hearing.

In a report dated March 30, 2010, Dr. Marc S. Effron, an attending Board-certified psychiatrist, stated:

“[Appellant] reports a recurrence of a similar quality severe intensity lumbar radicular pain into the right foot. She has the diagnosis of piriformis syndrome and has received benefit with corticosteroid injections in the past targeting the piriformis muscle on the right. [Appellant] admits that beginning yesterday she developed an acute worsening and is unsure of any specific inciting event. She works for the [employing establishment] doing modified duty.”

Dr. Effron diagnosed right piriformis syndrome, right sacroiliac joint dysfunction, lumbar radiculopathy and lumbar radicular pain. He noted that a magnetic resonance imaging (MRI) scan study of the sacrum did not show entrapment and an electrodiagnostic study of 10 years prior was normal. Dr. Effron found that appellant should remain off work the rest of the week and begin sedentary duty the following week.

In a progress report dated April 6, 2010, Dr. Roy M. Lerman, a Board-certified psychiatrist, discussed appellant’s complaints of increased right low back and leg pain. He recommended ruling out piriformis syndrome with a recent exacerbation and ruling out S1 joint dysfunction. Dr. Lerman noted that appellant did “more overall at work over the last few months.” He diagnosed an “exacerbation of her symptoms related to work activities” and recommended that she not work for two weeks. In reports dated April 20, 2010, Dr. Lerman diagnosed right piriformis syndrome and S1 joint dysfunction and found that appellant was unable to work for two weeks.

On May 7, 2010 appellant filed a notice of recurrence of disability on March 30, 2010 causally related to her March 16, 1993 employment injury. She related that she worked on March 29, 2010 and awoke the following morning with pain radiating from her back into her right leg.

On May 4, 2010 Dr. Lerman discussed appellant’s improvement with physical therapy. He diagnosed right piriformis syndrome and possible right S1 joint dysfunction. Dr. Lerman found that she should remain off work pending an evaluation in three weeks. On May 24, 2010

he noted that appellant related that she was “not quite back to her pre-flare-up baseline. Her one concern is her ability to tolerate activities involved with work.”

On June 2, 2010 Dr. Diamond applied the sixth edition of the A.M.A., *Guides* to the findings from his April 3, 2008 report. He found that appellant had a two percent impairment of the right lower extremity.

On July 19, 2010 appellant related that, after her injury to her back and right hip, she experienced continual soreness down her right leg. She related that even performing light duty aggravated the pain and resulted in flare-ups.³

In a progress report dated June 28, 2010, Dr. Lerman noted that appellant was “concerned as her claim has not been accepted by [OWCP].” He recommended a piriformis muscle injection and indicated that he had completed a duty status report with work restrictions.⁴

By decision dated August 2, 2010, OWCP found that appellant had not established that she sustained an employment-related recurrence of disability beginning March 30, 2010. On August 6, 2010 appellant’s attorney requested an oral hearing.

By decision dated August 10, 2010, a hearing representative set aside the March 4, 2010 schedule award decision. She found that an OWCP medical adviser responsible for creating the conflict in medical opinion inappropriately reviewed the report of Dr. Menkowitz, the impartial medical examiner. The hearing representative remanded the case for an OWCP medical adviser not previously associated with the case to review the report of Dr. Menkowitz.

In a report dated August 9, 2010, Dr. Lerman related that he had treated appellant beginning July 9, 1993 for her March 16, 1993 employment injury when she fell on her right hip after slipping on ice. Appellant sought treatment on March 30, 2010 for an exacerbation of her back and right leg pain. Dr. Lerman stated, “The day prior to that visit, there was an acute worsening of her symptoms in the course of her work at the [employing establishment].” He summarized the remainder of his treatment notes and advised that appellant could currently work with restrictions. Regarding OWCP’s request for clarification of his disability finding and causation, Dr. Lerman stated:

“[Appellant] has worked throughout this time on modified duty. She was taken off work for the exacerbation in March. This was an exacerbation of her preexisting condition. It was felt to be associated with increased activities at work. Over time, [appellant] has improved, restrictions were updated, and her supervisor was able to accommodate these restrictions.”

On August 31, 2010 OWCP’s medical adviser reviewed the evidence and found that there was “no evidence of nerve root injury or dysfunction” affecting the lower extremity based on

³ On July 21, 2010 a manager with the employing establishment asserted that appellant indicated that she felt fine when she left work on March 29, 2010 but woke up on March 30 with pain.

⁴ On July 12, 2010 Dr. Lerman noted that appellant experienced increased symptoms since returning to work. He noted that she wanted to keep working.

diagnostic studies. He further noted that Dr. Menkowitz found no loss of motion of the right hip. The medical adviser concluded that appellant had no permanent impairment to the right lower extremity.

By decision dated September 1, 2010, OWCP denied appellant's schedule award claim. On September 9, 2010 her attorney requested an oral hearing.⁵

In a progress report dated December 3, 2010, Dr. Lerman diagnosed possible right piriformis syndrome, gluteal myofascial pain and a possible lumbar disc injury. He advised that appellant's condition constituted a new injury rather than a recurrence of disability "as there was an occurrence at work that precipitated her current level of symptoms. The exact etiology of her symptoms is not known as she has not had further evaluation with [an] MRI scan of the lumbar spine."

At a December 14, 2010 hearing, appellant described her work duties delivering cluster boxes on March 29, 2010 and noted that when she woke up on March 30, 2010 she experienced considerable pain. Her attorney argued that her claim should be expanded to include piriformis syndrome and right S1 joint dysfunction.

In a decision dated January 25, 2011, the hearing representative affirmed the August 2, 2010 decision, as modified to reflect that appellant sustained lumbar radicular syndrome and piriformis syndrome based on the April 16, 2008 report of Dr. Hanley. He found, however, that the evidence was insufficient to show that she sustained a recurrence of disability.

In a decision dated February 23, 2011, a hearing representative affirmed the September 1, 2010 decision denying appellant's schedule award claim.

On appeal appellant's attorney contends that OWCP's delay in failing to issue a schedule award under the fifth edition of the A.M.A., *Guides* deprived her of a property right without due process. He also argues that Dr. Didizian's report is insufficient to create a conflict as he did not provide rationale for his conclusions or make specific reference to the A.M.A., *Guides*. Counsel notes that OWCP's medical adviser did not review Dr. Diamond's finding of a two percent impairment. He additionally argues that Dr. Menkowitz opinion is not based on an accurate statement of accepted facts as it did not include the expanded conditions of lumbar radicular syndrome and piriformis syndrome. Counsel further maintains that Dr. Lerman's August 9, 2010 report is sufficient to establish a recurrence of disability.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁶ and its implementing federal regulations⁷ set forth the number of weeks of compensation payable to employees sustaining permanent

⁵ In a duty status report dated October 11, 2010, Dr. Lerman listed work restrictions. He continued to submit progress reports.

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁸ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁹

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁰

ANALYSIS -- ISSUE 1

OWCP determined that a conflict arose between Dr. Diamond, appellant's physician, and Dr. Didizian, a referral physician, regarding whether he had any employment-related permanent impairment to the right lower extremity.¹¹ It referred her to Dr. Menkowitz, a Board-certified orthopedic surgeon, for resolution of the conflict in medical opinion. On January 28, 2010 Dr. Menkowitz reviewed the accepted conditions of lumbosacral joint sprain, myalgia, myositis and a sciatic nerve lesion. He discussed appellant's complaints of right leg pain radiating into the big toe of the foot and soreness around the piriformis area. Dr. Menkowitz found that she had full range of motion of the upper and lower extremities and no sensory deficit of the upper extremities. He opined that appellant had no permanent impairment of an extremity under the sixth edition of the A.M.A., *Guides*.

On appeal appellant's attorney argued that, subsequent to Dr. Menkowitz' opinion, OWCP accepted lumbar radicular syndrome and piriformis syndrome, and thus the impartial medical examiner's report was not based on a complete and accurate statement of accepted facts. Dr. Menkowitz rendered his opinion on January 28, 2010 and OWCP expanded acceptance of the claim on January 25, 2011. OWCP accorded special weight to Dr. Menkowitz' impartial medical examination in its February 23, 2011 decision even though he had no knowledge of the additional accepted conditions. As his opinion was not based on a current and accurate factual and medical background, the Board finds it cannot be entitled to special weight. The medical conflict regarding whether appellant has a permanent impairment entitling her to a schedule award remains unresolved.¹²

⁸ *Id.* at § 10.404(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹⁰ *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

¹¹ On appeal appellant's attorney argues that Dr. Didizian's report is insufficient to create a conflict; however, his report is detailed and rationalized and thus of sufficient probative value.

¹² *See R.F.*, Docket No. 09-1605 (issued June 10, 2010).

When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, it must secure a supplemental report from the specialist to correct the defect in his original report.¹³ On remand, it should provide Dr. Menkowitz with an updated statement of accepted facts and secure a supplemental report from him regarding whether the additional accepted conditions of lumbar radiculopathy and piriformis syndrome resulted in a permanent impairment of a scheduled member. After this and such other development as OWCP deems necessary, it should issue a *de novo* decision.¹⁴

LEGAL PRECEDENT -- ISSUE 2

Where an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.¹⁵

OWCP regulations provide that a recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.¹⁶ This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn, (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.¹⁷

¹³ See *Raymond A. Fondots*, 53 ECAB 637 (2002); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988).

¹⁴ On appeal appellant's attorney argues that OWCP's delay in issuing a schedule award under the fifth edition of the A.M.A., *Guides* deprived her of a property right without due process, citing *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). These cases held only that a claimant who was in receipt of benefits (in *Goldberg* public assistance, and in *Mathews* social security benefits) could not have those benefits terminated without procedural due process. In *Mathews* the court noted that the private interest that would be adversely affected by the erroneous termination of benefits was likely to be less in a disabled worker than a welfare recipient, and due process would not require an evidentiary hearing. In this case, appellant is simply making a claim for a schedule award. She is not in receipt of schedule award benefits nor is OWCP attempting to terminate any benefits. Appellant has not established a vested right to a schedule award decision under the fifth edition of the A.M.A., *Guides* nor has she identified any procedural due process which she has been denied. The cases cited by appellant are not applicable to the present case.

¹⁵ *Richard A. Neidert*, 57 ECAB 474 (2006); *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

¹⁶ 20 C.F.R. § 10.5(x).

¹⁷ *Id.*

ANALYSIS -- ISSUE 2

Following her March 16, 1993 work injury, appellant performed limited-duty employment. She stopped work on March 30, 2010 and filed a notice of recurrence of disability beginning that date. Appellant related that she performed work on March 29, 2010 and awoke the next morning with back pain radiating into her right leg.

Appellant has not alleged a change in the nature and extent of her light-duty job requirements. Instead, she attributed her recurrence of disability to a change in the nature and extent of her employment-related conditions. Appellant must provide medical evidence to establish that she was disabled due to a worsening of her accepted work-related conditions.¹⁸

On March 30, 2010 Dr. Effron related that appellant described a worsening of right radicular pain beginning the previous day without “any specific inciting event.” He noted that she performed modified duty for the employing establishment. Dr. Effron diagnosed right piriformis syndrome, right sacroiliac joint dysfunction and lumbar radiculopathy. He advised that appellant should remain off work one week and then perform sedentary duty. Dr. Effron, however, did not address the cause of her disability. Medical evidence that does not offer any opinion regarding the cause of an employee’s condition is of diminished probative value on the issue of causal relationship.¹⁹

In an April 6, 2010 report, Dr. Lerman reviewed appellant’s complaints of right back and leg pain and noted that she had done more at work in the last few months. He diagnosed a possible exacerbation of piriformis syndrome and possible S1 joint dysfunction. Dr. Lerman advised that appellant’s symptoms had been aggravated by employment activities. He found that she should not work for two weeks. A recurrence of disability, however, is a work stoppage caused by “a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.”²⁰ As Dr. Lerman found that appellant’s condition was aggravated by employment duties, any disability resulting from the alleged aggravation would be considered a new injury and not a recurrence as defined by the regulations.

In progress reports dated April 20, May 4 and 24, and June 28, 2010, Dr. Lerman diagnosed right piriformis syndrome and possible right S1 joint dysfunction and provided findings regarding disability. He did not, however, address causation and thus his report is of little probative value on the issue of causal relationship.²¹

On August 9, 2010 Dr. Lerman noted that he had treated appellant since July 9, 1993 for her March 16, 1993 employment injury. He diagnosed piriformis syndrome and possible right S1 joint dysfunction. Dr. Lerman opined that appellant aggravated her preexisting condition in

¹⁸ See *Jackie D. West*, *supra* note 15.

¹⁹ See *L.W.*, 59 ECAB 271 (2007); *Conrad Hightower*, 54 ECAB 796 (2003).

²⁰ 20 C.F.R. § 10.5(x).

²¹ See *supra* note 19.

March 2010 due to “increased activities at work.” As previously noted, however, a recurrence of disability does not include disability resulting from exposure to new work factors, even if it involves the same part of the body previously injured.²²

On December 3, 2010 Dr. Lerman recommended ruling out piriformis syndrome and a lumbar disc injury. He determined that appellant’s condition was a new injury rather than a recurrence of disability and that the exact etiology was not known. Consequently, Dr. Lerman’s opinion does not support that she sustained a recurrence of disability.

On appeal appellant’s attorney argues that Dr. Lerman’s August 9, 2010 report is sufficient to show a recurrence of disability. As discussed, however, Dr. Lerman attributed her condition to the course of her work the previous day and a condition caused or aggravated by new work factors constitutes a new injury rather than a recurrence of disability. On return of the case record, if it has not already done so, OWCP should appropriately develop a claim for a new injury.

With respect to the recurrence of disability, appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant sustained any permanent impairment to her right lower extremity. The Board further finds that she did not establish a recurrence of disability on March 30, 2010 causally related to her March 16, 1993 employment injury.

²² 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3b(2) (May 1997); *see also Cecelia M. Corley*, 56 ECAB 662 (2005).

ORDER

IT IS HEREBY ORDERED THAT the February 23, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board. The January 25, 2011 decision is affirmed.

Issued: January 17, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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