

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

D.A., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Columbus, OH, Employer)

**Docket No. 13-718
Issued: June 20, 2013**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 6, 2013 appellant, through his representative, filed a timely appeal from a January 14, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied his claim for a schedule award. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant established permanent impairment related to his accepted injuries.

FACTUAL HISTORY

This case was previously before the Board. By decision dated February 22, 2012, the Board affirmed OWCP's April 28, 2011 decision that denied appellant's claim that his left hip

¹ 5 U.S.C. § 8101 *et seq.*

avascular necrosis (AVN) condition and subsequent surgery or disability were causally related to the accepted dog bite injury of August 24, 2009.² The facts of the case as set forth in the prior decision are hereby incorporated by reference.

On February 10, 2010 OWCP accepted appellant's claim for dog bites to the left upper thigh and right shin. On April 14, 2010 it also accepted left thigh sprain, left knee sprain and trochanteric bursitis of the right thigh. On May 20, 2010 appellant underwent left hip replacement surgery. He returned to light duties in mid-July 2010.

On June 17, 2011 appellant requested a schedule award, but no relevant medical information was provided. In a June 27, 2011 letter, OWCP requested additional information from his physician, Dr. Thomas Scharschmidt, a Board-certified orthopedic surgeon.

OWCP received two reports dated July 20, 2011 from Dr. Scharschmidt pertaining to appellant's AVN condition. Dr. Scharschmidt noted findings on examination and diagnosed AVN. He opined that appellant had an underlying diagnosis of AVN which may have been exacerbated by a fall at work. Dr. Scharschmidt noted that since appellant was not seen until May 2010, it was difficult to determine the role the fall played in his condition. He also noted that appellant had AVN of the femoral head which became acutely worse after his fall in August 2009. Appellant was seen in May 2010 with the diagnosis of AVN with subchondral collapse and underwent a total hip replacement in May 2010 for that condition. Dr. Scharschmidt stated that appellant's pain became acutely worse after his fall and it was feasible that the fall caused exacerbation of his preexisting avascular necrosis or possibly the subchondral collapse leading to surgery.

By decision dated September 7, 2011, OWCP denied appellant's schedule award claim finding that the medical evidence did not address how the accepted conditions related to the August 24, 2009 dog bite caused or contributed to his left avascular necrosis.

Under claim file number xxxxxx973, OWCP accepted a September 8, 2011 work injury for left knee and hand sprains and open wound of left knee. Appellant did not lose time from work on account of the injury. Claim file number xxxxxx973 was subsequently doubled into the instant claim.

On September 13, 2011 appellant, through counsel, requested a telephonic hearing, which was held on December 15, 2011.

Appellant submitted medical records and diagnostic test results from The Ohio State University Medical Center and reports from Dr. Matthew Beal, a Board-certified orthopedic surgeon, and Dr. Martin Fritzhand, a Board-certified urologist.

In a February 1, 2012 report, Dr. Fritzhand reviewed a history of injury and set fourth findings on examination. He opined that appellant had reached maximum medical improvement by June 2011. Under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Dr. Fritzhand opined that appellant

² Docket No. 11-1645 (issued February 22, 2012).

sustained 31 percent impairment of the left lower extremity and 12 percent impairment of the right lower extremity as a result of the August 24, 2009 work injury. He stated that total hip replacement under Table 16-4 of the A.M.A., *Guides* was used to assess the left hip impairment and AVN under Table 16-4 of the A.M.A., *Guides* was used to assess the right hip impairment.

By decision dated February 29, 2012, OWCP's hearing representative set aside the September 7, 2011 decision and remanded the case for further development regarding the nature and extent of appellant's employment-related permanent impairment.

On remand, OWCP forwarded Dr. Fritzhand's February 1, 2012 report, a statement of accepted facts and the case record to an OWCP medical adviser for review. In a March 22, 2012 report, the medical adviser agreed with Dr. Fritzhand's February 1, 2012 impairment rating and stated that appellant reached maximum medical improvement in June 2011.

On May 2, 2012 OWCP determined a second opinion was necessary as both Dr. Fritzhand and OWCP's medical adviser provided an impairment rating based on appellant's underlying AVN condition which was not accepted as employment related.

OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Manhal A. Ghanma, a Board-certified orthopedic surgeon, to determine the nature and extent of any employment-related lower extremity impairment. In a May 22, 2012 report, Dr. Ghanma noted the history of injury and provided findings on examination. He reported left knee range of motion from 0 to 120 degrees flexion, with multiple small scars from dog bites, which had healed. Dr. Ghanma noted that the healed five scars on the left knee measured two centimeters (cm), one cm, two cm, one cm and 1 cm. There was no swelling or instability of the left knee and appellant's gait was normal. The right knee range of motion was from 0 to 130 degrees of flexion. The range of motion of the right hip was 0 to 110 degrees of flexion, 25 degrees internal rotation, 30 degrees external rotation, 30 degrees abduction and 20 degrees adduction. The left hip was not tested for range of motion given the total hip replacement. It was noted that there was no thigh scar from any dog bite in the left thigh region. Dr. Ghanma opined that appellant reached maximum medical improvement from the August 31, 2009 injury by November 30, 2009 and was likely at maximum medical improvement for the August 8, 2011 injury by November 8, 2011. Based on the sixth edition of the A.M.A., *Guides*, he also opined that appellant had zero percent (no) impairment due to the accepted conditions of left upper thigh and right shin sprain, left knee sprain and right thigh/hip throchoneritic bursitis, left knee sprain and open wound of the left knee (dog bite) as they fell into class 0, which represented zero percent lower extremity impairment. Dr. Ghanma utilized Table 16-3, page 509-11 of the A.M.A., *Guides* for evaluation of the knee and thigh conditions and Table 16-54, page 512-15 of the A.M.A., *Guides* for evaluation of the throchoneritic bursitis of the right hip. He noted that appellant had AVN of both hips that likely preexisted the work injury and his impairments and limitations were related to the left total hip replacement and right hip AVN.

In a July 9, 2012 report, OWCP's medical adviser reviewed Dr. Ghanma's May 22, 2012 report and agreed that there was no permanent impairment to the lower extremities related to the accepted employment-related conditions.

Appellant stopped work and underwent right total hip arthroplasty on June 28, 2012.

By decision dated July 19, 2012, OWCP denied a schedule award finding that appellant had no permanent impairment related to the accepted employment injuries.

In a July 23, 2012 letter, appellant, through counsel, requested a telephonic hearing, which was held on November 13, 2012. Counsel argued that since the AVN of the hips was a preexisting condition, it should have been considered as the basis for a schedule award.

In an August 8, 2012 letter, Dr. Beal stated that he first saw appellant on May 24, 2011 with diagnosis of AVN of the right femoral head with mild collapse and mild secondary osteoarthritis of the right hip. On March 9, 2012 appellant reported his pain had increased considerably due to walking as a mail carrier. Repeat x-rays showed a progression of the AVN in the right hip with collapse of the femoral head. Dr. Beal opined that appellant's AVN and osteoarthritis of the right hip were the result of the 2009 work injury and from day to day duties of a mail carrier.

By decision dated January 14, 2013, OWCP's hearing representative affirmed the July 19, 2012 decision.

LEGAL PRECEDENT

An employee seeking compensation under FECA has the burden of establishing the essential elements of his or her claim, including that he or she 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.³

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 appellant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of appellant, 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 appellant.⁴

The schedule award provision of FECA⁵ and its implementing regulations⁶ 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. The A.M.A., *Guides* has

³ See *Bobbie F. Cowart*, 55 ECAB 476 (2004). In *Cowart*, the employee claimed entitlement to a schedule award for permanent impairment of her left ear due to employment-related hearing loss. The Board determined that appellant did not establish that an employment-related condition contributed to her hearing loss and, therefore, it denied her claim for entitlement to a schedule award for the left ear.

⁴ *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404 (1999).

been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁷ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁸ 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.⁹

ANALYSIS

OWCP accepted that on August 24, 2009 appellant sustained a dog bite to the left upper thigh and right shin, left thigh sprain, left knee sprain and throchoneritic bursitis of the right thigh during the performance of duty. It also accepted, under claim file number xxxxxx973, that on September 8, 2011, he sustained left knee and hand sprains and an open wound of the left knee during the performance of duty. Claim file number xxxxxx973 was combined into the current claim. Appellant requested that his claim be accepted for a left total hip arthroplasty due to AVN of his hips. The Board, in its February 22, 2012 decision, affirmed the denial of the conditions of AVN of the hip and total left hip replacement surgery.¹⁰ OWCP subsequently denied appellant's schedule award claim, finding that the medical evidence did not establish that he had any impairment related to the accepted employment conditions. The Board finds that the record is not sufficient to establish that he has any impairment caused by his accepted conditions.

The impairment opinion provided by Dr. Fritzhand in his February 1, 2012 report was based on appellant's underlying AVN condition, a nonaccepted condition pertaining to his hips. Appellant must establish impairment to a scheduled member caused by the accepted condition before impairment due to a preexisting or subsequent condition can be assessed.¹¹ OWCP properly referred him to Dr. Ghanma for a second opinion examination for a determination as to whether appellant had any impairment due to his accepted conditions.

In a May 22, 2012 report, Dr. Ghanma reviewed the record and provided examination findings. He determined that the accepted injury-related conditions had resolved. Under the A.M.A., *Guides*, Dr. Ghanma determined that there was no permanent impairment due to the accepted conditions to the thighs, shins or knees. Under the appropriate tables in the A.M.A., *Guides*, he found that the resolved accepted conditions were class 0, which represented zero percent lower extremity impairment. OWCP's medical adviser reviewed Dr. Ghanma's report and concurred with the conclusion. The Board finds that OWPC properly relied upon the report of Dr. Ghanma and its medical adviser to deny appellant's schedule award claim. Dr. Ghanma provided a review of the medical evidence and examination findings and provided reasoning for his conclusion that appellant had sustained no permanent impairment due to the accepted

⁷ *Id.*

⁸ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁹ See *Dale B. Larson*, 41 ECAB 481, 490 (1990).

¹⁰ Appellant underwent a right total hip arthroplasty on June 28, 2012.

¹¹ See generally *Thomas P. Lavin*, 57 ECAB 353 (2006).

injuries.¹² Furthermore, there is no report from appellant's physicians which indicate that the accepted conditions are still active.

The Board also notes that in August 2011 the Secretary of Labor added skin to the list of scheduled members. A schedule award for the skin (205 weeks) may be paid for injuries occurring on or after September 11, 2001.¹³ While Dr. Ghanma noted that appellant had five small scars on the left knee, measuring from one to two cm, he noted that they had healed. In evaluating permanent impairment of the skin, pursuant to Table 8-2 of the A.M.A., *Guides*,¹⁴ physical examination findings, with symptoms, must be present, before a skin disorder is ratable. As Dr. Ghanma reported that the scars had healed, and did not report any ongoing symptoms, the evidence of record does not establish that appellant has a ratable permanent impairment of the skin.

Regarding appellant's bilateral hip conditions, Dr. Ghanma stated that appellant's AVN of both hips preexisted the work injury. Appellant must establish impairment to a scheduled member caused by the accepted condition before an impairment due to a preexisting or subsequent condition can be assessed.¹⁵ His treating physicians, Dr. Scharschmidt and Dr. Beal opined that appellant's hip conditions were work related, but neither physician offered adequate medical rationale to explain how his dog bite injury to the knee, shins or thighs contributed to AVN of the hips. Dr. Scharschmidt's opinion that it was feasible that the work incident exacerbated the conditions is speculative, at best. Dr. Beal offered insufficient medical rationale to support his conclusion that appellant's hip conditions were work related. While appellant has evidence of preexisting avascular necrosis, which Dr. Ghanma noted during his second opinion evaluation, which resulted in total hip replacement and osteoarthritis, these conditions have not been accepted. As previously noted, he must establish impairment to a scheduled member caused by the accepted condition before impairment due to a preexisting or subsequent condition can be assessed.

For these reasons, appellant did not show that he was entitled to schedule award compensation and OWCP properly denied his claim.

On appeal, appellant argues OWCP's decision is contrary to fact and law. There is no probative medical evidence of record establishing that he sustained a permanent impairment to either lower extremity resulting from his accepted conditions.

¹² *Michael S. Mina*, 57 ECAB 379 (2006).

¹³ 20 C.F.R. § 10.404(b); Federal (FECA) Procedure Manual, Part 2, *supra* note 7 at 2.808.5(c)(a) Chapter 8 in the A.M.A., *Guides* outlines specific criteria to be considered when calculating permanent impairment of the skin. In assessing skin impairment, the physician must evaluate the severity of the condition, the frequency, intensity and complexity of the medical condition and treatment regimen and the impact of the condition on the ability to perform Activities of Daily Living (ADLs). ADLs include bathing, dressing, eating, personal hygiene, *etc.* See also *L.M.*, Docket No. 13-476 (issued May 1, 2013).

¹⁴ A.M.A., *Guides*, Table 8-2 166.

¹⁵ See generally *Thomas P. Lavin*, 57 ECAB 353 (2006).

Appellant may request a schedule award or an increased schedule award based on evidence of a new exposure or medical evidence showing a progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish entitlement to a schedule award for permanent impairment.

ORDER

IT IS HEREBY ORDERED THAT the January 14, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 20, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board