

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

R.T., Appellant)	
)	
and)	
)	Docket No. 13-833
)	Issued: June 5, 2013
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer)	
)	
)	

Appearances: *Case Submitted on the Record*
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On or about November 5, 2012 appellant, through her attorney, filed a timely appeal from the July 23, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied a schedule award. Pursuant to the Federal Employees' Compensation Act¹ (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's April 18, 1989 employment injury caused any permanent impairment to her right lower extremity.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

In the prior appeal,² the Board found that appellant's case was not in posture for decision on whether she had more than an eight percent impairment of her right lower extremity causally related to her April 18, 1989 employment injury. Appellant, a 46-year-old mail handler, injured her right hip and low back in the performance of duty when she stepped on something, lifted her foot and fell to the ground. OWCP accepted her claim for a right hip contusion and lumbosacral strain.

A conflict in medical opinion had arisen on the extent of impairment to appellant's right lower extremity. Under 5 U.S.C. § 8123(a), OWCP referred appellant to Dr. E. Michael Okin, a Board-certified orthopedic surgeon, to resolve the conflict. The Board found, however, that clarification was warranted. Although OWCP had accepted appellant's claim for right hip contusion and lumbosacral strain, Dr. Okin did not examine her right hip or low back. Appellant had advised him that she was there only for an evaluation of her right knee. The Board carefully reviewed the record and found no evidence, prior to 1993, that appellant had any medical condition in her right knee. "This was four years after the incident, and to date, no physician has explained the lack of bridging evidence or provided a sound medical basis for attributing any right knee condition to what happened on April 18, 1989."

The Board instructed OWCP to ask Dr. Okin whether any reliable findings were causally related to the 1989 right hip contusion or lumbosacral strain, and if so, whether these findings showed a ratable impairment of the right lower extremity. The facts of this case, as set forth in the Board's prior decision, are hereby incorporated by reference.

As Dr. Okin had closed his practice, OWCP referred appellant to Dr. Bong S. Lee, a Board-certified orthopedic surgeon, to resolve the extent of her permanent impairment. Dr. Lee related that the history that appellant gave to him. Pointing to her right knee joint area, appellant complained of swelling and occasion pain in the right lower extremity. Dr. Lee examined her and found full range of low back motion with no complaints of pain. He also found full range of hip motion with no complaints of pain and no local tenderness on palpation, including the greater trochanteric area. Both knees were slightly tender to patellar palpation and mild crepitus could be heard on compression of the patella against the femoral condyle. Dr. Lee reviewed appellant's medical record.

Based on the statement of accepted facts and on his comprehensive orthopedic examination, Dr. Lee found that appellant had fully recovered from the accepted medical conditions with no residuals. He found no permanent impairment. Dr. Lee explained that appellant's present condition was one of mild degenerative joint disease of the right knee, but this was not a result of her April 18, 1989 employment injury, as he made clear in a supplemental report. Rather, he explained, this represented a more recent onset of the normal progression of aging. Dr. Lee added that these changes were much less than the average of her contemporaries.

OWCP's medical adviser reviewed Dr. Lee's evaluation and agreed that appellant had no impairment of her right lower extremity as a result of her employment injury.

² Docket No. 10-1417 (issued January 24, 2011).

On September 14, 2011 OWCP denied appellant's claim for a schedule award. On December 7, 2011, however, OWCP's hearing representative found that it did not follow the Board's instructions to ask the impartial medical specialist whether any reliable findings were causally related to the 1989 right hip contusion or lumbosacral strain, and if so, whether these findings showed a ratable impairment of the right lower extremity. The hearing representative remanded the case for clarification.

Dr. Lee made clear that at the time of his examination appellant had no permanent impairment as a result of her April 18, 1989 right hip contusion and lumbosacral strain.

On February 9, 2012 OWCP denied a schedule award.³

Dr. David Weiss, an osteopath, updated his evaluation of impairment based on his 2004 findings and knee x-rays taken in 2011. The history he provided was that appellant injured her right knee when she slipped and fell in 1987. Dr. Weiss found a 1 percent impairment of the right lower extremity due to right hip trochanteric bursitis and a 16 percent impairment due to primary knee joint arthritis. He found that appellant reached maximum medical improvement in 2004, when he last examined her.

In a July 23, 2012 decision, OWCP's hearing representative affirmed the February 9, 2012 decision. The hearing representative found that the weight of the medical evidence rested with the thorough and well-rationalized opinion of Dr. Lee, the impartial medical specialist. The hearing representative also found that Dr. Weiss' report was insufficient to shift the weight of the evidence.

Appellant's representative argues that Dr. Lee's opinion cannot carry the weight of the medical evidence: he did not have the benefit of the 2011 knee x-rays; he made no reference to impairment guidelines; and he did not give a knee impairment rating due to the degenerative condition. Further, he argues that Dr. Lee gave no explanation for his conclusion, and OWCP did not refer Dr. Lee's report to OWCP's medical adviser. The representative notes that appellant's right knee condition dates back to 1993, and a diagnostic study in 1997 showed degenerative changes and a meniscal tear.

LEGAL PRECEDENT

A claimant seeking compensation under FECA has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence,⁴ including that he or she sustained an injury in the performance of duty and that his or her disability, if any, was causally related to the employment injury.⁵

³ Although Dr. Lee found no permanent impairment of the right lower extremity causally related to the 1989 employment injury, OWCP did not declare an overpayment for the eight percent impairment rating previously awarded. This was consistent with its procedures. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7.b(4) (January 2010).

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

⁵ *Elaine Pendleton*, 40 ECAB 1143 (1989); see *Daniel R. Hickman*, 34 ECAB 1220 (1983).

If there is permanent disability involving the loss or loss of use of a scheduled member or function of the body, the claimant is entitled to a schedule award for permanent impairment.⁶ It is thus the claimant's burden to establish that his or her employment injury caused permanent impairment to a scheduled member or function.⁷

If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁸ When there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁹

ANALYSIS

The Board has, on more than one occasion, carefully reviewed appellant's record and found no evidence, until 1993, that she had any kind of right knee condition. OWCP accepted her claim for right hip contusion and lumbosacral strain. Although the record shows that it would later accept a right knee sprain, there was no suggestion from 1989 to 1993 that appellant might have injured her right knee. An imaging study in 1993 showed an abnormal signal in the posterior horn of the lateral and medial meniscus (not extending to the articular surface), most likely related to degenerative changes. No physician has tried to account for the lack of bridging evidence, nor has a physician offered a sound medical basis for attributing any right knee condition to what happened on April 18, 1989.

As appellant's representative notes, the right knee condition dates back to 1993, but this does not mean that the abnormal meniscal signals were in any way related to her 1989 fall at work. The fact that abnormal signals were seen four years later does not raise an inference of causal relationship¹⁰ and the record contains no rationalized medical opinion to establish this element. Moreover, there is no evidence that appellant had any preexisting impairment of her right lower extremity.

It should also be noted that OWCP has never expanded appellant's claim to include any kind of degenerative condition or primary knee arthritis. Having later accepted a mere sprain of the right knee, it is appellant's burden to establish that this sprain or hip contusion or lumbosacral strain caused permanent physical impairment to her right lower extremity.

⁶ 5 U.S.C. § 8107(a).

⁷ See *Raymond E. Gwynn*, 35 ECAB 247 (1983); *Philip N.G. Barr*, 33 ECAB 948 (1982) (FECA provides that a schedule award be payable for a permanent impairment resulting from an employment injury).

⁸ 5 U.S.C. § 8123(a).

⁹ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

¹⁰ *Thomas D. Petrylak*, 39 ECAB 276 (1987).

OWCP properly referred appellant to Dr. Lee, a Board-certified orthopedic surgeon and impartial medical specialist, to resolve the extent of any permanent impairment. It provided Dr. Lee a statement of accepted facts and appellant's medical record so he could base his opinion on a proper factual and medical history.

Consistent with his findings on physical examination, Dr. Lee found that appellant had fully recovered from her accepted medical conditions with no residuals, and therefore no permanent impairment. Appellant did exhibit mild degenerative joint disease in the right knee, which was not an accepted medical condition and which was not, in his opinion, a result of her April 18, 1989 fall at work. Dr. Lee explained that this was a more recent onset of the normal progression of aging, and in fact, her degenerative changes were much milder than average for her age.

The Board finds that Dr. Lee based his opinion on a proper factual and medical background. The Board further finds that his opinion is sufficiently well rationalized that it must be accorded special weight in resolving the extent of any permanent impairment. As the weight of the medical opinion evidence establishes no permanent impairment of the right lower extremity resulting from the April 18, 1989 fall at work, the Board finds that appellant has not met her burden to establish that she is entitled to a schedule award. Accordingly, the Board will affirm OWCP's July 23, 2012 decision.

Dr. Weiss offered a combined impairment rating of 17 percent based on right hip trochanteric bursitis and primary knee joint arthritis. However, neither of these were accepted medical conditions. Further, Dr. Weiss' findings in 2004 were dated. Dr. Lee examined appellant seven years later and found full range of hip motion with no complaints of pain and no local tenderness on palpation, including the greater trochanteric area. As Dr. Weiss did not establish that she had any impairment causally related to what happened on April 18, 1989, his opinion on permanent impairment carries no probative weight.

OWCP did not accept appellant's claim for arthritis, and there is no evidence that appellant had any preexisting permanent impairment of her right lower extremity. Dr. Lee did not refer to impairment guidelines because there was no need. The accepted medical conditions had resolved without residuals. Any current impairment due to knee arthritis alone would not entitle appellant to a schedule award.

Dr. Lee did support his conclusion with medical rationale. His knowledge of the mechanism of injury and the accepted medical conditions, together with his findings on physical examination and his review of the medical record, led him to conclude that the accepted conditions had resolved without residuals, and that appellant's current right knee condition was simply the natural progression of aging, unrelated to what happened in 1989. This opinion represents the special weight of the medical evidence.

OWCP did refer Dr. Lee's evaluation to its medical adviser. When it later asked him to clarify his opinion in light of a corrected date of injury, he did so without altering his opinion in the least. Accordingly, there was nothing further for the medical adviser to review.

Appellant may request a schedule award or increased 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. Appellant has not met her burden to establish that her April 18, 1989 employment injury caused any permanent impairment to her right lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the July 23, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 5, 2013
Washington, DC

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

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

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