

ISSUE

The issue is whether appellant has met her burden of proof to establish a ratable permanent impairment of the left lower extremity causally related to her November 28, 2016 accepted employment injury.

FACTUAL HISTORY

On December 13, 2016 appellant, then a 51-year-old part-time flexible sales, service, and distribution associate, filed a traumatic injury claim (Form CA-1) alleging that on November 28, 2016 she injured her left hip and pelvic area when she ran into a table while delivering a package in the performance of duty. She stopped work on December 13, 2016.

In a report dated January 18, 2018, Dr. Eric Rudd, a Board-certified orthopedic surgeon and OWCP referral physician, obtained a history of appellant striking her right thigh on the edge of a table on November 28, 2016. He diagnosed a right hip contusion and lumbar strain causally related to the November 28, 2016 employment incident. Dr. Rudd further found left trochanteric bursitis/iliotibial band inflammation due to the injury. He opined that, even though appellant's left thigh had sustained no direct impact, the extent of the impact on the right side and her limping after the right thigh injury had resulted in left trochanteric bursitis/iliotibial band inflammation. Dr. Rudd found that she had no work restrictions and advised that he anticipated no rating for the hip/thigh when she reached maximum medical improvement (MMI).

On February 8, 2018 OWCP accepted the claim for a contusion of the right hip, a strain of the muscle, fascia, and tendon of the lower back, and left hip trochanteric bursitis. It paid appellant wage-loss compensation for the period January 21, 2017 to January 19, 2018.

On November 20, 2018 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In an impairment evaluation dated December 3, 2018, Dr. Thomas L. Gritzka, a Board-certified orthopedic surgeon, discussed appellant's complaints of pain in her lower lumbosacral or sacroiliac area and left hip. On examination he measured range of motion (ROM) of the hips and found no paravertebral muscle spasm, intact sensation, and full strength of the lower extremities. Referencing Table 16-24 on page 549 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),³ Dr. Gritzka found that appellant had 30 percent permanent impairment of the left lower extremity due to reduced ROM of the hip.

In a supplemental report dated March 19, 2019, Dr. Rudd advised that appellant could return to work without restrictions as of the date of his evaluation. He indicated that she had "no ratable impairment for the hip/thigh issues."

On July 2, 2019 Dr. Eric M. Orenstein, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), advised that he had insufficient information to rate the extent of

³ A.M.A., *Guides* (6th ed. 2009).

appellant's permanent impairment of the left lower extremity based on Dr. Gritzka's report. He noted that Dr. Gritzka had failed to obtain three measurements or to provide the left hip ROM measurements.

OWCP determined that a conflict existed between Dr. Rudd and Dr. Gritzka regarding the extent of appellant's left lower extremity impairment. It referred her to Dr. Josef K. Eichinger, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated September 17, 2019, Dr. Eichinger discussed appellant's complaints of pain on the right side of her back radiating into her leg and bilateral hip pain particularly on the left side. On examination he found full strength and intact sensation of the lower extremities. Dr. Eichinger diagnosed a resolved right thigh contusion due to the November 28, 2016 employment injury. He disagreed that appellant had sustained trochanteric bursitis causally related to her accepted employment injury as the condition developed over time. Dr. Eichinger related, "A contusion to the thigh in an individual [who] is able to continue working and ambulating without gait abnormality at the time of injury is not a plausible cause of contralateral trochanteric bursitis." He further found that appellant's lumbar sprain and strain due to the November 28, 2016 employment injury had more probably than not resolved. Dr. Eichinger diagnosed bilateral hip osteoarthritis and attributed her hip complaints to "femoroacetabular impingement which is not a traumatically induced condition." He opined that appellant had no permanent impairment causally related to her November 28, 2016 employment injury.

By decision dated December 2, 2019, OWCP denied appellant's schedule award claim. It found that the opinion of Dr. Eichinger, the impartial medical examiner (IME), represented the special weight of the evidence and established that she had no permanent impairment due to her accepted employment injury.

On December 10, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on April 10, 2020.

By decision dated June 18, 2020, OWCP's hearing representative vacated the December 2, 2019 decision. She found that there was no conflict regarding the extent of permanent impairment between Dr. Rudd and Dr. Gritzka at the time of OWCP's referral of appellant to Dr. Eichinger, noting that Dr. Rudd had not specifically addressed the extent of any injury-related impairment. The hearing representative found that a conflict now existed between Dr. Gritzka and Dr. Eichinger regarding whether appellant sustained left hip trochanteric bursitis causally related to the accepted November 28, 2016 employment injury.

On August 26, 2020 OWCP referred appellant to Dr. Alan B. Brown, a Board-certified orthopedic surgeon, for an impartial medical examination. It provided a statement of accepted facts that set forth the accepted conditions, including left hip trochanteric bursitis. OWCP requested that Dr. Brown address whether appellant had sustained left hip trochanteric bursitis due to the November 28, 2016 employment injury and, if so, to determine the extent of any permanent impairment.

In a report dated October 15, 2020, Dr. Brown discussed appellant's history of injury and provided his review of the medical reports of record. On examination he measured ROM of the hips and spine and discussed her complaints of burning down the right leg and over the bilateral greater trochanter. Dr. Brown noted that x-rays of the left hip showed "long-standing femoral acetabular impingement with mild-to-moderate bilateral osteoarthritis, left greater than right." He diagnosed a resolved right thigh contusion as the only condition causally related to the November 28, 2016 employment injury. Dr. Brown found that appellant had not sustained left hip trochanteric bursitis causally related to the accepted employment injury. He related, "There is no mechanism of injury which could reasonably explain how a contusion of the right thigh could cause a left hip trochanteric bursitis or, for that matter, the subsequent development of a right hip trochanteric bursitis long after the subject accident." Dr. Brown opined that appellant had no residuals of her employment injury and that her complaints of bilateral hip arthritis, low back pain, and bilateral trochanteric bursitis were unrelated to her employment injury. He further asserted that she had no permanent impairment of the lower extremities as any reduced ROM of the hips was unrelated to her employment injury. Dr. Brown found that appellant had reached MMI.

By decision dated April 30, 2021, OWCP denied appellant's claim for a schedule award. It found that Dr. Brown's opinion as the IME constituted the special weight of the evidence and established that she had no ratable impairment due to her trochanteric bursitis as he had determined that the condition was unrelated to her accepted employment injury.

On May 10, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on August 16, 2021.

By decision dated November 1, 2021, OWCP's hearing representative affirmed the April 30, 2021 decision.

LEGAL PRECEDENT

The schedule award provision of FECA,⁴ and its implementing federal regulations,⁵ 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. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*, published in 2009.⁶ The Board has approved the use by

⁴ *Supra* note 2.

⁵ 20 C.F.R. § 10.404.

⁶ For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also id.* at Chapter 3.700, Exhibit 1 (January 2010).

OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.⁷

OWCP bears the burden of proof to justify rescission of acceptance based on new evidence, legal argument, and/or rationale.⁸ Probative and substantial positive evidence or sufficient legal argument must establish that the original determination was erroneous. OWCP must also provide a clear explanation of the rationale for rescission.⁹

ANALYSIS

The Board finds that the case is not in posture for decision.

OWCP accepted that appellant sustained a right hip contusion, back strain, and left hip trochanteric bursitis due to a November 28, 2016 employment injury. Appellant requested a schedule award. After development, OWCP found that a conflict in medical opinion existed between Dr. Gritzka, her physician, and Dr. Eichinger, an OWCP referral physician, regarding whether she had sustained the accepted condition of left hip trochanteric bursitis. It referred appellant to Dr. Brown for an impartial medical examination. OWCP requested that Dr. Brown determine whether her left hip trochanteric bursitis was related to her accepted employment injury and, if so, to evaluate the extent of any permanent impairment of the left lower extremity.

On October 15, 2020 Dr. Brown opined that appellant had sustained only a right thigh contusion that had now resolved as a result of her November 28, 2016 employment injury. He asserted that the mechanism of injury did not support a diagnosis of left hip trochanteric bursitis. Dr. Brown found that appellant's current complaints of bilateral hip arthritis, low back pain, and bilateral trochanteric bursitis were not employment related. He concluded that she had no permanent impairment of the lower extremities as any loss of ROM was not related to her accepted employment injury.

Based on Dr. Brown's opinion, OWCP denied appellant's schedule award claim, finding that his report constituted the special weight of the evidence as IME and established that she had not sustained the accepted condition of left hip trochanteric bursitis. The Board finds, however, that OWCP failed to follow its established procedures for rescinding the acceptance of a condition. OWCP's procedures provide that if, after proper development, it finds that the original decision was issued in error, the claims examiner must issue a proposed and final decision rescinding the original finding.¹⁰ Its procedures further provide that a rescission decision should contain a brief background of the claim, discuss the evidence on which the original decision was based, and explain why OWCP finds that the decision should be rescinded. The evidence used to rescind the

⁷ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

⁸ *See D.P.*, Docket No. 18-1213 (issued July 30, 2020); *L.G.*, Docket No. 17-0124 (issued May 1, 2018).

⁹ *See W.H.*, Docket No. 17-1390 (issued April 23, 2018).

¹⁰ *Supra* note 6 at Chapter 2.1400.19(b) (February 2013); *see also D.P.*, *supra* note 8.

claim should be thoroughly discussed so that it is clear to the reader how the case was incorrectly adjudicated and why the original decision is now being invalidated.¹¹

OWCP did not follow the specific procedures for a rescission decision.¹² It failed to notify appellant that the accepted condition of left hip trochanteric bursitis was being rescinded or acknowledge that it held the burden of proof for rescinding an accepted condition. The Board thus finds that OWCP failed to follow its procedures to determine whether it should rescind acceptance of her claim prior to denying her schedule award claim based on its finding that she had not sustained the accepted condition of left trochanteric bursitis. Consequently, the Board will remand the case for appropriate further development, to be followed by a *de novo* decision regarding whether appellant sustained a permanent impairment of the left lower extremity.

CONCLUSION

The Board finds that the case is not in posture for decision.

¹¹ *Id.* at Chapter 2.1400.19(d); *see also* D.S., Docket No. 17-0250 (issued August 29, 2017).

¹² *See* D.S., *id.*; S.R., Docket No. 12-1401 (issued December 11, 2012).

ORDER

IT IS HEREBY ORDERED THAT the November 1, 2021 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 21, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

A handwritten signature in black ink, appearing to read "J. D. McGinley", written in a cursive style.

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board