



## ISSUE

The issue is whether appellant has established an employment-related permanent impairment of the lower extremities, warranting a schedule award.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>3</sup> The facts of the case as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On January 29, 2008 appellant, then a 31-year-old, transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on January 12, 2008 she injured her back while lifting a heavy bag. OWCP accepted the claim for lumbosacral sprain. It has not paid any wage-loss compensation with respect to this claim.

An attending osteopath, Dr. Nicholas Diamond, opined in a February 11, 2009 report that appellant lifted heavy baggage on January 12, 2008 and felt low back and leg pain. He concluded that appellant had 23 percent bilateral lower extremity permanent impairment.<sup>4</sup> Dr. Diamond found motor strength deficits from the hips affecting the lower extremities.

An OWCP medical adviser, Dr. Henry Magliato, a Board-certified orthopedic surgeon, opined in a September 9, 2009 report that Dr. Diamond had not properly applied the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>5</sup>

Dr. Diamond submitted a January 26, 2010 report. He wrote that there was a typographical error in his February 11, 2009 report, as the grade modifier for clinical studies should be two, instead of one. Dr. Diamond also indicated that sensory and motor examinations were used to determine the severity of deficits. He wrote that appellant had motor strength deficits in the right hip flexors, adductors, and abductors, as well as motor strength deficit, as well as left hip abductors and adductors.

By report dated February 20, 2010, another OWCP medical adviser, Dr. Andrew Merola, a Board-certified orthopedic surgeon, opined that appellant had two percent right lower extremity permanent impairment. He determined that the date of maximum medical improvement (MMI) was February 11, 2009.

OWCP referred appellant for a second opinion examination. In a report dated July 15, 2010, Dr. Jerome Rosman, a Board-certified orthopedic surgeon, opined that appellant had suffered a limited soft tissue injury and had no ratable permanent impairment. By report dated

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<sup>3</sup> Docket No. 13-1954 (issued September 5, 2014); Docket No. 12-0790 (issued September 12, 2012).

<sup>4</sup> Appellant had a prior injury to the left shoulder and arm on August 9, 2006, and Dr. Diamond also found three percent left upper extremity permanent impairment.

<sup>5</sup> 6<sup>th</sup> ed. 2009.

August 10, 2010, Dr. Merola concurred with Dr. Rosman that there was no ratable permanent impairment.

By decision dated August 23, 2010, OWCP found appellant was not entitled to a schedule award under 5 U.S.C. § 8107. It found the weight of the medical evidence did not establish employment-related permanent impairment.

Appellant requested a hearing before an OWCP hearing representative on September 17, 2010. By decision dated November 30, 2010, the hearing representative set aside the August 23, 2010 OWCP decision. She found that a conflict existed between Drs. Rosman and Diamond, and pursuant to 5 U.S.C. § 8123(a) a referral to an impartial specialist was required.

OWCP selected Dr. Andrew Carollo, a Board-certified orthopedic surgeon, as an impartial medical examiner. In a report dated February 16, 2011, Dr. Carollo provided results on physical examination, including range of motion for the hips. He reported 100 degrees of hip flexion for each hip, indicated that 120 degrees was normal, and also wrote that all range of motion results were normal. Dr. Carollo opined that appellant had no permanent impairment of her lower extremities under the A.M.A., *Guides*.

By decision dated March 18, 2011, OWCP found that appellant was not entitled to a schedule award. It found the weight of the evidence was represented by the opinion of Dr. Carollo.

On April 12, 2011 appellant requested a hearing before an OWCP hearing representative, which was held on July 6, 2011. By decision dated August 23, 2011, the hearing representative affirmed the March 18, 2011 OWCP decision. He found the medical evidence of record did not establish employment-related permanent impairment of either lower extremity.

Appellant appealed to the Board. The Board set aside the August 23, 2011 OWCP hearing representative decision by decision dated September 12, 2012.<sup>6</sup> The Board noted that Dr. Carollo had reported abnormal range of motion results for the hips, although he had classified the results as normal. The Board found that the case should have been referred to an OWCP medical adviser for review of Dr. Carollo's report and for a determination of whether clarification was required. Accordingly, the case was remanded to OWCP for further development.

On return of the case record, OWCP requested that an OWCP medical adviser review Dr. Carollo's report and provide an opinion with respect to a permanent impairment under the A.M.A., *Guides*. In a report dated October 16, 2012, the medical adviser, Dr. Harvey Seigel, Board-certified in family practice, stated that Dr. Carollo found no weakness or atrophy, normal reflexes, and normal sensation. He did not discuss hip range of motion. Dr. Seigel opined that appellant had no permanent impairment in accordance with the A.M.A., *Guides*.

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<sup>6</sup> Docket No. 12-0790 (issued September 12, 2012).

By decision dated November 30, 2012, OWCP denied appellant's claim for a schedule award. On December 19, 2012 appellant requested a review of the written record. By decision dated February 7, 2013, the hearing representative affirmed the November 30, 2012 decision. He found that the weight of the medical evidence did not establish permanent impairment.

By decision dated September 5, 2014, the Board set aside the February 7, 2013 OWCP decision.<sup>7</sup> The Board found there remained an unresolved conflict as to whether permanent impairment could be based on a loss of range of motion for the hips. OWCP was directed to secure a probative report from Dr. Carollo on the issue.

On remand, OWCP sent Dr. Carollo an April 21, 2015 letter, requesting that he indicate whether a permanent impairment based on loss of range of motion of the hips would be appropriate. In a report dated May 19, 2015, Dr. Carollo indicated that his review of the examination showed that range of motion for the left hip was within normal limits. He also wrote that appellant had no complaints referable to either the left or right hip at the time of examination.

By decision dated June 4, 2015, OWCP denied appellant's claim for a schedule award. It found the medical evidence from Dr. Carollo did not support an employment-related permanent impairment based on the hips.

Appellant requested a review of the written record by an OWCP hearing representative on July 2, 2015. In a decision dated December 17, 2015, the hearing representative set aside the June 4, 2015 OWCP decision. She found OWCP had not obtained the necessary information from Dr. Carollo to properly resolve the conflict. The hearing representative noted that Dr. Carollo had found 100 degrees of hip flexion, and described the results as normal, but had also indicated normal was 120 degrees. She indicated that Dr. Carollo should explain his findings regarding range of motion, and whether any motion deficit was casually related to the work injury.

In a letter dated March 14, 2016, OWCP requested an additional report from Dr. Carollo. It asked Dr. Carollo to explain whether appellant's current condition was employment related and discuss the hip range of motion results.

In a report dated May 11, 2016, Dr. Carollo opined that he did not believe that any loss of range of motion related to hip flexion was causally related to the work injury. He wrote that there was no history of injury to the left hip. Dr. Carollo also indicated that some individuals were more flexible than others, and in his opinion appellant's flexion was within the normal range of motion.

By decision dated June 14, 2016, OWCP again denied appellant's claim for a schedule award. It found that the medical evidence of record did not establish employment-related permanent impairment.

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<sup>7</sup> Docket No. 13-1954 (issued September 5, 2014).

Appellant, through counsel, requested a review of the written record on July 8, 2016. By decision dated November 2, 2016, the hearing representative affirmed the June 14, 2016 decision. He found the evidence from Dr. Carollo resolved the conflict in the medical evidence.

### **LEGAL PRECEDENT**

5 U.S.C. § 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.<sup>8</sup> Neither FECA nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole.<sup>9</sup> The back is specifically excluded from the definition of organ under FECA.<sup>10</sup> 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.<sup>11</sup>

Neither FECA nor its implementing regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>12</sup> For schedule awards after May 1, 2009, the permanent impairment is evaluated under the sixth edition.<sup>13</sup> The permanent impairment must be causally related to an accepted employment injury.<sup>14</sup>

It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict under 5 U.S.C. § 8123(a), the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>15</sup>

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<sup>8</sup> 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

<sup>9</sup> See *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

<sup>10</sup> See 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

<sup>11</sup> *Thomas J. Engelhart*, 50 ECAB 319 (1999).

<sup>12</sup> *A. George Lampo*, 45 ECAB 441 (1994).

<sup>13</sup> See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

<sup>14</sup> *Rosa Whitfield Swain*, 38 ECAB 368 (1987).

<sup>15</sup> *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

## ANALYSIS

Appellant has an accepted lumbosacral sprain from a lifting incident at work on January 12, 2008. She seeks a schedule award for permanent impairment of her lower extremities under 5 U.S.C. § 8107.

The Board finds that the medical evidence of record indicates that the special weight of the evidence does not establish employment-related permanent impairment, warranting a schedule award.

As the Board noted on the prior appeals, there was a conflict between Dr. Diamond, an attending physician, and Dr. Rosman, the second opinion physician, as to whether appellant had an employment-related permanent impairment. Dr. Carollo, the impartial medical specialist, opined in his February 16, 2011 report that there was no ratable permanent impairment under the A.M.A., *Guides*. However, there remained an unresolved issue with respect to the hip range of motion and a possible permanent impairment to a lower extremity. Dr. Carollo had provided range of motion results for the right and left hip of 100 degrees flexion. While he described the range of motion results as normal, under the A.M.A., *Guides* 100 degrees of flexion would be considered a mild lower extremity impairment under Table 16-24 of the A.M.A., *Guides*.<sup>16</sup>

The history of injury provided in Dr. Diamond's February 11, 2009 report noted that the January 12, 2008 lifting employment-related injury caused low back pain radiating into the legs. Hip pain was not specifically noted. The Board also notes that while Dr. Diamond had reported motor strength deficit for both the right and left hips in his January 26, 2010 report, he did not discuss causal relationship of appellant's hip condition with the accepted employment injury.

The Board finds that the additional reports from Dr. Carollo clarify that he did not find any limitation of hip range of motion to be causally related to the January 12, 2008 employment injury. OWCP has not accepted a hip condition. The only accepted condition was a lumbosacral sprain. Since the accepted condition was a lumbar sprain, the medical evidence must establish that this condition caused the permanent impairment of the hips. The Board has previously explained that the medical evidence must show that the employment injury contributed to the permanent impairment for which schedule award compensation is alleged.<sup>17</sup>

As Dr. Carollo indicated in his May 19, 2015 report, there were no complaints referable to either of appellant's hips at the time of his examination on February 16, 2011. He also found a lack of causal relationship with employment in his May 11, 2016 report, noting the lack of history of a left hip injury. The Board finds that Dr. Carollo provided a rationalized medical opinion on the lower extremity permanent impairment issues presented. He explained that with respect to hip range of motion, any limitation was not employment related. The opinion was based on a complete background and his examination. As noted above, the opinion of an

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<sup>16</sup> A.M.A., *Guides* 549, Table 16-24.

<sup>17</sup> *V.S.*, Docket No. 16-0464 (issued June 1, 2016). Appellant's claim was accepted for lumbosacral strain. The Board noted that the medical evidence of record did not explain how appellant's employment-related soft-tissue injury could cause permanent impairment of his lower extremities.

impartial medical specialist, if rationalized and based on a proper factual and medical background, must be given special weight.<sup>18</sup> The Board therefore finds that Dr. Carollo represents the special weight of the medical evidence in this case.

Based on the evidence of record, appellant has not established employment-related permanent impairment to a scheduled member or function of the body under 5 U.S.C. § 8107.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.<sup>19</sup>

### **CONCLUSION**

The Board finds that appellant has not established employment-related permanent impairment of the lower extremities, warranting a schedule award.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 2, 2016 is affirmed.

Issued: November 13, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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

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<sup>18</sup> See also *M.H.*, Docket No. 16-1428 (issued February 13, 2017).

<sup>19</sup> See *Linda T. Brown*, 51 ECAB 115 (1999).