

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

HERMON W. BLACKMON, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
North Little Rock, AR, Employer**

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**Docket No. 05-1085
Issued: December 8, 2005**

Appearances:
Hermon W. Blackmon, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 18, 2005 appellant filed a timely appeal from the December 23, 2004 merit decision of the Office of Workers' Compensation Programs, which denied his claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.¹

ISSUE

The issue is whether appellant is entitled to a schedule award for his accepted L5 disc condition.

¹ Appellant does not appeal the Office's April 4, 2005 nonmerit decision denying his request for reconsideration.

FACTUAL HISTORY

On September 5, 2002 appellant, then a 40-year-old custodian, filed a claim alleging that his bilateral degenerative joint disease and L5 lumbar disc injury was a result of the physical requirements of his job over a prolonged period. On September 16, 2002 he stated:

“I have known about my having degenerative joint disease in my hips since 1992.... This condition had to have occurred by the constant bending, carrying, walking, stooping and lifting that a custodian does in performing the task assigned. I was never aware of any back injuries, I was never told that the hip arthritis had any relationship to my back injury that I now have.”

Duty status reports described pain in the back and hip joints. A September 16, 2002 magnetic resonance imaging (MRI) scan of the lumbar spine revealed lumbar spondylosis. Appellant’s attending family practitioner, Dr. J. Richard Duke, diagnosed lumbar and hip pain and an L4-5 disc herniation.

In a decision dated October 18, 2002, the Office denied appellant’s claim for compensation on the grounds that the evidence did not establish a causal relationship between the accepted employment factors and his diagnosed condition.

On or about November 20, 2002 appellant requested reconsideration:

“My medical history of having degenerative joint disease in both hips relate back to the time frame of June 15, [19]83 and at that time, I really did n[o]t know what exactly it was that caused me to fall and to hurt in this [way]. Enclosed is some medical evidence that I would like for you to read to hopefully clarify the denial that you gave me. I am working with my doctors to hopefully come up with a solution on my conditions. The VA [Veterans Administration] doctor requested yet another MRI [scan] on my hips about a week ago and I do n[o]t know what they have found until I go to the appointment. Please reconsider your decision and evaluate the cause and I am sure that you will find that I am not fabricating anything. I have an FMLA [Family Medical Leave Act] packet that describes the nature of my injury in the hips and now there is one for my back.”

Appellant submitted a March 17, 1998 treatment note relating the following history:

“36-year-old male presents with hip pain since 1983. He was told at that time that he was having muscle spasms. In 1991 [and 199]2 he was diagnosed with degenerative joint disease while working in Germany. He was placed on medication for arthritis at that time but had to decline it secondary to gastritis. He also received 2 or 3 cortisone shots in each hip while in Germany 1992 [and 19]93. Patient states that his hip is gradually getting worse with sudden episodes of shooting pain down his left leg associated with weakness.”

Findings on physical examination included limited painful internal and external rotation and abduction and absent hip contracture. X-rays were reported to show bilateral degenerative joint disease. Appellant submitted other treatment notes as far back as April 12, 1995 showing

chronic hip pains and a diagnosis of chronic hip arthritis or degenerative joint disease and bilateral hips. A November 1, 2002 note diagnosed lumbar spinal spondylosis and hip pain, most likely due to avascular necrosis. A November 14, 2002 note stated: “[Appellant’s] low back pain appears to be aggravated by work-related injury.”

In a decision dated January 24, 2003, the Office reviewed the merits of appellant’s claim and denied modification of its prior decision. The Office found that, although the medical evidence supported that he had a diagnosed condition of bilateral chronic hip arthritis and degenerative joint disease dating back to 1983, the medical evidence did not establish that employment factors caused or contributed to this medical condition.

Appellant again requested reconsideration. He submitted a November 24, 2002 report from Dr. Duke, who noted appellant’s significant hip complaints:

“He stated [that] the pains began in 1983 and have increased in severity since then. The pains are greater on the left side than the right side. They feel like an ice pick stabbing him in the hip with resulting decreased range of motion in that hip. They last for 15 [to] 20 minutes. He stated that he had no previous history of a back injury.”

On the issue of causal relationship, Dr. Duke stated:

“Regarding whether or not [appellant] received an injury at his current place of employment which is responsible for his current lumbar and hip abnormalities, I do not have enough information to make this determination. He has a long history of symptoms extending back to 1983 when he was in the military. However, I do not know whether or not his current lumbar and hip abnormalities existed back in 1983. He has certainly been injured in his current occupation. However, I am unable to determine whether his job injuries have cause[d] his current lumbar and hip abnormalities. It may be that his lumbar and hip abnormalities have been slowly developing over the years causing increased likelihood for the progressive frequency of his current symptoms.”

In a December 9, 2002 report, Dr. James R. McCoy related appellant’s history, findings on examination and noted his impression that appellant had moderate osteoarthritis in both hips and acute low back pain from the September 28, 2002 lifting incident at work.

On July 22, 2003 the Office accepted appellant’s claim for an aggravation of bilateral joint disease (arthritis) at L5 lumbar disc.

On April 4, 2004 appellant filed a claim for a schedule award. On February 10, 2004 Dr. Ronald N. Williams, a Board-certified neurosurgeon, reported that appellant had a mild degenerative disc disease and a five percent impairment of the whole person due to the injury to the lumbar spine with mild degenerative changes. On May 23, 2004 Dr. Johnny K. Smelz, a Board-certified specialist in physical medicine and rehabilitation, reported that radiographs showed bilateral degenerative joint disease at the hips, mild on the right and moderate on the left. She rated appellant’s impairment as three percent of the whole person due to a left hip cartilage interval of three millimeters.

The Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Thomas P. Rooney, a Board-certified orthopedic surgeon, for a second opinion. On October 20, 2004 he related appellant's complaints and history. Dr. Rooney described findings on examination and the results of previous radiographic studies, including studies of the hips. He stated:

"X-rays of the hips done on January 6, [20]00, as well as September 4, [20]02 show moderate degenerative changes in both hip joints with periarticular acetabular cysts and sprain around the base of the femoral heads and progressive narrowing of the hip joints."

* * *

"He does have objective findings of degenerative disc disease in the lumbosacral spine, as well as degenerative arthritis in both hips, which will restrict his activities in the usual fashion. Although he complains of left low back and leg pain, neither physical examination or electrical studies confirm spinal cord or nerve root compression. Therefore, there is no impairment rating."

On November 17, 2004 the Office referred the case to a medical adviser for a review of Dr. Rooney's report and a calculation of permanent impairment. The Office advised that the accepted condition was aggravation of bilateral joint disease. On December 6, 2004 the Office medical adviser reported that appellant had no lower extremity impairment. He stated:

"I have reviewed the [statement of accepted facts] (September 15, [20]04) and the impairment evaluation from Dr. Thomas P. Rooney, (MD-[o]rthopedics). [Maximum medical improvement] would be the date of the evaluation, *i.e.*, October 20, [20]04.

"Dr. Rooney reports lumbar degenerative disc disease, degenerative arthritis of the hips, lumbar pain with radiation, no lower extremity sensory or motor deficits, normal [electromyogram/nerve conduction studies], no evidence of lower extremity impairment and therefore no impairment [zero percent] of the lower extremities.

"Based upon the report from Dr. Rooney and the fifth edition [American Medical Association,] *Guides [to the Evaluation of Permanent Impairment (A.M.A., Guides)]* I am able to make the following determination:

"There is [0 percent] lower extremity impairment."

In a decision dated December 23, 2004, the Office denied appellant's claim for a schedule award.

On appeal, appellant contends that the Office did not acknowledge that he injured his hips. He noted that his employee files showed that he had leave under the Family Medical Leave Act approved for his hip condition.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act² authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.³

ANALYSIS

No schedule award is payable for a member, organ or function of the body not specified in the Act or in the implementing regulations.⁴ Neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back and no claimant is entitled to such an award.⁵ The Act explicitly excludes the back from the definition of "organ."⁶ Dr. Williams, a Board-certified neurosurgeon, reported that appellant had a mild degenerative disc disease and a five percent impairment of the whole person due to injury to the lumbar spine with mild degenerative changes. However, there is no basis for the payment of a schedule award for whole man impairment.⁷ Rather, section 8107 provides for payment of compensation for loss of use of specified members of the body.

Amendments to the Act provide claimants with a schedule 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. As the schedule award provisions of the Act 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.⁸ Dr. Rooney, the second opinion orthopedic surgeon, reported that neither physical examination nor electrical studies confirmed a spinal cord or nerve root compression. There appears to be no physiological basis for a lower extremity impairment rating in this case. No physician has reported that appellant's accepted low back condition is causing permanent impairment to the lower extremities. The medical evidence of record is insufficient to establish entitlement to a schedule award because there is no evidence of permanent impairment to the

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999). Effective February 1, 2001 the Office began using the A.M.A., *Guides* (5th ed. 2001).

⁴ *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies equally to body members that are not enumerated in the schedule provision as it read before the 1974 amendment and to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment); see 20 C.F.R. § 10.404 (1999) (current regulations).

⁵ *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

⁶ 5 U.S.C. § 8101(19).

⁷ *See Phyllis F. Cundiff*, 52 ECAB 439 (2001).

⁸ *Rozella L. Skinner*, 37 ECAB 398 (1986).

lower extremities originating from the accepted L5 disc condition. The Board will affirm the Office's denial of a schedule award.⁹

CONCLUSION

The Board finds that the evidence does not establish a permanent impairment to appellant's lower extremities originating from the accepted L5 disc condition. The Office properly denied a schedule award for such impairment.

ORDER

IT IS HEREBY ORDERED THAT the December 23, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 8, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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

⁹ The Office has not issued a final decision on appellant's entitlement to a schedule award for permanent impairment to his lower extremities due to the chronic arthritis or degenerative joint disease in his hips, which Dr. Smelz addressed in her May 23, 2004 report. This aspect of the claim is not presently before the Board. *See* 20 C.F.R. § 501.2(c).