United States Department of Labor
Employees' Compensation Appeals Board

V.S., Appellant	)	
and	)	**Docket No. 16-0464**
	)	**Issued: June 1, 2016**
DEPARTMENT OF DEFENSE, DEFENSE LOGISTIC AGENCY, Tracy, CA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 12, 2016 appellant, through counsel, filed a timely appeal from a November 12, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 has established a claim for a schedule award.

FACTUAL HISTORY

On June 18, 2003 appellant, then a 45-year-old materials handler, filed a traumatic injury claim (Form CA-1) alleging that on the same day June 18, 2003 he sustained a back injury when a forklift he was operating hit a pothole. OWCP accepted that he sustained a lumbar strain and he received disability compensation on the daily rolls from August 26 to October 3, 2003.

[1] 5 U.S.C. § 8101 *et seq.*

Appellant returned to limited-duty work for the employing establishment on October 3, 2003 and retired on disability retirement effective January 4, 2008.

In a May 19, 2008 report, Dr. Michael Hebrard, an attending Board-certified physical medicine and rehabilitation physician, detailed appellant's factual and medical history and current back and lower extremity complaints and reported his physical examination findings. He provided an opinion that appellant sustained a compression injury on June 18, 2003 that caused a permanent aggravation and an accelerated rate of degeneration of his preexisting back condition.

In October 2008, OWCP referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion report regarding whether he continued to have residuals of his June 18, 2003 employment injury.

In a report dated November 22, 2008, Dr. Swartz described appellant's factual and medical history and detailed his findings on physical examination. He disagreed with Dr. Hebrard's opinion that appellant continued to have residuals from his June 18, 2003 employment injury through a permanent aggravation of his preexisting degenerative back condition. Dr. Swartz explained that there was no evidence that on June 18, 2003 appellant sustained a permanent aggravation of his preexisting degenerative back condition. He indicated that the employment-related lumbar strain appellant had sustained on June 18, 2003 had resolved and that his continuing back problems were due to his underlying, preexisting back condition.

In order to resolve the conflict in the medical evidence between Dr. Hebrard and Dr. Swartz, regarding whether appellant continued to have employment-related residuals, OWCP referred him in April 2009 to Dr. Kuldeep Sidhu, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the matter.

In a May 5, 2009 report, Dr. Sidhu detailed appellant's factual and medical history, including the circumstances of his June 18, 2003 employment injury which had been accepted for a lumbar strain. He noted that appellant complained of a shooting pain in his right groin, lower back pain, and pain and numbness in the front and back of his right leg. Dr. Sidhu reported the findings of his physical examination on May 5, 2009 noting that knee reflexes and ankle jerks were present and that appellant complained of pain when moving his right leg. He posited that appellant's reported lower back and leg pain was due to facet hypertrophy of lumbar spine, a condition which preexisted the June 18, 2003 employment injury. Appellant had back and leg pain for seven years prior to the June 18, 2003 employment injury. Dr. Sidhu indicated that diagnostic test performed in February 2003 confirmed the facet hypertrophy. He posited that appellant's June 18, 2003 employment-related lumbar strain resolved after a few weeks and that his ongoing symptoms were "related to preexisting condition and not to the industrial injury." Dr. Sidhu opined that there was no objective evidence that the June 18, 2003 employment injury caused any permanent damage.

The case remained open with no further medical development activity from 2009 to October 25, 2011 when appellant requested expansion of the claim to include several other conditions. This request was based on a September 8, 2011 report from Dr. James H. Holmes, a family practitioner. OWCP denied the request on November 30, 2011. On March 6, 2012 appellant's counsel requested a more detailed response to the report of Dr. Holmes. In

June 2012, appellant changed representatives. The new counsel resubmitted Dr. Holmes reports, along with other medical program reports.

In June 2013, when OWCP referred appellant to Dr. Ernest Miller, a Board-certified orthopedic surgeon, for a second opinion report regarding whether appellant continued to have residuals of his June 18, 2003 employment injury. In a July 11, 2013 report, Dr. Miller reported appellant's history and detailed the findings of his physical examination on that date. He diagnosed lumbar degenerative disc disease at multiple levels and chronic lower back pain (preexisting the June 18, 2003 employment incident), and resolved acute lumbar strain (sustained on June 18, 2003). Dr. Miller opined that the currently diagnosed conditions preexisted the June 18, 2003 employment injury and that aggravation and acceleration by the June 18, 2003 employment injury were not indicated. He noted that the acute lumbar strain had resolved within six months of June 18, 2003 without objective evidence of residuals.

On April 29, 2014 appellant filed a claim for compensation (Form CA-7) claiming a schedule award due to his June 18, 2003 employment injury. In a letter dated May 5, 2014, OWCP requested that appellant submit an impairment rating report in support of his schedule award claim.

Appellant submitted a May 21, 2014 report in which Dr. Hebrard reported findings of electromyogram and nerve conduction velocity testing of his lower extremities obtained on that date. The report contained impressions of "electrodiagnostic evidence for a left L5-S1 radiculopathy" and "electrodiagnostic evidence for a right L4-5 radiculopathy." In a separate report dated May 21, 2014, Dr. Hebrard discussed appellant's electrodiagnostic findings, reported findings upon physical examination, and diagnosed lumbosacral radiculopathy in both lower extremities. He opined that the diagnosed conditions were causally related to the June 18, 2003 employment injury and that appellant had permanent impairment due to nerve root damage.[2] Dr. Hebrard referenced *The Guides Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009)[3] and concluded that appellant had 21 percent permanent impairment of his right lower extremity and 21 percent permanent impairment of his left lower extremity under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009).

In November 2014, OWCP referred the case record to Dr. Leonard A. Simpson, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, for an opinion regarding the extent of the permanent impairment of appellant's lower extremities.

On December 4, 2014 Dr. Simpson discussed the medical evidence of record. He opined that the medical records showed that the accepted June 18, 2003 lumbar strain had resolved. Dr. Simpson indicated, "Based on accepted "lumbosacral strain" there would be a class 0 -- 0 present impairment of each lower extremity as a result of the work-accepted strain with no permanent aggravation accepted. Date of maximum medical improvement following the work-

[2] Dr. Hebrard indicated that appellant's "subjective complaints and my objective findings are consistent with the mechanism of injury" and that "he has not recovered from [his] industrially-related condition."

[3] *See infra* note 14.

accepted strain would be no later than June 18, 2004, *i.e.*, no later than one year following the industrial-related incident…."

In a March 11, 2015 decision, OWCP denied appellant's schedule award claim because the medical evidence of record did not support that he had employment-related permanent impairment of his lower extremities.

Appellant requested a telephonic hearing with an OWCP hearing representative. During the hearing held on October 7, 2015, appellant's counsel at the time discussed the impairment rating report of Dr. Hebrard and posited that it contained a rationalized opinion on permanent impairment.

By decision dated November 12, 2015, an OWCP hearing representative affirmed OWCP's March 11, 2015 decision denying appellant's schedule award claim. She found that the weight of the medical evidence of record showed that he ceased to have residuals of his accepted June 18, 2003 lumbar strain and that he did not have permanent impairment of his lower extremities due to an employment injury.

LEGAL PRECEDENT

An employee seeking compensation under FECA has the burden of establishing the essential elements of his or her claim, including that he sustained an injury in the performance of duty as alleged and that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.[4] The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[5]

The schedule award provision of FECA[6] and its implementing regulations[7] 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 standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the

[4] *See Bobbie F. Cowart*, 55 ECAB 476 (2004).

[5] *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

appropriate standard for evaluating schedule losses.[8] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[9]

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.[10] A schedule award is not payable for the loss, or loss of use, of a part of the body that is not specifically enumerated under FECA.[11] Moreover, neither FECA nor its implementing regulations provides for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under FECA.[12]

In 1960, amendments to FECA modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[13] The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009) is to be applied.[14]

ANALYSIS

OWCP accepted a lumbar strain on June 18, 2003 when appellant's forklift hit a pothole. On April 29, 2014 appellant filed a Form CA-7 claiming a schedule award due to his June 18, 2003 employment injury. In a March 11, 2015 decision, OWCP denied his schedule award claim because the medical evidence of record did not support an employment-related permanent impairment of his lower extremities. By decision dated November 12, 2015, an OWCP hearing representative affirmed OWCP's March 11, 2015 decision denying appellant's schedule award claim.

The Board finds that appellant has not established a claim for a schedule award.

---

[8] *Id*. *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (January 2010); *id*., Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (January 2010).

[9] *See also id*. at Chapter 2.808.5a (February 2013).

[10] *Pamela J. Darling*, 49 ECAB 286 (1998).

[11] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[12] *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

[13] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[14] *See G.N*., Docket No. 10-850 (issued November 12, 2010); *see also supra* note 8 at Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

In support of his schedule award claim, appellant submitted a May 21, 2014 report in which Dr. Hebrard, an attending Board-certified physical medicine and rehabilitation physician, diagnosed lumbosacral radiculopathy in both lower extremities and opined that the diagnosed conditions were causally related to the June 18, 2003 employment injury and that appellant had permanent impairment due to nerve root damage.[15] He referenced *The Guides Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009)[16] and concluded that appellant had 21 percent permanent impairment of his right lower extremity and 21 percent permanent impairment of his left lower extremity under the standards of the sixth edition of the A.M.A., *Guides*.

The Board notes, however, that Dr. Hebrard did not provide a rationalized medical opinion that appellant's lower extremity conditions were related to the accepted June 18, 2003 employment injury. Dr. Hebrard did not explain how appellant's employment-related soft-tissue injury from almost 11 years prior could cause permanent impairment in his lower extremities.[17] As noted above, the medical evidence must show that an employment injury contributed to the permanent impairment for which schedule award compensation is alleged.[18]

Appellant has not submitted rationalized medical evidence showing that he had permanent impairment of lower extremities stemming from the accepted June 18, 2003 employment injury or some other employment-related condition. Therefore, there was no basis to find the existence of such permanent impairment and thus appellant has not established his schedule award claim.

Appellant may make a request to OWCP for a 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 has not established a claim for a schedule award.

[15] Dr. Hebrard indicated that appellant's "subjective complaints and my objective findings are consistent with the mechanism of injury" and that "he has not recovered from [his] industrially-related condition."

[16] *See supra* note 14.

[17] The Board has held that a medical report is of limited probative value on a medical matter if it contains an opinion which is unsupported by medical rationale. *C.M.*, Docket No. 14-88 (issued April 18, 2014). OWCP did not accept that appellant sustained a lower extremity condition on June 18, 2003 and the medical evidence of record does not otherwise support the existence of such an employment-related injury.

[18] *See supra* note 4.

ORDER

IT IS HEREBY ORDERED THAT the November 12, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 1, 2016
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board