

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

S.P., Appellant)	
)	
and)	Docket No. 15-225
)	Issued: April 1, 2015
U.S. POSTAL SERVICE, POST OFFICE,)	
Edison, NJ, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 10, 2014 appellant, through her attorney, filed a timely appeal from the August 5, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant is entitled to a schedule award for her October 12, 1988 injury-related back and right leg contusions.

FACTUAL HISTORY

On October 12, 1988 appellant, then a 33-year-old letter carrier, sustained a traumatic injury in the performance of duty when she was struck by a bicyclist and fell on her back. She returned to regular duty a few days later. OWCP accepted appellant's claim for back and right leg contusions.

¹ 5 U.S.C. § 8101 *et seq.*

Twenty-three years later, on September 7, 2011, appellant filed a schedule award claim. Dr. Arthur F. Becan, Jr., an orthopedic surgeon, related her history, including minimal bulging annuli at L3-4 and L4-5 in 1992. In 1995 appellant was found to have posterior spondylosis in the lower lumbar spine causing central canal encroachment, mild disc bulge posterolaterally on the right L5-S1, and mild disc bulge posterolaterally at L4-5 in the inferior neural foramen. In 1996 she was found to have chronic L4 and L5 radiculopathy on the right. A study in 1999 revealed degenerative disc disease and bulging of the L4-5 and L5-S1 disc spaces.

Dr. Becan described his findings on examination and found that the work-related injury of October 12, 1988 was the competent producing factor for appellant's current subjective and objective findings. He evaluated her and found that she had a 42 percent impairment of her right lower extremity and a 22 percent impairment of her left lower extremity.

An OWCP medical adviser reviewed Dr. Becan's evaluation and agreed with impairment ratings. He found, however, that Dr. Becan's findings seemed "out of touch" with earlier medical reports in the file. The medical adviser noted that the examination was performed a couple of decades after the work injury and that there was a 12-year gap between Dr. Becan's examination and the most recent examination in 1999. The 1999 examination revealed only subjective complaints. There were no sensory deficits, and there was no mention of any motor loss. This led the medical adviser to ask: "If the claimant had all the motor and sensory deficits that Dr. Becan found, when did they develop?" He also wondered why no one operated to decompress the involved nerve roots if severe deficits were present, and whether there were any medical reports since 1999. The medical adviser recommended a second opinion examination.

OWCP found a conflict between Dr. Becan and the medical adviser. It referred appellant, together with the medical record and a statement of accepted facts, to Dr. Edward B. Krisiloff, a Board-certified orthopedic surgeon, for an impartial medical examination.

Dr. Krisiloff saw appellant on October 8, 2013. He reviewed her medical record and the statement of accepted facts. Dr. Krisiloff related appellant's history and current complaints. He described his findings on physical examination and noted that imaging studies revealed degenerative changes and minimal bulging of discs but no apparent significant encroachment on the neural elements. It was Dr. Krisiloff's opinion that appellant had recovered from the accepted lower back contusion and right leg contusion within approximately 10 weeks of the October 12, 1988 work injury. Dr. Krisiloff found that appellant was currently suffering from a degenerative condition of her lower back, which was not the result of the work injury as the injury caused no fracture or herniated disc, and nerve studies were normal. Moreover, appellant's degenerative condition currently showed no objective findings on examination. Dr. Krisiloff noted no evidence of neurologic deficit in 1988 and 1989, and no objective findings

in 1996 and 1998. He concluded that the medical record and physical examination did not support an expansion of the claim to include any other medical condition. Dr. Krisiloff added:

“If we are to take into account the claimant’s history of injury over 20 years ago, her radiographic studies and her nerve testing, we can state within a reasonable degree of medical probability that the claimant has no permanency of her lower extremities. The examination performed by Dr. Becan in 2011 and his determination of permanency is based entirely on subjective findings. In my opinion it therefore has no clinical validity. If we look at the weight of the medical evidence in this case it becomes quite clear.”

In a decision dated January 31, 2014, OWCP denied appellant’s schedule award claim due to the lack of a measurable impairment. Appellant requested a hearing.

By report dated June 6, 2014, Dr. Becan stood by his earlier report. He recalculated appellant’s impairment and found a 36 percent impairment of the right lower extremity and a 24 percent impairment of the left lower extremity. Dr. Becan noted that motor strength should be graded from zero to five and sensory examination should be performed using Semmes-Weinstein monofilament testing. He added that Dr. Krisiloff did not indicate specific motor groups, nor did he grade motor strength or sensory deficits.

In a decision dated August 5, 2014, an OWCP hearing representative affirmed the January 31, 2014 decision. She found that a conflict arose between Dr. Becan and the medical adviser on the issue of impairment. The hearing representative also found that Dr. Krisiloff, the impartial medical specialist, provided a reasoned opinion discussing the historical evidence of record.

Counsel argues that OWCP should have expanded appellant’s claim to include lumbar radiculopathy and disc displacement early on in the claims process. He argues that it should have included in the statement of accepted facts that appellant sustained a recurrence of disability and was paid compensation for wage loss from 1995 through 1999, a period during which appellant was receiving treatment for radiculopathy. Counsel further argues that Dr. Krisiloff’s opinion cannot carry the weight of the evidence: Dr. Krisiloff’s physical examination was almost nonexistent, speculative, he did not identify what tests he performed or the muscle groups tested, and he made no reference to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009).

LEGAL PRECEDENT -- ISSUE 1

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² Section 8107 provides that if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.³ A claimant seeking compensation under FECA has the burden to establish the

² *Id.* at § 8102(a).

³ *Id.* at § 8107(a).

essential elements of her claim by the weight of the reliable, probative, and substantial evidence.⁴ A claimant seeking a schedule award under section 8107, therefore, has the burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of an injury sustained while in the performance of duty.⁵

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a back contusion and a right leg contusion when a bicyclist struck her on October 12, 1988, causing her to fall on her back. It has accepted no other medical condition as a result of the work injury. Counsel notes that OWCP accepted a recurrence of disability in 1995 and paid compensation for wage loss, but the Board has held that the payment of compensation does not, in and of itself, constitute acceptance of a particular condition or disability in the absence of evidence from OWCP indicating that a particular condition or disability has been accepted as work related.⁶ Back right leg contusions are the only accepted injuries in the case. OWCP did not expand its acceptance to include degenerative disc disease of the lumbar spine, spondylosis, bulging discs, or radiculopathy.

Accordingly, when appellant filed her schedule award claim, the issue presented was simply whether the accepted contusions had caused permanent impairment to a scheduled member of the body. Dr. Becan, the orthopedic surgeon, who examined appellant 23 years after the work injury, did not report that she continued to suffer from these contusions. He made no finding of contusion on physical examination, and he diagnosed no back or right leg contusion. Dr. Becan based his evaluation of impairment instead on motor and sensory nerve deficits stemming from a low back condition that was not accepted as an injury sustained in the performance of duty.

Dr. Krisiloff, an orthopedic surgeon and independent medical examiner, reviewed appellant's medical record and the statement of accepted facts. He found that she had recovered from the accepted lower back contusion and right leg contusion within approximately 10 weeks of the 1988 work incident. Dr. Krisiloff explained that appellant's current symptoms arose from a degenerative condition of her lower back. He is not considered an impartial medical specialist on the issue of contusion-related residuals because there was no conflict on whether she continued to suffer from the soft-tissue injuries she sustained in 1988. Dr. Becan certainly never found that appellant did suffer from the soft-tissue injuries. Dr. Krisiloff nonetheless carries the weight of the medical opinion evidence as to permanent impairment because he addressed the issue directly, and his opinion is consistent with the nature of the accepted condition, appellant's

⁴ *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

⁵ See, e.g., *Ernest P. Govednik*, 27 ECAB 77 (1975) (no medical evidence that the employment injury caused the claimant to have a permanent loss of use of a lower extremity or any other member of the body specified in the schedule).

⁶ *M.C.*, Docket No. 12-64 (issued May 10, 2012); *Gary L. Whitmore*, 43 ECAB 441 (1993).

prompt return to regular duty, and her lack of continuing medical attention for the accepted contusions.⁷

As there is no evidence that the accepted contusions in October 1988 caused permanent impairment to a scheduled member of the body, the Board finds that appellant is not entitled to a schedule award. The Board will affirm OWCP's August 5, 2014 decision on the issue of permanent impairment.

Appellant may request a 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 is not entitled to a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 1, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁷ See e.g., *J.B.*, Docket No. 10-1216 (issued March 2, 2011), where the Board found that OWCP improperly declared a conflict in medical opinion as neither the medical adviser, nor the second opinion physician provided a probative medical opinion using the A.M.A., *Guides*. Thus, the Board found that the physician identified as an impartial medical specialist was actually a second opinion physician whose opinion carried the weight of the medical evidence.