United States Department of Labor
Employees' Compensation Appeals Board

RANDY W. HALL, Appellant	)	
and	)	**Docket No. 05-539**
	)	**Issued: September 22, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Wichita, KS, Employer	)	

Appearances:
Randy W. Hall, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On December 29, 2004 appellant filed an appeal of the Office of Workers' Compensation Programs' decisions dated September 21, 2004, denying appellant's request for an additional schedule award, and May 25, 2004, denying appellant's claim for a recurrence. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these decisions.

ISSUES

The issues are: (1) whether appellant is entitled to wage loss for total disability from July 15 through August 29, 2002; and (2) whether appellant has established that he has more than a five percent impairment of his left lower extremity, for which he received a schedule award, by showing that his L5-S1 radiculopathy is causally related to his accepted employment injury.

FACTUAL HISTORY

On June 5, 1997 appellant, a 41-year-old letter carrier, filed a traumatic injury claim, which was accepted for laceration and contusion of the left knee and was later expanded to

include arthroscopic surgery. Appellant returned to work with permanent restrictions on December 10, 1997 as a modified mail carrier.

By decision dated October 2, 1998, the Office determined that appellant's position as a modified mail carrier fairly and reasonably represented his wage-earning capacity. In its calculation of the compensation rate, the Office determined that appellant's wages met or exceeded wages of the job he held when injured and that, therefore, no loss of wages had occurred.

On January 19, 1999 appellant was granted a schedule award for a one percent impairment of his left lower extremity.

Appellant filed a claim for recurrence of disability on June 29, 1999. On March 14, 2000 the Office authorized repeat arthroscopic surgery of the left knee, which was performed on June 1, 2000 by Dr. Douglas Davidson, an orthopedic surgeon. On August 2, 2000 appellant returned to work with restrictions.

In a second opinion report dated October 9, 2001, Dr. Scott R. Jahnke, a Board-certified family practitioner, recommended permanent restrictions and opined that appellant had reached maximum medical improvement and had a two percent whole person impairment pursuant to the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[1]

On March 7, 2002 appellant requested a schedule award. In a report dated March 27, 2002, Dr. Pedro A. Murati, a Board-certified physiatrist, related appellant's complaints of left knee and left hip pain and provided diagnoses of left knee pain, status post left knee surgery; left trochanteric bursitis; and signs and symptoms of a left-sided lumbar radiculopathy. An April 17, 2002 report of an electromyogram (EMG) of the left lower extremity revealed lumbosacral strain with radiculitis.

On May 6, 2002 Dr. Murati submitted a request to expand appellant's case to include back and hip complaints. In a May 9, 2002 report, he diagnosed low back pain secondary to left L5-S1 radiculopathy; left knee pain, status post left knee surgery; and left trochanteric bursitis. On June 7, 2002 the Office advised appellant that the medical evidence submitted was insufficient to establish a causal relationship between his back and hip complaints and his accepted knee condition.

In a July 15, 2002 work slip, Dr. Murati indicated by checking a box "no work at this time." In a July 18, 2002 report, he related appellant's claim that he "[could not] work in the condition [he was] in." In an undated report received by the Office on July 25, 2002, Dr. Murati opined that appellant had developed an antalgic gait trying to accommodate his left knee pain and, by doing so, had developed low back pain.

[1] A.M.A., *Guides* (5th ed. 2001).

On July 29, 2002 appellant filed a claim for recurrence of disability, alleging that he had had pain and problems with his left knee ever since his 1997 accepted injury and was now having problems with his left hip and back as well.

By letter dated August 12, 2002, the Office advised appellant that the information submitted was insufficient to establish his claim for a recurrence of disability. The Office further advised appellant that he must provide evidence that his light-duty assignment no longer met his physician's restrictions or that he could no longer perform his duties because his condition had worsened.

By letter dated August 12, 2002, the Office advised appellant that his request for a schedule award was premature, pursuant to Dr. Murati's opinion that his lower left extremity was not well stabilized.

By letter dated August 12, 2002, the Office expanded appellant's claim to include lumbosacral strain and left trochanteric bursitis.

The record reflects that appellant stopped working on July 15, 2002 and was released to return to work with restrictions on August 20, 2002. He filed a claim for compensation for the period July 15 through August 29, 2002.

In an August 7, 2002 telephone interview, appellant told an investigator that he was unable to work and that, although he had visited his in-laws who lived a few miles away, he had stayed at home the rest of the time. An investigative memorandum dated September 5, 2002 revealed that inspectors had surveiled appellant's residence from July 31 through August 3, 2002, discovering that he had left town and was not expected back until August 5, 2002. The report further reflected that appellant had driven a rental car 1220 miles between August 1 and August 3, 2002. In an August 29, 2002 interview, appellant initially claimed that he had been off work since July 15, 2002 because his back hurt and that he had spent most of his time in bed, but later admitted to having driven approximately 250 miles to visit his elderly grandmother, who was very ill and, when confronted with the mileage on the rental car, admitted that he had also gone to Western Kansas to retrieve some items belonging to his grandmother. When the inspector asked why he had misrepresented that he had not left town while he was off work, appellant replied that leaving town had been a spur of the moment decision and that he had felt "it was best left unsaid." He stated that he did half of the driving on the trip and admitted that he was "wrong" not to have been truthful.

On November 4, 2002 the Office accepted appellant's claim for a recurrence of disability.

In a report dated November 8, 2002, Dr Murati stated that he had placed appellant "completely off work" from July 15 through August 28, 2002 due to increasing pain. He explained that the L5-S1 radiculopathy is a nerve root impingement of the lower back that caused pain down the legs, due to appellant's altered gait from his left knee pain. Dr. Murati further indicated that appellant had not consulted him prior to taking his road trip; however, he opined that, because the trip involved sitting, it would not have impacted the level of appellant's injury.

On November 22, 2002 the employing establishment advised appellant that he would be terminated for unacceptable conduct by misrepresentation of his condition and abilities to perform his duties and false statements regarding activities.

On December 3, 2002 appellant requested a schedule award.

On December 27, 2002 appellant resigned from his position at the employing establishment for "health and personal reasons."

By decision dated January 17, 2003, the Office denied appellant's claim for compensation for the period July 15 through August 29, 2002, finding that the medical evidence was insufficient to establish temporary total disability for the period claimed.

On January 29, 2003 Dr. Daniel D. Zimmerman, the district medical director, accepted Dr. Jahnke's October 9, 2001 report as complete and thorough. Finding that the determination would be the same whether using the fourth or fifth edition of the A.M.A., *Guides*, he concurred that appellant had a five percent impairment of the left lower extremity. He further found the date of maximum medical improvement to be October 9, 2001.

On February 11, 2003 the Office granted appellant a schedule award for a five percent impairment of his left lower extremity 14.4 weeks, commencing October 9, 2001.

On February 17, 2003 appellant requested an oral hearing on the Office's January 17, 2003 decision denying compensation. On March 3, 2003 he requested an oral hearing on the February 11, 2003 schedule award. An oral hearing consolidating both issues was held on January 28, 2004. At the hearing, appellant contended that he had been unable to work during the period at issue due to swelling and pain and the fact that his knee had to be elevated. His representative argued that the district medical director's finding of a five percent impairment of the left lower extremity was based on Dr. Jahnke's outdated opinion, which was rendered in 2001.

In a January 26, 2004 report, Dr. Murati opined that appellant had a 12 percent whole body impairment. Referring to Table 62, page 83 of the fourth edition of the A.M.A., *Guides*, he determined that appellant had a five percent left lower extremity impairment for patella femoral syndrome with probable meniscal involvement. He then opined that appellant's five percent impairment converted to a two percent whole person impairment. Referring to the DRE lumbosacral Category 3, page 102 for appellant's low back condition secondary to L5-S1 radiculopathy, Dr. Murati found an additional 10 percent whole person impairment. Using the Combined Values Chart on page 322, he concluded that appellant had a 12 percent whole person impairment.

The record reflects a letter dated August 16, 2002 and a duty status report dated August 12, 2002, wherein Dr. Murati indicated that appellant could work with restrictions.

By decision dated May 25, 2004, the Office hearing representative denied appellant's claim for a recurrence of total disability, finding that appellant had failed to show a worsening of his injury-related condition. He found further that Dr. Murati's report was not probative, in that it contained only subjective complaints rather than clinical findings.

By decision dated May 25, 2004, the hearing representative vacated the Office's February 11, 2003 schedule award. The Office was directed to return the case to the medical director for review of Dr. Murati's January 26, 2004 report for a determination of whether appellant's L5-S1 radiculopathy was causally related to the employment injury and, if so, whether and to what extent Dr. Murati's findings established an additional impairment rating based on radiculopathy.

In a report dated July 9, 2004, Dr. Zimmerman stated, after reviewing the record, that Dr. Murati failed to provide a medical rationale explaining how and why a lumbar disc condition could be due to the accepted condition. He opined that, therefore, the Office could not accept a lumbar spine condition, nor could a whole body rating for a lumbar spine condition be used for schedule award purposes.

Finding a conflict between the opinions of Dr. Zimmerman and Dr. Murati, the Office referred appellant, along with a statement of accepted facts and the entire medical record, to Dr. Lee R. Dorey, a Board-certified orthopedic surgeon, for an independent medical examination.

In a report dated September 9, 2004, Dr. Dorey opined that no additional impairment should be assessed to appellant's lower extremity related to radiculopathy. Dr. Dorey related in detail the history of appellant's injury and treatment. During his physical examination of appellant, he found mild tenderness in the left middle trapezius muscle; that the cervical spine was not particularly tender; that the thoracic spine had some minimal tenderness in the upper portion; that the lumbar spine had some mild tenderness in the upper and lower portion; that the left sciatic notch had moderate tenderness; forward flexion of the lower back of 80 to 85 degrees by goniometer measurement with extension 10 degrees where he described pain going down into the left knee; that appellant could squat flexing knees with left knee bending to 95 degrees; that in a recumbent position, appellant's hips would flex to 100 degrees limited by back pain where external rotation was 30 degrees and internal rotation was 10 degrees bilaterally; that straight leg raising on the left side at 45 degrees caused lower back pain and became worse as appellant dorsiflexed his foot; and with hip extended and left leg over the table at 100 degrees, appellant described knee pain, particularly at patella tendon. Neurologically, Dr. Dorey found that appellant's left knee had no laxity to varus or valgus stress; had no effusion; had full extension and would flex to 110 degrees. He found negative anterior and posterior drawer sign; crepitation extending knee against gravity; marked tenderness when percussing the patella; mild tenderness along the medial and lateral joint lines and mild tenderness of the suprapatellar pouch; minimal guarding with lateral and medial subluxation of patella done manually with knee in extension; and patella tendon reflexes were +2 bilaterally. After reviewing the MRI scan films of August 21, 2002, Dr. Dorey noted some spinal stenosis on the left side at L5-S1 level. He indicated that x-rays of the left knee performed in his office revealed "quite subtle early aspects of osteoarthritic changes" and that x-rays of the lumbar spine revealed mild narrowing of disc space posteriorly, slightly shorter pedicle and mild hypermobility at the L4-5 level. Dr. Dorey provided diagnoses of left knee status post-traumatic injury with patella femoral arthritis of mild proportion; lumbar strain, chronic; and lumbosacral radiculopathy of the left lower extremity, very mild. He opined that the lumbosacral radiculopathy was not related to the accepted lumbosacral strain or the injury of June 5, 1997, but rather had "come about as a common

sequela[e] of time passing without distinct cause." Dr. Dorey further opined that the radiculopathy would have become clinically apparent regardless of the accident of 1997.

By decision dated September 21, 2004, the Office denied appellant's request for an increased schedule award. Finding that Dr. Dorey's report represented weight of the medical evidence, the Office determined that appellant had failed to establish a causal relationship between the radiculopathy and the work-related condition.

LEGAL PRECEDENT -- ISSUE 1

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.[2]

This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with medical reasoning.[3] Where no such rationale is present, the medical evidence is of diminished probative value.[4]

An award of compensation may not be based on surmise, conjecture, speculation or appellant's belief of causal relationship. Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.[5]

The Board has held that when a wage-earning capacity determination has been issued, and appellant submits evidence with respect to disability for work, the Office must evaluate the evidence to determine if modification of wage-earning capacity is warranted.[6] However, the Office is not precluded from accepting a limited period of employment-related disability, without a formal modification of the wage-earning capacity determination.[7]

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[2] *See Shelly A. Paolinetti*, 52 ECAB 391, 392 (2001); *see also Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[3] *Ronald A. Eldridge*, 53 ECAB 218 (2001).

[4] *Mary A. Ceglia*, 55 ECAB ___ (Docket No. 04-113, issued July 22, 2004).

[5] *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

[6] See *Katherine T. Kreger*, 55 ECAB ___ (Docket No. 03-1765, issued August 13, 2004); *see also Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

[7] *See Sharon C. Clement, supra* note 6.

ANALYSIS -- ISSUE 1

The Board finds that appellant failed to sustain his burden of proof in establishing that he had a period of recurrent total disability due to an employment-related condition from July 15, 2002 through August 29, 2002 entitling him to monetary compensation. When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a light-duty position, the employee has the burden of establishing by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and showing that he 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.[8] There was no evidence presented that appellant's job requirements had changed or that he was required to perform duties outside of his job restrictions, nor was sufficient evidence presented that appellant's condition had worsened to the degree that he was unable to perform the duties of his modified position.

Appellant's original claim was accepted for laceration and contusion of the left knee and later expanded to include arthroscopic surgery. By decision dated October 2, 1998, the Office determined that appellant's position as a modified mail carrier fairly and reasonably represented his wage-earning capacity. After filing a claim for recurrence of disability, appellant underwent authorized repeat arthroscopic surgery to the left knee on June 1, 2000 and returned to work with restrictions on August 2, 2000. Appellant continued to work in this modified position until July 15, 2002. On July 29, 2002 appellant filed a claim for recurrence of disability and filed a claim for compensation for the period July 15 through August 29, 2002. The Board has held that when a wage-earning capacity determination has been issued, and appellant submits evidence with respect to disability for work, the Office must evaluate the evidence to determine if modification of wage-earning capacity is warranted.[9] However, the Office is not precluded from accepting a limited period of employment-related disability, without a formal modification of the wage-earning capacity determination.[10] Therefore, in the instant case, the Office properly considered the acceptance of this limited period of employment-related disability, which is comparable to a closed period of time following surgery.

By letter dated August 12, 2002, the Office expanded appellant's claim to include lumbosacral strain and left trochanteric bursitis, and on November 4, 2002, the Office accepted appellant's claim for a recurrence of disability. Although the evidence submitted in support of appellant's claim for the period July 15 through August 29, 2002, supports a causal relationship between appellant's alleged condition and the accepted employment injury, it fails to show a worsening of his condition such that he was rendered totally disabled.

The relevant medical evidence consists of reports from Dr. Murati. In a July 15, 2002 work slip, Dr. Murati indicated appellant's inability to work by checking a box next to the phrase "no work at this time." However, he offered no explanation as to why or to what extent

[8] *See Shelly A. Paolinetti, supra* note 2; *see also Terry R. Hedman, supra* note 2.

[9] *See Katherine T. Kreger, supra* note 6; *see also Sharon C. Clement, supra* note 6.

[10] *See Sharon C. Clement, supra* note 6.

appellant was disabled. In a July 18, 2002 report, Dr. Murati related appellant's claim that he "[could not] work in the condition [he was] in," but offered no clinical evidence of appellant's inability to work. Appellant's allegation alone is insufficient to establish his claim. In an undated report received by the Office on July 25, 2002, Dr. Murati opined that appellant had developed an antalgic gait trying to accommodate his left knee pain and, by doing so, had developed low back pain. However, he did not represent that appellant was totally disabled as a result of this development. In fact, the record contains a letter dated August 16, 2002 and a duty status report wherein Dr. Murati indicated that appellant could work with restrictions. In his November 8, 2002 report, Dr Murati represented that he had placed appellant "completely off work" from July 15, 2002 until August 28, 2002 due to increasing pain. He explained that the L5-S1 radiculopathy is a nerve root impingement of the lower back that caused pain down the legs, due to appellant's altered gait from his left knee pain. The Board finds that Dr. Murati's report lacks probative value, in that it was dated more than three months after the fact and does not explain how appellant's condition prevented him from performing the duties of his modified position.

For the reasons stated above, the Board finds that appellant failed to sustain his burden of proof in establishing that he was totally disabled due to his accepted employment condition from July 15 through August 29, 2002.

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of the Act[11] 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.[12] The schedule award provisions of the Act[13] and its implementing federal regulation[14] sets 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, the Act 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 to all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[15]

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.[16] As neither the Act nor its regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a

[11] 5 U.S.C. § 8107(a).

[12] *Id.*

[13] 5 U.S.C. § 8107.

[14] 20 C.F.R. § 10.404.

[15] 20 C.F.R. § 10.404.

[16] *See Richard R. LeMay*, 56 ECAB ___ (Docket No. 04-1652, issued February 16, 2005); *Thomas J. Engelhart*, 50 ECAB 319 (1999).

whole, no claimant is entitled to such a schedule award.[17] The Board notes that section 8109(19) specifically excludes the back from the definition of "organ."[18] However, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.[19]

Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[20] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[21] It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background, must be given special weight.[22]

The weight of medical opinion evidence is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the opinion.[23] The opinion of a physician supporting causal relation must be one of reasonable medical certainty, supported with affirmative evidence, explained by medical rationale and based on a complete and accurate factual and medical background.[24]

ANALYSIS -- ISSUE 2

On August 12, 2002 the Office expanded appellant's claim to include lumbosacral strain and left trochanteric bursitis, and on November 4, 2002, the Office accepted appellant's claim for a recurrence of disability. After returning to work with restrictions, appellant again filed a claim for a schedule award on December 3, 2002. On February 11, 2003 the Office granted appellant a schedule award for a five percent impairment of his left lower extremity, finding that the date of maximum medical improvement was October 9, 2001. In his May 25, 2004 decision, the Office

[17] 5 U.S.C. § 8107. *See Richard R. LeMay, supra* note 16; *see also Phyllis F. Cundiff*, 52 ECAB 439 (2001); *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[18] 5 U.S.C. § 8109(c).

[19] *Thomas J. Engelhart, supra* note 16.

[20] 5 U.S.C. § 8123(a). *See Raymond A. Fondots*, 53 ECAB 637 (2002).

[21] *William C. Bush*, 40 ECAB 1064 (1989).

[22] *See Elaine Sneed*, 56 ECAB ___ (Docket No. 04-2039, issued March 7, 2005). *See also Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

[23] *See James R. Taylor*, 56 ECAB ___ (Docket No. 05-135, issued May 13, 2005). *See also Anna C. Leanza*, 48 ECAB 115 (1996).

[24] *See Manuel Gill*, 52 ECAB 282 (2001).

hearing representative set aside the February 11, 2003 schedule award and remanded the case for a determination by the medical director as to whether appellant's radiculopathy was causally related to the employment injury, thereby entitling appellant to a schedule award greater than five percent. The medical director opined that the evidence did not support an additional rating. In order to resolve the conflict between Dr. Murati and the medical director, the Office properly referred appellant to Dr. Dorey for an independent medical examination.

Appellant may be entitled to a schedule award for permanent impairment of his left lower extremity, even though the impairment originated in his spine, if the accepted back condition caused such impairment.[25] In the instant case, the issue presented to the referee physician was whether or not there was a causal relationship between appellant's neurological condition and the employment injury.[26] The Board finds that Dr. Dorey provided a proper factual and medical background; described in detail his findings on examination; and rendered diagnoses based on the results of his examination and review of the entire record. After extensively reviewing the evidence in this case, he concluded that appellant's lumbosacral radiculopathy was not related to the accepted work condition of lumbosacral strain or the June 5, 1997 industrial injury. Dr. Dorey opined that the radiculopathy came about as a common sequelae of time passing without distinct cause and that it would have become clinically apparent regardless of the 1997 accident. He found, therefore, that no additional impairment should be assessed to appellant's lower extremity as related to radiculopathy. The Board finds that Dr. Dorey's impartial medical opinion is sufficiently probative, rationalized, and based upon a proper background. For this reason, his opinion represents the weight of the medical evidence. The Board will affirm the Office's September 21, 2004 finding that appellant failed to establish a causal relationship between the radiculopathy and his work-related condition.

CONCLUSION

The Board finds that appellant has not established entitlement to wage-loss benefits from July 15 through August 29, 2002. The Board further finds that appellant failed to establish that he has more than a five percent impairment of his left lower extremity, in that he has not shown that his L5-S1 radiculopathy is causally related to his accepted employment injury.

[25] *See Thomas J. Engelhart, supra* note 16.

[26] Although the hearing representative set aside the February 11, 2003 schedule award, it is clear that the only issue on remand was the causal relationship between appellant's L5-S1 radiculopathy and his accepted injury, and that the May 25, 2004 decision affirmed the schedule award as it pertained to appellant's five percent left lower extremity impairment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 25, 2004 denying appellant's claim for a recurrence of total disability from July 15 through August 29, 2002 is hereby affirmed.

IT IS FURTHER ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 21, 2004 is hereby affirmed.

Issued: September 22, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board