

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH Q. ASHLEY and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Madison, WI

*Docket No. 02-124; Submitted on the Record;
Issued July 22, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has more than a 37 percent impairment of both lower extremities, for which he has received schedule awards.

The Board has given careful consideration to the issue involved, the contentions of the parties on appeal and the entire case record. The Board finds that the July 9, 2001 decision of the Office of Workers' Compensation Programs regarding appellant's left lower extremity is in accordance with the facts and the law in this case and hereby adopts the findings and conclusions of the Office hearing representative.¹

The Board also finds that appellant has no more than a 37 percent permanent impairment of his right lower extremity, for which he received a schedule award.

Section 8107 of the Federal Employees' Compensation Act² sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.³ The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.⁴ The Act's implementing regulation has adopted

¹ On June 16, 2000 the Office doubled appellant's claims under file number, 100429074, with an initial date of injury of May 16, 1989. On September 22, 2000 the Office accepted appellant's left hip replacement done on June 17, 1991 as work related.

² 5 U.S.C. §§ 8101-8109.

³ 5 U.S.C. § 8107.

⁴ *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule award losses.⁵

On January 27, 2000 the Office issued a schedule award for a 37 percent permanent impairment of appellant's right lower extremity, running from April 7, 1998 to April 22, 2000 for 106.52 weeks of compensation. Appellant requested reconsideration, arguing that he had not had a good result from his hip replacement and experienced constant pain. In addition, the hip's instability caused him to fall in June 1999, jamming his left rotator cuff, which resulted in a frozen left shoulder. He added that the instability and give-away weakness mentioned in the August 16, 1999 report of Dr. Steven K. Staires, Board-certified in anesthesiology and pain management, qualified him for the 50 percent impairment rating provided by his treating physician, Dr. Jeffrey R. Stitgen, and by the second opinion physician, Dr. Michel E. Heard, both Board-certified orthopedic surgeons.⁶

On November 21, 2000 the Office denied modification of its prior decision. The Office noted that the impairment ratings from Drs. Stitgen and Heard did not conform to the A.M.A., *Guides* because Dr. Stitgen used state guidelines and Dr. Heard failed to cite to any tables or pages in the A.M.A., *Guides*.

On October 4, 1999 the Office medical adviser reviewed the reports of Drs. Heard and Staires and used the former's March 17, 1999 report as the basis for his impairment rating. He noted Dr. Heard's findings of no effusion, full range of motion and stable ligaments in the right knee; full flexion, abduction and rotation of the right hip; and normal motor and sensory examination of the lower extremities. The Office medical adviser concluded that appellant's right hip replacement was "functioning quite well" with no gait derangement, range-of-motion abnormality or leg weakness. Although Dr. Heard mentioned impending instability due to the slightly vertical position of the acetabular component,⁷ there had been no episodes of instability.⁸ Maximum medical improvement occurred on April 7, 1998.

Responding to an inquiry, the Office medical adviser explained his 37 percent rating by citing to Table 65, page 3/87 of the fourth edition of the A.M.A., *Guides*. Appellant walked with a normal gait, upright posture and no limp; thus, only a slight amount of pain was coming from

⁵ 20 C.F.R. § 10.404 (1999).

⁶ In a report dated March 3, 1999, Dr. Wayne T. Lindeman, a practitioner in physical medicine and rehabilitation, stated that according to the A.M.A., *Guides*, fourth edition, appellant had a 24 percent whole person impairment rating, which included a 20 percent whole person rating for his bilateral hip replacements. The Act does not provide compensation for whole person impairments. *John Yera*, 48 ECAB 243, 247 (1996).

⁷ Dr. Heard stated, in a March 17, 1999 report, that appellant had not achieved maximum medical improvement because "there may be some problems with the position of the acetabular of the right hip that may require further surgical intervention." He added that, although appellant "was not having clinical complaints and signs of right hip instability," the acetabular cup appeared to be hyper-abducted, giving "an appearance of relative instability."

⁸ On April 6, 1998 Dr. Thomas J. Montgomery, an orthopedic practitioner, examined appellant and reported a "normal hip exam[ination]" and no obvious pain with range of motion of the hips. He stated that all of appellant's pain was "coming from his back." Dr. Stitgen stated on January 28, 1998 that there was no "conceivable way" that the position of the right acetabular could cause appellant's back pain.

his hip, which resulted in 40 points. Another 30 points came from walking without a limp or supportive devices for 6 to 8 blocks. Full range of motion of the hips added 10 points, for a total of 80, needing only 5 more from the activities section to qualify for a good result and a 37 percent rating.

After reviewing the August 22, 2000 report of Dr. Alan C. Farries, a Board-certified orthopedic surgeon who found that appellant's left hip replacement was causally related, the Office medical adviser reiterated his previous comments. He added that range of motion was found to be essentially equal on both sides with 90-plus degrees of flexion, 30 degrees of abduction and 40 degrees of internal rotation. The Office medical adviser found no additional objective medical evidence to support a permanent partial impairment rating beyond 37 percent, which is awarded for a good result from a total hip replacement according to Table 64, page 3/85 of the A.M.A., *Guides*.⁹

Finally, the Office medical adviser stated that appellant was entitled to no additional rating due to the instability noted in Dr. Staires' August 16, 1999 report because, first, the A.M.A., *Guides* did not provide for such a factor, second, give-away weakness indicated a lack of full resistance by the patient, and, third, Dr. Staires implied that the give-away weakness was associated with radiculopathy from appellant's lower back and not his hip. The Office medical adviser added that appellant's hips were "quite stable" and thus unlikely to have caused a fall in June 1999.

The Board finds that the Office properly applied the standards found in the fourth edition of the A.M.A., *Guides* to the medical evidence in this case and found a 37 percent impairment of appellant's right lower extremity.¹⁰ As the Office found, the 50 percent impairment ratings provided by Drs. Stitgen and Heard were not calculated according to the requirements for impairment caused by hip replacements in the fourth edition of the A.M.A., *Guides*.¹¹ Because their impairment opinions were not based on the A.M.A., *Guides* and therefore could not

⁹ On March 31, 1999 Dr. John E. Cobb, a Board-certified orthopedic surgeon, examined appellant and x-rays and concluded that both hips looked fine and showed no signs of loosening. His impression was "satisfactory results" for both hip replacements.

¹⁰ See *Richard F. Kastan*, 48 ECAB 651, 653 (1997) (finding that the Office medical adviser's report provided the only evaluation that conformed to the A.M.A., *Guides* and thus represented the weight of the evidence).

¹¹ The fifth edition of the A.M.A., *Guides* became effective February 1, 2001. FECA Bulletin No. 01-05 (issued January 29, 2001) provides that any initial schedule award decision issued on or after February 1, 2001 will be based on the fifth edition of the A.M.A., *Guides*, even if the amount of the award was calculated prior to that date. In this case, the impairment ratings were properly based on the fourth edition.

establish a rating, the Office properly requested that its medical adviser review the medical evidence and determine a proper rating.¹²

The July 9, 2001 and December 4 and November 20, 2000 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
July 22, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹² See *Denise D. Cason*, 48 ECAB 530, 531 (1997) (finding that although appellant's physician found a greater impairment rating, he failed to explain the basis of his opinion, and the Office medical adviser properly applied the "Diagnosis Based Estimates" in the fourth edition of the A.M.A., *Guides* to determine the correct percentage of impairment).