

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

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**J.W., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Philadelphia, PA, Employer**

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**Docket No. 10-2129  
Issued: July 8, 2011**

*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  
ALEC J. KOROMILAS, Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On August 19, 2010 appellant filed a timely appeal from a May 4, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) concerning his schedule award. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUE**

The issue is whether appellant has established that he has an injury-related impairment which would entitle him to a schedule award.

**FACTUAL HISTORY**

This case has previously been before the Board. In an October 2, 2006 decision, the Board affirmed OWCP's November 14, 2005 and February 23, 2006 decisions which terminated appellant's compensation benefits effective October 25, 2004 on the grounds that he no longer

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

had any residuals or disability causally related to his December 27, 2003 employment injury.<sup>2</sup> The Board accorded weight to the August 13, 2004 medical opinion of Dr. E. Michael Okin, a Board-certified orthopedic surgeon serving as the impartial medical examiner, who found that appellant's employment-related injuries had resolved without residuals and that his present symptomatology and restrictions were due to his preexisting underlying degenerative condition. The facts of the case as set forth in the prior decision are incorporated herein by reference.<sup>3</sup> The facts relevant to the present appeal are hereafter set forth.

On January 28, 2009 appellant filed a claim for a schedule award. In an October 21, 2008 report, Dr. Arthur Becan, an orthopedic surgeon, noted the history of appellant's employment injuries of March 20 and December 27, 2003<sup>4</sup> and discussed his course of treatment, including objective testing. He provided his physical examination findings and diagnosed: chronic post-traumatic cervical and lumbosacral strain and sprain; aggravation of preexisting degenerative disc disease and cervical arthropathy; left cervical C7 radiculopathy; aggravation of congenital scoliosis; aggravation of preexisting arthropathy and degenerative disc disease of the lumbar spine and lumbosacral radiculitis. Dr. Becan opined that the employment-related injuries of March 20 and December 27, 2003 were the competent producing factor for appellant's current subjective and objective findings. He further opined that appellant reached maximum medical improvement as of October 21, 2008. Pursuant to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. Becan opined that appellant had 26 percent left upper extremity impairment, 26 percent right upper extremity impairment, 23 percent left lower extremity impairment, and 23 percent right lower extremity impairment.

In a February 23, 2009 report, OWCP's medical adviser reviewed the medical evidence of record and concluded that appellant sustained a lumbar strain superimposed upon advanced degenerative disc disease and osteoarthritic changes of the lumbar spine. He stated that the lumbar strain improved, but appellant had residual osteoarthritic problems with no evidence of nerve root compression of the upper or lower extremities. The medical adviser noted that the electromyogram (EMG) study showed a left C7 radiculopathy. He opined that appellant reached maximum medical improvement on October 21, 2008. The medical adviser utilized Dr. Becan's examination findings and opined, under the fifth edition of the A.M.A., *Guides*, appellant had 10 percent impairment of the left upper extremity.

On March 12, 2009 OWCP requested that the medical adviser clarify his February 23, 2009 report as to whether there was any permanent impairment as a result of the work-related injury. On March 21, 2009 OWCP's medical adviser opined that "despite the fact that Drs. Okin and Salem found no abnormalities, it is possible that the claimant has pain that is secondary to nerve root compression despite the fact objective parameters cannot be identified. Thus, he

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<sup>2</sup> Docket No. 06-1055 (issued October 2, 2006).

<sup>3</sup> The Office accepted that on December 27, 2003 appellant, then a 58-year-old motor vehicle operator, sustained a lumbar sprain and a cervical sprain. Appellant stopped work on January 2, 2004 and returned to part-time limited duty as a van driver on June 14, 2004.

<sup>4</sup> The claim pertaining to any March 20, 2003 injury is not before the Board on the present appeal.

opined that appellant had one percent impairment of the right lower extremity, left lower extremity and left upper extremity under the fifth edition of the A.M.A., *Guides*.

On March 31, 2009 OWCP referred appellant for a second opinion evaluation regarding whether the effects of the work-related condition remained active and whether he had any residual impairment to other parts of his body. In an April 22, 2009 report, Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon and OWCP referral physician, reviewed a statement of accepted facts along with the medical record. He set forth his examination findings and diagnosed degenerative joint disease of the neck and back. Based on his review of the medical records, Dr. Hanley opined that appellant no longer had residuals of the work-related injury of December 2003, but rather had ongoing symptomology associated with his underlying degenerative process. Therefore he reasoned that any current symptomology appellant has would not be ratable as a work-related consequence. Dr. Hanley further stated that the date of maximum medical improvement would be three months from the date of injury.

In an August 31, 2009 report, Dr. Noubar Didizian, a Board-certified orthopedic surgeon and OWCP referral physician, noted that the history of injury, his review of appellant's medical record and presented his examination findings. He opined that appellant's accepted cervical and lumbosacral sprains and strains had resolved by June 2004 when he returned to work. Dr. Didizian indicated that strains and sprains normally resolve within 8 to 12 weeks. He additionally stated that, if appellant had any aggravation of his preexisting degenerative disease, he would allow a total of six months from the date of injury or June 2004 for appellant's symptoms to resolve. Dr. Didizian opined that appellant's ongoing symptoms are the basis of his preexisting degenerative joint disease. Under the sixth edition of the A.M.A., *Guides*, he opined that appellant had no work-related impairment.

On October 13, 2009 OWCP received Dr. Becan's October 21, 2008 report using the examination findings with the sixth edition of the A.M.A., *Guides*. Dr. Becan opined that appellant had 25 percent impairment to both the right and left upper extremities and 21 percent impairment to both the right and left lower extremities.

In an October 18, 2009 report, OWCP's medical adviser reviewed the medical record. He utilized Dr. Didizian's August 31, 2009 examination findings and opined, under the sixth edition of the A.M.A., *Guides*, that appellant had zero percent impairment for both upper and lower extremities based upon documented history of sprain/strain-type injury now resolved with continued complaints of neck and back pain with no objective findings on examination. References to Table 17-2, page 564, and Table 17-4, page 570, were provided.

By decision dated October 22, 2009, OWCP denied schedule award compensation on the basis the evidence was insufficient to establish a permanent impairment to a scheduled member due to the accepted work-related injury.

On October 27, 2009 appellant, through his attorney, disagreed with OWCP's decision and requested an oral hearing, which OWCP scheduled for February 23, 2010. Counsel subsequently requested a review of the written record. By decision dated May 4, 2010, OWCP's hearing representative reviewed the written record and affirmed OWCP's October 22, 2009 decision.

## LEGAL PRECEDENT

The schedule award provision of FECA<sup>5</sup> and its implementing regulations<sup>6</sup> set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.<sup>7</sup> However, neither FECA nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, OWCP adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.<sup>8</sup> Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (6<sup>th</sup> ed. 2008).<sup>9</sup>

The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.<sup>10</sup> The Board notes that, before applying the A.M.A., *Guides*, OWCP must determine whether the claimed impairment of a scheduled member is causally related to the accepted work injury.<sup>11</sup>

## ANALYSIS

OWCP accepted appellant's claim for a lumbar sprain and a cervical sprain. The Board previously affirmed OWCP's termination of appellant's compensation benefits effective October 25, 2004 on the grounds that the weight of the medical evidence, as represented by the impartial medical examiner, reflected that the accepted medical conditions, lumbar and cervical sprains, had resolved and appellant's continuing symptomatology and disability were due to his preexisting underlying degenerative condition.

Appellant thereafter requested schedule award compensation. He has the burden of proof to establish that the condition for which a schedule award is being sought is causally related to his employment.<sup>12</sup>

Dr. Becan opined that in his October 21, 2008 report appellant's employment injuries were causally related to his current conditions of chronic post-traumatic cervical and lumbosacral strain and sprain; aggravation of preexisting degenerative disc disease and cervical arthropathy; left cervical C7 radiculopathy; aggravation of congenital scoliosis; aggravation of preexisting

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<sup>5</sup> 5 U.S.C. § 8107(c).

<sup>6</sup> 20 C.F.R. § 10.404.

<sup>7</sup> *Supra* note 5 at § 8107(c)(19).

<sup>8</sup> *Supra* note 6.

<sup>9</sup> FECA Bulletin No. 09-03 (issued March 15, 2009).

<sup>10</sup> *Veronica Williams*, 56 ECAB 367, 370 (2005).

<sup>11</sup> *Michael S. Mina*, 57 ECAB 379, 385 (2006).

<sup>12</sup> *Veronica Williams*, *supra* note 10.

arthropathy and degenerative disc disease of the lumbar spine and lumbosacral radiculitis. However, he provided no medical explanation or medical rationale as to how any of appellant's accepted conditions in the claim before the Board were causally related to the employment injury and not due to his preexisting degenerative disease conditions.<sup>13</sup> Thus, Dr. Becan's opinion is insufficient to establish a continuing employment-related disability or medical condition after October 25, 2004 causally related to his December 27, 2003 employment injury. Accordingly, his impairment evaluations under the A.M.A., *Guides* are premature as it is not established that the rated impairment is causally related to an accepted work injury. While the Office referred appellant for second opinion evaluations with Dr. Hanley and Dr. Didizian regarding the nature and extent of any continuing injury-related residuals, disability and impairment, both physicians provided reasoned opinions that appellant no longer had residuals of the December 27, 2003 work injury and had no impairment of either the upper or lower extremities due to his employment. Appellant did not submit any other medical evidence sufficient to establish a work-related condition that caused physical impairment.

On appeal, appellant's counsel argues that Dr. Becan's October 21, 2008 report is sufficient to create a conflict in medical evidence with OWCP's second opinion physicians. As discussed, Dr. Becan's impairment evaluations are of diminished probative value as he failed to provide a rationalized medical opinion explaining why any of appellant's conditions were causally related to the December 27, 2003 employment injury, accepted for cervical and lumbar sprains that were found to have resolved, and not due to his preexisting degenerative disease conditions. As Dr. Becan's report is not of equal weight to that of OWCP's second opinion physicians, it is not sufficient to create a conflict in medical opinion evidence. While appellant's attorney properly notes that OWCP's medical adviser originally found appellant had impairment in his March 5 and 12, 2009 reports, the medical adviser did not provide a reasoned opinion as to how such impairments were related to the accepted employment injuries.

The medical evidence does not establish that appellant has permanent impairment to a scheduled member of the body causally related to his accepted injury. Consequently appellant has not established entitlement to a schedule award.

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

### **CONCLUSION**

The Board finds that appellant has not established entitlement to a schedule award.

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<sup>13</sup> *Alice J. Tysinger*, 51 ECAB 638 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 4, 2010 is affirmed.

Issued: July 8, 2011  
Washington, DC

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

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board