

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

D.F., Appellant

and

**U.S. POSTAL SERVICE, JACK D. WATSON
POST OFFICE, Fort Worth, TX, Employer**

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**Docket No. 20-0811
Issued: July 19, 2021**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 2, 2020 appellant, through counsel, filed a timely appeal from a January 31, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met her burden of proof to establish more than two percent permanent impairment of her left lower extremity, for which she previously received a schedule award.

FACTUAL HISTORY

On October 28, 1999 appellant, then a 42-year-old city carrier, slipped on a piece of plastic and fell while in the performance of duty. OWCP accepted her claim for contusion of the right hip, contusion of the right finger, abrasion or friction burn of fingers alone without infection, right foot sprain, and displacement of lumbar intervertebral disc without myelopathy at L4-5 and L5-S1. Appellant underwent an authorized L4-5 total disc replacement arthroplasty and partial corpectomy at L5-S1 on February 20, 2006. OWCP paid her wage-loss compensation on the periodic rolls through October 1, 2006; she returned to work on October 2, 2006.

By decision dated December 5, 2007, OWCP granted appellant a schedule award for two percent permanent impairment of the left lower extremity, based upon peripheral nerve impairment from appellant's accepted lumbar conditions. The period of the award ran for 5.76 weeks from June 12 through July 22, 2007.³

In a report dated May 15, 2013, Dr. Ajai Cadambi, a Board-certified orthopedic surgeon, related that appellant was seen for complaints regarding her left hip, which she twisted during a fall in 1998. He diagnosed probable left hip osteoarthritis and indicated that further diagnostic studies would be performed to determine whether left hip arthroplasty was required. In an addendum report dated June 5, 2013, Dr. Cadambi related that appellant had undergone x-rays and a magnetic resonance imaging (MRI) scan. He related that her hip x-rays revealed arthritic changes, but not bone-on-bone changes, and her MRI scan revealed moderate arthrosis of the left hip with articular cartilage narrowing. Dr. Cadambi concluded that based on these findings he could certainly continue conservative measures vs arthroplasty of the left hip.

In an August 20, 2013 report, Dr. Ronald Blum, a Board-certified internist, acting as a district medical adviser, (DMA), opined that based upon normal imaging studies of appellant's left hip that were performed five to six years post injury, and due to the lack of hip symptoms found in the record until 2003, appellant's osteoarthritis in the left hip was "most likely, not causally related to the accepted fall of [October 28, 1999]."

On September 17, 2013 OWCP forwarded Dr. Blum's report to Dr. Cadambi for review and response. No response was received.

An October 29, 2018 nerve conduction velocity study revealed no electrophysiological evidence of a focal nerve impairment, generalized peripheral neuropathy, plexopathy, or lumbosacral radiculopathy.

³ Appellant retired on March 5, 2010.

On November 28, 2018 appellant, through counsel, filed a claim for an increased schedule award (Form CA-7).

In a development letter dated December 13, 2018, OWCP requested that appellant provide a medical report from her treating physician that included an impairment rating utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)⁴ and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*). It afforded her 30 days to submit the requested information. OWCP did not receive an impairment rating.

By decision dated April 30, 2019, OWCP denied appellant's claim for an increased schedule award. It found that the evidence of record was insufficient to establish that she sustained permanent impairment of a scheduled member or function of the body due to her accepted work injury.

On May 8, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on September 10, 2019. During the hearing, appellant testified that her biggest complaint was her left hip and impairment from her left hip. OWCP's hearing representative explained that her left hip condition was not an accepted condition. OWCP's hearing representative also noted that appellant might be eligible for an impairment to her lower extremity, due to a spinal condition.

By decision dated November 20, 2019, OWCP's hearing representative affirmed the April 30, 2019 decision.

On January 14, 2020 appellant, through counsel, requested reconsideration and submitted additional medical evidence.

In a November 25, 2019 report, Dr. Lubor Jarolimek, an orthopedic surgeon, noted that the accepted conditions included a lumbar disc displacement, contusion of left hip, contusion of finger on the right, foot sprain on the right, and abrasion or friction burn of fingers alone without infections. He related that appellant had undergone left hip total arthroplasty on June 9, 2014. Dr. Jarolimek provided a diagnosis of total left hip arthroplasty and referred to Table 16-4, Hip Regional grid, and Table 16-6, Functional history of the A.M.A., *Guides*. He assigned an impairment rating of 25 percent to the left lower extremity for the left hip arthroplasty. Dr. Jarolimek advised that appellant reached maximum medical improvement on November 25, 2019.

By decision dated January 31, 2020, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

The schedule award provisions of FECA and its implementing regulations set forth the number of weeks of compensation payable to employees sustaining permanent impairment from

⁴ A.M.A., *Guides* (6th ed. 2009).

loss or loss of use of scheduled members or functions of the body.⁵ 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. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁶ As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).⁷

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health.⁸ Under the sixth edition, the evaluator identifies the impairment for the class of diagnosis (CDX), which is then adjusted by a grade modifier for functional history (GMFH), a grade modifier for physical examination (GMPE), and/or a grade modifier for clinical studies (GMCS).⁹ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).¹⁰ It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.¹¹ However, where there is no demonstrated permanent impairment due to an accepted workplace injury, the claim is not ripe for consideration of any preexisting impairment.¹²

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish more than two percent permanent impairment of her left lower extremity, for which she previously received a schedule award.

In support of her claim for a schedule award, appellant submitted a November 25, 2019 report from Dr. Jarolimek who assigned a permanent impairment rating of 25 percent of the left lower extremity for the left hip arthroplasty. Dr. Jaromilek noted that the accepted conditions included contusion of the left hip. The record, however, reflects that appellant's claim was

⁵ 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

⁶ *Id.* at § 10.404; *see G.S.*, Docket No. 20-0210 (issued December 31, 2020); *L.T.*, Docket No. 18-1031 (issued March 5, 2019); *see also Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Chapter 3.700.2 and Exhibit 1 (January 2010).

⁸ A.M.A., *Guides* (6th ed. 2009), section 1.3, The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

⁹ *Id.* at 493-556.

¹⁰ *Id.* at 521.

¹¹ *T.W.*, Docket No. 16-1818 (issued December 28, 2017); *see B.M.*, Docket No. 09-2231 (issued May 14, 2010); *supra* note 7 at Chapter 3.700.3(a)(3) (January 2010); *Dale B. Larson*, 41 ECAB 481 (1990); *Beatrice L. High*, 57 ECAB 329 (2006) (OWCP's procedures provide that the impairment rating of a given scheduled member should include any preexisting permanent impairment of the same member or function).

¹² *M.F.*, Docket No. 16-1089 (issued December 14, 2016); *Thomas P. Lavin*, 57 ECAB 353 (2006).

accepted for right hip contusion, not left hip contusion. Furthermore, Dr. Jarolimek only addressed appellant's left hip arthroplasty, which was not an authorized procedure for an accepted condition.¹³ Thus, this report is insufficient to establish entitlement to an increased schedule award.

As appellant has not submitted medical evidence sufficient to establish permanent impairment of her left lower extremity due to her accepted employment-related conditions, the Board finds that she has not established entitlement to an increased schedule award.¹⁴

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.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish more than two percent permanent impairment of her left lower extremity, for which she previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the January 31, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 19, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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

¹³ *Id.*; see also *G.S.*, *supra* note 6; *M.D.*, (Docket No. 20-0007 (issued May 13, 2020)); *D.B.*, Docket No. 17-1444 (issued January 11, 2018).

¹⁴ See *J.D.*, Docket No. 19-1207 (issued February 3, 2020); *J.A.*, Docket No. 17-1846 (issued March 27, 2018).