

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

T.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Lexington, KY, Employer**

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**Docket No. 10-2056
Issued: July 21, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 10, 2010 appellant filed a timely appeal of the February 17 and July 9, 2010 merit decisions of the Office of Workers' Compensation Programs (OWCP) denying his schedule award claim.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained permanent impairment due to his accepted employment injuries.

¹ In a prior appeal, the Board issued a decision on September 10, 2010 affirming OWCP's October 23, 2008 and March 24, 2009 decisions which found that appellant did not sustain an emotional condition in the performance of duty. Docket No. 09-1730 (issued September 10, 2010).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 2, 1999 appellant, then a 41-year-old mail handler, filed a traumatic injury claim (Form CA-1) in File No. xxxxxx077 alleging that he hurt his lower back when he missed a step and hit the floor. OWCP accepted his claim for lumbar strain.

On August 8, 1999 appellant filed a Form CA-1 in File No. xxxxxx454 alleging that he experienced right hip pain while lifting a bag that weighed approximately 60 pounds on May 17, 1999. Also on August 8, 1999 he filed an occupational disease claim in File No. xxxxxx456 alleging that on May 5, 1999 he first realized that his right hip pain was caused by heavy lifting at work. OWCP accepted appellant's claims for lumbar strain and right sacroiliac (SI) strain. It combined these files into a master claim assigned File No. xxxxxx456.

On July 2, 2007 appellant requested a schedule award.

By letter dated July 30, 2007, OWCP requested that appellant submit medical evidence in support of his claim.

In an August 17, 2007 report, Dr. Gregory T. Snider, an attending Board-certified family practitioner, found that appellant had six percent impairment of the whole person based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) due to his accepted lumbar and right hip SI joint conditions. He advised that appellant reached maximum medical improvement on March 2, 2001. In a September 11, 2007 report, Dr. Snider advised that his six percent impairment rating related to appellant's back and not his right hip condition.

On September 18, 2007 OWCP's medical adviser reviewed the medical record, including Dr. Snider's August 17 and September 11, 2007 report. The medical adviser noted that impairment ratings of the spine were not accepted under OWCP's procedures. OWCP's medical adviser stated that medical symptoms and objective findings regarding the lower extremities was required to rate any permanent impairment based on the fifth edition of the A.M.A., *Guides*.

In a September 27, 2007 decision, OWCP denied appellant's schedule award claim, finding the medical evidence insufficient to establish that he sustained permanent impairment to a scheduled member due to his accepted employment-related injuries.

On October 2, 2007 appellant requested an oral hearing.

In a November 30, 2007 decision, OWCP's hearing representative set aside the September 27, 2007 decision. The case was remanded to OWCP for referral of appellant to an appropriate medical specialist for a second opinion examination to determine the extent of any impairment to his lower extremities.

In a December 12, 2007 report, Dr. Snider noted appellant's primary complaint of pain while driving. Appellant had residual right SI joint pain that radiated to his buttock and hip. Dr. Snider listed his range of motion measurements for the right hip, which included 73 degrees of flexion, 0 degrees each of extension and internal rotation, 29 degrees of external rotation, 32 degrees of abduction and 19 degrees of adduction. He diagnosed chronic right SI joint sprain

and listed appellant's physical restrictions. Dr. Snider determined that appellant had 25 percent impairment of the right lower extremity due to loss of range of motion of his right hip (A.M.A., *Guides* 537, Table 17-9).³

On August 17, 2009 Dr. Howard P. Hogshead, a medical adviser, reviewed the medical record, including Dr. Snider's December 12, 2007 findings. He noted that the record had been twice reviewed by other medical advisers who noted that the SI joint was not part of an extremity. Dr. Hogshead stated that OWCP could only consider impairment to the extremities and not the spine. He noted that Dr. Snider's finding that appellant had restricted range of motion of the right hip had not been previously noted or accepted by OWCP. There was insufficient documentation to support Dr. Snider's finding of restricted right hip range of motion. Dr. Hogshead concluded that appellant had no impairment to either the right or left lower extremity.

In an August 21, 2009 decision, OWCP denied appellant's schedule award claim, finding insufficient medical evidence to support permanent impairment to a scheduled member.

By letter dated September 9, 2009, appellant requested an oral hearing.

In a February 17, 2010 decision, OWCP's hearing representative affirmed the August 21, 2009 decision. He found that the medical evidence was insufficient to establish that appellant had any permanent impairment to a scheduled member due to his accepted employment-related conditions.

By letter dated April 22, 2010, appellant requested reconsideration. In an October 11, 2009 report, Dr. Dale J. Hamilton, a Board-certified internist, noted appellant's complaint of right hip and thigh pain. He listed his findings on physical and mental examination and diagnosed sciatica.

In a March 17, 2010 report, Dr. Snider advised that the 25 percent right lower extremity impairment rating was based on the range of motion measurements listed in his December 12, 2007 report. He explained that, although the SI joint was not a direct part of the hip, the pelvis housed the hip socket and directly influenced the hip joint and musculature surrounding the joint. As an indirect measure of dysfunction, hip motion could be used as an alternative for rating impairment. Dr. Snider reiterated that appellant's chronic right SI joint dysfunction was causally related to his May 2, 1999 employment injury. He advised that the accepted condition affected the function of his right hip. Dr. Snider reiterated his opinion that appellant had 25 percent impairment of the right lower extremity due to his accepted right SI joint condition.

³ In an October 6, 2008 decision, OWCP suspended appellant's compensation benefits effective October 25, 2008 as he failed to attend a scheduled second opinion medical examination with Dr. Richard T. Sheridan, a Board-certified orthopedic surgeon, without showing good cause for his refusal. In an August 11, 2009 decision, OWCP's hearing representative set aside the October 6, 2008 decision. He found that a second opinion medical examination was not necessary based on Dr. Snider's December 12, 2007 report. The hearing representative remanded the case to OWCP for review of Dr. Snider's report by OWCP's medical adviser.

In a July 9, 2010 decision, OWCP denied modification of the February 17, 2010 decision. It found that the evidence submitted by appellant was insufficient to establish that he was entitled to a schedule award under FECA.

LEGAL PRECEDENT

The schedule award provision of FECA⁴ and its implementing regulations⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*. As of May 1, 2009, any decision regarding a schedule award must be based on the sixth edition.⁶ The Board has adopted OWCP's finding that any recalculations of previous awards which result from hearing or reconsideration decisions issued on or after May 1, 2009, should be based on the sixth edition of the A.M.A., *Guides*.⁷

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the regulations.⁸ Neither FECA nor regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine.⁹ No claimant is entitled to such an award.

Amendments to FECA, however, modified the schedule award provisions to provide for an award for permanent impairment to a member of the body not covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to a limb even though the cause of the impairment originated in the spine.¹⁰

⁴ 5 U.S.C. §§ 8101-8193, 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

⁷ *C.K.*, Docket No. 09-2371 (issued August 18, 2010).

⁸ *William Edwin Muir*, 27 ECAB 579 (1976); *W.D.*, Docket No. 10-274 (issued September 3, 2010).

⁹ FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19). *Timothy J. McGuire*, 34 ECAB 189 (1982); *W.D.*, *id.*

¹⁰ *Rozella L. Skinner*, 37 ECAB 398 (1986); *W.D.*, *id.*

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. Recognizing that certain jurisdictions, such as federal claims under FECA, mandate ratings for extremities and preclude ratings for the spine, the A.M.A., *Guides* has offered an approach to rating spinal nerve impairments consistent with sixth edition methodology.¹¹ OWCP has adopted this approach for rating impairment of the upper or lower extremities caused by a spinal injury, as provided in Chapter 3.700 of its procedures.¹² Specifically, it will address lower extremity impairments originating in the spine through Table 16-11¹³ and upper extremity impairment originating in the spine through Table 15-14.¹⁴

In addressing lower extremity impairments, the sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).¹⁵

Section 8123(a) of FECA 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.¹⁶ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to a referee physician, pursuant to section 8123(a), to resolve the conflict in the medical evidence.¹⁷

ANALYSIS

The Board finds that the case is not in posture for decision due to a conflict in medical opinion between Dr. Snider, an attending physician, and Dr. Hogshead, OWCP's medical adviser, as to whether appellant sustained permanent impairment caused by the accepted lumbar and right SI joint strains.

Dr. Snider examined appellant and rated 25 percent impairment to the right lower extremity on loss of range of motion of the right hip according to Table 17-9 at page 537 of the fifth edition of the A.M.A., *Guides*. He presented a probative, well-supported method for calculating an impairment of the right lower extremity, which was in accordance with Table 17-9, the applicable section of the A.M.A., *Guides* for measuring lower extremity range of motion impairments. Dr. Snider asserted in his March 17, 2010 report that, while the SI joint was not a

¹¹ FECA Transmittal No. 10-04 (issued January 9, 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Exhibit 4 (January 2010).

¹² Federal (FECA) Procedure Manual, *id.*, at Chapter 3.700 (Exhibits 1, 4) (January 2010).

¹³ A.M.A., *Guides* 533, Table 16-11.

¹⁴ *Id.* at 425, Table 15-14.

¹⁵ *Id.* at 521. *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

¹⁶ 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

¹⁷ *William C. Bush*, 40 ECAB 1064 (1989).

direct part of the hip, he measured range of motion for the hip because the pelvis directly influenced the hip joint and musculature surrounding the joint. He further asserted that the accepted right SI joint strain caused appellant's impairment to the right lower extremity.

Dr. Hogshead reviewed Dr. Snider's findings, but concluded that the SI joint was not an extremity and, thus, appellant was not entitled to a schedule award for impairment. He noted that a schedule award was not payable for impairment to the spine. Dr. Hogshead stated that restricted range of motion of the right hip had not been recorded or accepted by OWCP entitling appellant to a schedule award for impairment to either his right or left lower extremity. He further stated that there was no medical documentation of arthritis to support a restricted range of motion finding.

The Board finds that a conflict exists as to whether appellant's accepted injuries caused impairment to his lower extremities. Accordingly, the Board will set aside the February 17 and July 9, 2010 OWCP decisions and remand the case to OWCP for referral of appellant, the medical record and a statement of accepted facts to an appropriate independent medical specialist to determine the nature and degree of permanent impairment to appellant's lower extremities. The Board notes that OWCP's decisions were issued after May 1, 2009. Thus, on remand OWCP should instruct the impartial medical specialist to resolve the conflict as to whether appellant had any impairment of the lower extremities in accordance with the standards of the sixth edition of the A.M.A., *Guides*. Following this and such other development as deemed necessary, OWCP should issue an appropriate merit decision on appellant's schedule award claim.

CONCLUSION

The Board finds that the case is not in posture for decision due to an unresolved conflict in medical opinion.

ORDER

IT IS HEREBY ORDERED THAT July 9 and February 17, 2010 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further action consistent with this decision of the Board.

Issued: July 21, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board