

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

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**I.P., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Long Branch, NJ, Employer**

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**Docket No. 13-1323  
Issued: December 11, 2013**

*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 May 15, 2013 appellant filed a timely appeal from a January 15, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.<sup>2</sup>

**ISSUE**

The issue is whether appellant sustained any permanent impairment as a result of his January 22, 1998 work injury warranting a schedule award.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> Appellant also submitted medical evidence on appeal. However, the Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

## **FACTUAL HISTORY**

On January 22, 1998 appellant, then a 54-year-old postal worker, was involved in a work-related automobile accident while stopped at a traffic light. OWCP accepted his claim for a neck strain and sprains of the shoulder and upper arm, acromioclavicular, bilateral. Appellant did not stop work. He was prescribed work restrictions for light-duty work effective January 23, 1998, the date of initial treatment following the accident. Appellant's concurrent or preexisting conditions include cervical degenerative disc disease, lumbar herniated disc, right ankle arthroscopy with synovectomy in 2003; history of right foot fifth metatarsal fracture; and a history of high blood pressure, asthma and diabetes. He had also been involved in a nonemployment-related automobile accident on August 9, 1998.

On July 12, 2010 appellant filed a Form CA-7 claim for a schedule award. In an April 6, 2010 report, Dr. Padmaja R. Yatham, an anesthesiologist, found that under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), appellant had seven percent impairment of the cervical spine based on four percent impairment due to a cervical disc herniation and three percent for pain. He also rated 18 percent upper extremity impairment and 24 percent whole person impairment.

In a May 4, 2010 report, Dr. Yatham noted a history of work-related injuries occurring on January 22 and August 1998 and August 13, 2002. He noted a June 19, 2001 cervical spine magnetic resonance imaging (MRI) scan showed a disc bulge at C5-6 and large left posterolateral disc herniation at C5-6 and C6-7. On examination there was decreased cervical spine motion, decreased strength, atrophy, sensory and motor deficits in the upper extremity. Dr. Yatham listed an impression of lower back pain with lumbosacral strain or sprain and cervicgia with cervical radiculitis, right upper extremity radiculitis and cervical disc herniation at C6-7 was provided. He opined that appellant reached maximum medical improvement. Under the sixth edition of the A.M.A., *Guides*, Dr. Yatham opined that appellant had 25 percent right upper extremity impairment and 3 percent right lower extremity impairment. A copy of his impairment worksheet for the upper extremity was provided.

In a November 10, 2011 report, Dr. Henry J. Magliato, an OWCP medical adviser, reviewed the statement of accepted facts and reports of Dr. Yatham. While Dr. Yatham performed a schedule award evaluation on May 4, 2010, his narrative report did not explain how he arrived at the impairment rating applying the A.M.A., *Guides* and his worksheets were poorly filled out. Dr. Magliato noted that Dr. Yatham mixed up peripheral nerve impairment with the upper extremity diagnostic grids. He also noted that, while the October 23, 2010 worksheet was more detailed, it was not clear how Dr. Yatham arrived at either the 23 percent or 3 percent impairment values. Dr. Magliato recommended a second-opinion examination.

In a March 6, 2012 report, Dr. Yatham listed an impression of lower back pain, lumbosacral radiculitis and lumbar disc herniation. He stated that the MRI scan report noted multiple disc herniations and lumbar spinal stenosis. Dr. Yatham noted that appellant did not share such pain before the accident and opined that the disc herniations may be from the accident. He did not have any office MRI scan reports to compare the previous studies.

On May 10, 2012 OWCP referred appellant, together with a statement of accepted facts, a list of questions, and the medical record, to Dr. Gerard M. Gerling, a Board-certified neurologist, for a second-opinion examination. In a June 5, 2012 report, Dr. Gerling noted the history of injury and provided findings on examination. He stated that appellant's gait was wide based, unsteady and antalgic in appearance with hypoactive reflexes but with no evidence of muscle atrophy or focal weakness. Dr. Gerling noted that appellant was assigned to reduced duties after the 1998 motor vehicle accident and had advanced degenerative spondylosis of the cervical and lumbar spine as well as insulin-dependent diabetes mellitus. Appellant reported that a marked disability began after the motor vehicle accident caused him to be in a light-duty work restriction, until he retired in 2004. Dr. Gerling concluded that appellant was totally disabled as a result of the degenerative changes, as seen on the diagnostic reports, along with his insulin-dependent diabetes mellitus.

In a June 13, 2012 addendum report, Dr. Gerling noted that the claim was accepted for neck and bilateral shoulder strains, which were common in rear-end type collisions and typically resolved in 10 to 14 days. Appellant had no objective evidence of injury and there was no evidence that he had suffered a neurological or spinal injury as a result of the motor vehicle accident. Dr. Gerling opined that the medical conditions appellant complained of were personal, preexisting and/or idiopathic in nature.

By decision dated June 19, 2012, OWCP denied a schedule award finding that appellant had no permanent impairment related to the accepted employment injuries.

In a June 26, 2012 letter, appellant, through counsel, requested an oral hearing which was held on October 25, 2012. Counsel argued that Dr. Gerling's report was insufficient to carry the weight of the medical evidence as he provided a cursory opinion but failed to report specific examination findings to support his conclusions and failed to consider electromyogram (EMG) findings.

In an October 4, 2012 report, Dr. Yatham noted that appellant had been a patient since July 2009. The diagnostic studies evidenced a cervical disc herniation, lumbar disc herniation and nerve damage. Dr. Yatham stated that appellant was on multiple medications and had chronic pain. He opined that appellant was disabled because of his condition.

In an October 22, 2012 letter, appellant reiterated that Dr. Gerling performed a cursory examination and caused neck pain when the physician tried to move his neck.

By decision dated January 15, 2013, an OWCP hearing representative affirmed the June 19, 2012 decision.

### **LEGAL PRECEDENT**

An employee seeking compensation under FECA has the burden of establishing the essential elements of his or 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 permanent impairment for which schedule award compensation is alleged.<sup>3</sup>

The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between appellant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of appellant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.<sup>4</sup>

The schedule award provision of FECA<sup>5</sup> and its implementing regulations<sup>6</sup> 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, FECA does not specify the manner in which the percentage of loss shall be determined. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>7</sup> The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.<sup>8</sup> It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.<sup>9</sup>

### ANALYSIS

OWCP accepted a neck strain and bilateral shoulder strains due to a 1998 motor vehicle accident. Appellant requested a schedule award. It denied the schedule award claim, finding that the medical evidence had not established any permanent impairment related to the accepted employment conditions. The Board finds that the record is not sufficient to establish that he has any impairment caused by his accepted conditions.

Appellant came under Dr. Yatham's care in July 2009. Dr. Yatham found diagnostic evidence of a cervical disc herniation, a lumbar disc herniation and evidence of nerve damage.

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<sup>3</sup> See *Bobbie F. Cowart*, 55 ECAB 476 (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. See also *Veronica Williams*, 56 ECAB 367, 370 (2005).

<sup>4</sup> *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> 20 C.F.R. § 10.404 (1999).

<sup>7</sup> *Id.*

<sup>8</sup> FECA Bulletin No. 09-03 (issued March 15, 2009).

<sup>9</sup> See *Dale B. Larson*, 41 ECAB 481, 490 (1990).

He rated permanent impairment. OWCP, however, never accepted a cervical disc herniation or a low back condition as related to the January 22, 1998 motor vehicle accident. In a March 6, 2012 report, Dr. Yatham stated that the lumbar disc herniations could have been from the work injury. This opinion is equivocal and is of little probative value.<sup>10</sup> Dr. Yatham rated impairment due to the cervical disc bulges and pain; but he did not explain how the conditions causing permanent impairment were causally related to the accepted work injury. It is appellant's burden to prove that the condition for which a schedule award is sought is causally related to his or her employment.<sup>11</sup> Appellant must establish that impairment to a scheduled member was caused by the accepted injury before impairment can be assessed.<sup>12</sup>

OWCP properly referred appellant to Dr. Gerling for a second-opinion examination for a determination as to whether he had any impairment due to his accepted conditions. In a June 5, 2012 report, Dr. Gerling noted the history of injury and provided findings on examination. He concluded that appellant was totally disabled as a result of his preexisting, advanced degenerative spondylosis of the cervical and lumbar spine and insulin-dependent diabetes mellitus. In a June 13, 2012 addendum report, Dr. Gerling noted that the claim was accepted for neck and bilateral shoulder strains, which he explained were commonly diagnosed in rear-end type collision and which usually resolved in 10 to 14 days. He concluded that appellant had no objective evidence of injury or evidence that he sustained a neurological or spinal injury as a result of the motor vehicle accident. The Board notes that, under the appropriate tables in the A.M.A., *Guides*, no impairment is due to the accepted conditions of neck and bilateral shoulder strains, which Dr. Gerling found had resolved. Resolved conditions typically are class 0, which represents zero percent upper extremity impairment.<sup>13</sup>

The Board finds that OWCP properly relied upon the reports of Dr. Gerling to deny appellant's schedule award claim. Dr. Gerling reviewed the medical evidence and statement of accepted facts and provided examination findings and provided reasoning for his conclusion that appellant's accepted conditions had resolved.<sup>14</sup> Thus, appellant had sustained no permanent impairment due to the accepted injuries. Furthermore, there is no report from appellant's physicians which indicate that the accepted conditions are still active.

For these reasons, appellant did not show that he sustained permanent impairment.

On appeal, appellant argued that Dr. Gerling did not provide a full examination, complete with objective testing and only examined him for five minutes. He contends that his condition is severe and has affected his way of living for the past 13 years. As noted, Dr. Gerling reviewed appellant's medical records, the statement of accepted facts and utilized findings on examination

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<sup>10</sup> See *Kathy A. Kelley*, 55 ECAB 206 (2004).

<sup>11</sup> *Veronica Williams*, *supra* note 3.

<sup>12</sup> See generally *Thomas P. Lavin*, 57 ECAB 353 (2006).

<sup>13</sup> See e.g., A.M.A., *Guides* 401, Table 15-5. The Board notes that OWCP failed to route the medical record to its medical adviser to review Dr. Gerling's reports for an impairment determination.

<sup>14</sup> *Michael S. Mina*, 57 ECAB 379 (2006).

to reach his stated conclusion. While appellant has evidence of preexisting conditions, these conditions have not been accepted.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

**CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish entitlement to a schedule award for permanent impairment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 15, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 11, 2013  
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