

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

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T.A., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL  
CENTER, Biloxi, MS, Employer**

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**Docket No. 14-766  
Issued: December 10, 2014**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On February 21, 2014 appellant filed a timely appeal from September 13, 2013 and January 14, 2014 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 a permanent impairment to a scheduled member causally related to his accepted injury of August 28, 2001.

On appeal, appellant noted that he had two hip replacements and that he contends were related to his employment injury. He also argued that the second opinion physician made a "predetermined diagnosis."

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

## **FACTUAL HISTORY**

On August 28, 2001 appellant, then a 44-year-old laundry worker, filed a traumatic injury claim alleging that, on that date, he suffered a low back strain while lifting the shelf of a linen cart. OWCP accepted his claim for lumbosacral strain; disorders of meninges and other nervous system complication; displacement of a lumbar intervertebral disc without myelopathy; mechanical complication of a nervous system device, implant and graft; and other postoperative infections.<sup>2</sup> Appellant underwent multiple back surgeries.

On August 20, 2006 appellant filed a claim for a schedule award. By letter dated February 23, 2007, OWCP requested medical information in support of his claim. Appellant did not forward evidence addressing any permanent impairment.

On January 23, 2013 OWCP denied appellant's claim for a schedule award. It found the evidence was not sufficient to establish any permanent impairment to any scheduled member due to the accepted work injury.

On February 12, 2013 appellant requested an oral hearing before an OWCP hearing representative.

At the June 26, 2013 hearing, appellant testified that he had both hips replaced as a result of the employment injury. He read from several medical reports and discussed his physical limitations.

In an August 31, 2012 letter, Dr. Patricia L. Sutton, an osteopath, stated that appellant sustained an employment-related back injury on August 28, 2001. Due to his injury, appellant's gait became abnormal and over time pushed both of his femur bones into his pelvic region. He subsequently underwent surgery on the right side in 2008 and on the left side in 2010. Dr. Sutton opined that the need for surgery was directly related to the employment-related injury in 2001. She noted that appellant had osteoarthritis, which was exacerbated by the bone displacement caused by the accepted injury.

In a September 12, 2012 report, Dr. Peter F. Sharkey, a Board-certified orthopedic surgeon, noted that he performed appellant's right hip replacement and that another physician performed the left hip replacement. He noted that the hip replacement surgeries appeared to be successful and that the range of motion was good and strength in the hips was also reasonably good. Dr. Sharkey noted that appellant was severely disabled due to problems related to his lumbar spine.

In an August 7, 2012 report, Dr. Richard C. Wender, a Board-certified family practitioner, discussed appellant's employment injury. He noted that appellant did not get full relief from his hip pain despite three spinal surgeries. Dr. Wender noted that throughout this period, appellant did have pain related to his hips but that the focus was on his back. He noted that appellant's right hip was replaced in 2007 and his left hip was replaced in 2008. Dr. Wender

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<sup>2</sup> In OWCP File No. xxxxxx088, OWCP accepted that on October 29, 2003 appellant sustained an employment-related rupture of the right biceps tendon and sprains of the right shoulder and upper arm.

opined that it was distinctly possible that the original injury suffered in 2001 contributed to causing or accelerating the progression of his back problems and his hip arthritis.

By decision dated September 13, 2013, an OWCP hearing representative remanded the case for further development of the medical evidence. She instructed OWCP to refer appellant to a Board-certified specialist for an impairment assessment. The hearing representative noted that the specialist should be advised that OWCP has not accepted the hip injuries/replacements or osteoarthritis. She stated that the specialist should offer an opinion on whether the hip conditions or osteoarthritis are causally related to the back injuries, back surgeries or their affects and that, if so, these hip conditions may be incorporated into the impairment rating, as appropriate.

On November 1, 2013 OWCP referred appellant to Dr. Robert F. Draper, a Board-certified orthopedic surgeon, for a second opinion. In a November 19, 2013 opinion, Dr. Draper diagnosed appellant as status postlaminectomy and fusion L3-4, L4-5 (October 1, 2012) and status post decompressive surgery L3-4 and L4-5. He noted unrelated conditions of osteoarthritis of right hip and left hip. Dr. Draper opined that appellant's osteoarthritis was not causally related to the injury of August 28, 2001, nor was the osteoarthritis of the right and left hip permanently aggravated by the accepted injury. He noted that appellant's claim had been accepted for sprain of lumbosacral joint, disorder of meninges, displacement of lumbar intervertebral disc without myelopathy, mechanical complication of nervous system device, implant, and graft and other system complications. Dr. Draper opined that the accepted conditions had not completely resolved and appellant continued to have residuals; however, appellant had reached maximum medical improvement. He found that appellant was capable of performing sedentary work or very light-duty work. Dr. Draper stated that appellant had some permanent impairment, but noted that the impairment was related to the back and back surgery, and that OWCP did not accept impairment ratings for the lumbar spine. For that reason, he did not offer an impairment rating. Dr. Draper stated that there was no evidence for radiculopathy upon which any impairment for the lower extremities could be assessed.

By decision dated January 14, 2014, OWCP denied appellant's claim for a schedule award.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>3</sup> and its implementing regulations<sup>4</sup> set 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, FECA 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, good administrative practice necessitates the use of a single set of tables so that there may be uniform stands applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the American Medical Association, *Guides to the Evaluation of*

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<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> 20 C.F.R. § 10.404.

*Permanent Impairment* (A.M.A., *Guides*).<sup>5</sup> The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>6</sup>

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.<sup>7</sup> Neither FECA nor the implementing federal regulations provide for payment of a schedule award for the permanent loss of use of the back, the spine or the body as a whole; a claimant is not entitled to such a schedule award.<sup>8</sup> The Board notes that section 8101(19) specifically excludes the back from the definition of organ.<sup>9</sup> A claimant may receive a schedule award for any permanent impairment to the upper or lower extremities even though the cause of the impairment originated in the spine.<sup>10</sup>

The sixth edition of the A.M.A., *Guides* provides a specific methodology for rating spinal nerve impairment, set forth in the July/August 2009 *The Guides Newsletter*.<sup>11</sup> It was designed for situation in which a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.<sup>12</sup> The Board has recognized the adoption of this methodology as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.<sup>13</sup>

### ANALYSIS

OWCP accepted appellant's claim for lumbosacral strain; disorders of meninges and other nervous system complication; displacement of lumbar intervertebral disc without myelopathy; mechanical complication of nervous system device, implant and graft; and other postoperative infections. Appellant filed a claim for a schedule award.

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<sup>5</sup> *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 and Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

<sup>6</sup> *See id.*; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

<sup>7</sup> *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>8</sup> *See Jay K. Tomokiyo*, 51 ECAB 361 (2000).

<sup>9</sup> 5 U.S.C. § 8101(19).

<sup>10</sup> *Supra* note 7.

<sup>11</sup> The methodology and applicable tables were published in *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009).

<sup>12</sup> *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4.

<sup>13</sup> *D.S.*, Docket No. 14-12 (issued March 18, 2014).

OWCP referred appellant for an impairment assessment. Dr. Draper conducted the second opinion examination, and based on his findings, OWCP denied appellant's claim for a schedule award.

The Board finds that Dr. Draper found that appellant did not sustain permanent impairment of the lower extremities due to his accepted back condition. Dr. Draper noted that appellant's osteoarthritis was not causally related to the August 28, 2001 employment injury, nor was the osteoarthritis of the right and left hip permanently aggravated by the employment injury. He noted that appellant was capable of performing very light-duty work. As noted, no schedule award is payable for permanent loss of use of the back, spine or body as a whole. Dr. Draper found that appellant had permanent impairment related to his lower back and back surgery, but as no rating was allowed for the lumbar spine, he did not rate impairment of the spine. He found that there was no evidence of radiculopathy upon which any impairment for the lower extremities could be rated. The report of Dr. Draper does not establish any impairment to appellant's legs based on the sixth edition of the A.M.A., *Guides*. Although Drs. Sutton, Sharkey and Wender discussed appellant's hip and back conditions, they did not offer any opinion on permanent impairment to the lower extremities related to the accepted employment injury.

The Board found that the weight of medical opinion is represented by Dr. Draper, whose conclusions are supported by a physical examination and review of the record. Dr. Draper correctly noted that FECA does not allow impairment ratings for the back or spine and found appellant had no radiculopathy upon which any impairment to the lower extremities could be assessed. Accordingly, appellant had not established entitlement to a schedule award.

### **CONCLUSION**

The Board finds that appellant had not established any permanent impairment to his lower extremities causally related to his injury of August 28, 2001.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated January 14, 2014 and September 13, 2013 are affirmed.

Issued: December 10, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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