United States Department of Labor
Employees' Compensation Appeals Board

J.A., Appellant	)	
and	)	**Docket No. 16-1458**
	)	**Issued: December 16, 2016**
U.S. POSTAL SERVICE, MAIN POST OFFICE, Madison, WI, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 20, 2016 appellant filed a timely appeal from a November 23, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from November 23, 2015, the date of OWCP's last decision was May 21, 2016, a Saturday; consequently, the period for filing the appeal ran to the next business day, Monday, May 23, 2016. Since using May 25, 2016, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is May 20, 2016, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has more than 37 percent permanent impairment of each lower extremity, for which he received schedule awards.

FACTUAL HISTORY

This case has previously been before the Board relative to schedule awards.[3] The facts and circumstances as set forth in the Board's prior decision and order are incorporated herein by reference. The facts relevant to the instant appeal are set forth below.

On January 12, 1994 appellant, then a 51-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he sustained deterioration of the hips causally related to factors of his federal employment. OWCP accepted the claim for a permanent aggravation of bilateral hip osteoarthritis, sacroilitis, and lumbosacral spondylosis.[4]

Appellant underwent a left hip arthroplasty in 1991 and a right hip arthroplasty in 1997.[5] He retired from the employing establishment in August 1997. OWCP also accepted that appellant sustained right hip strain under file number xxxxxx564.

In a decision dated January 27, 2000, OWCP granted appellant a schedule award for 37 percent permanent impairment of the right lower extremity due to his total hip replacement. Appellant requested reconsideration. By decision dated November 21, 2000, OWCP denied modification of its January 27, 2000 schedule award decision.

OWCP, by decision dated December 4, 2000, granted appellant a schedule award for 37 percent permanent impairment of the left lower extremity as a result of his total hip replacement. Appellant requested an oral hearing. On July 9, 2001 an OWCP hearing representative affirmed the December 4, 2000 decision.

[3] Docket No. 02-0124 (issued July 22, 2002).

[4] By decision dated July 27, 1994, OWCP denied appellant's occupational disease claim as the medical evidence was insufficient to show that he sustained a diagnosed condition casually related to the accepted work factors. On March 24, 1995 an OWCP hearing representative conducted a preliminary review and found that the case was not in posture for a hearing. He determined that newly submitted medical evidence was sufficient to warrant further development.

[5] In a November 29, 1995 decision, OWCP found that appellant had not established that his left hip replacement resulted from his work injury. On May 20, 1996 an OWCP hearing representative set aside the November 29, 1995 decision. On October 2, 1996 OWCP again found that appellant did not require a left hip replacement as a result of his accepted work injury. On June 25, 1998 the Board reversed in part and remanded in part the October 2, 1996 decision. *Order Granting Reversal in Part and Remand in Part*, Docket No. 97-0425 (issued June 25, 1998). By decision dated August 27, 1999, OWCP determined that appellant's left hip replacement was not due to his accepted work injury. On May 8, 2000 a hearing representative set aside the August 27, 1999 decision. On August 22, 2000 Dr. Alan C. Farries, a Board-certified orthopedic surgeon and OWCP referral physician, advised that appellant's work duties aggravated his hip condition possibly accelerating the need for total hip replacements.

Appellant appealed to the Board. By decision dated July 22, 2002, the Board affirmed OWCP's finding that appellant had no more than 37 percent permanent impairment of each lower extremity.[6]

On February 4, 2009 an OWCP medical adviser recommended that OWCP authorize a fusion at L4-5 and expand acceptance of appellant's claim to include degenerative spondylolisthesis at L4-5 and degeneration of a lumbar disc.

A December 2, 2010 nerve conduction velocity (NCV) study of appellant's lower extremities revealed a "systemic probable axonal polyneuropathy." A December 14, 2010 electromyogram (EMG) and NCV study of the legs and lower back showed "widespread denervation consistent with lesions of the L4, L5, and S1 roots."

On June 7, 2011 appellant underwent a bilateral decompression, fusion, and internal fixation from L3 to L5 with instrumentation.

In a February 20, 2014 impairment evaluation, Dr. Jason Cormier, a neurosurgeon, opined that appellant had reached maximum medical improvement. He discussed the history of a lumbar fusion with arthrodesis resulting in "chronic leg and nerve damage." Dr. Cormier opined that appellant had 20 to 23 percent whole person impairment using the diagnosis-based tables of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) relevant to the lumbar spine.

OWCP, on August 1, 2014, requested that Dr. Cormier evaluate whether appellant had permanent impairment of his lower extremities using the A.M.A., *Guides*. It specified that he should use *The Guides Newsletter,* Rating Spinal Nerve Impairment Using the Sixth Edition (July/August 2009) to rate an impairment of the lower extremities originating from the spinal nerves. No response was received.

On October 28, 2014 OWCP referred appellant to Dr. Brett Rothaermel, a Board-certified physiatrist, for an impairment evaluation.

In a report dated November 17, 2014, Dr. Rothaermel noted that appellant was not able to provide details of his May 16, 1989 injury and described a history of "multiple falls since his original injury." He reviewed appellant's history of a laminectomy, decompression, and fusion on June 7, 2011 at L3 through L5 and hip replacements on the left in 1991 and right in 1997. Dr. Rothaermel discussed appellant's complaints of pain, numbness, and weakness in the right leg and numbness in the left leg. On examination he found no edema, loss of sensation, or reduced strength of the bilateral lower extremities and mild motion loss of the hips consistent with his hip replacements. Dr. Rothaermel found a positive straight leg raise on the right. He noted that FECA did not provide for impairment ratings of the back unless it caused an impairment of the extremities. Dr. Rothaermel related:

> "The evaluator identifies the nerve involved and then identifies the severity of the sensory and/or motor deficit. [Appellant] does have objective findings of

[6] *Supra* note 3.

> denervation changes on electrodiagnostic testing. However, my clinical examination revealed normal lower extremity strength and sensation in the lower extremities. Normal lower extremity strength and sensation has also been consistently documented by his treating doctors as well in recent clinical notes since recovering from his surgery. Unfortunately, there is no evidence of impairment involving either lower extremity peripheral or spinal nerves as defined by *The Guides* impairment rating methodology."

Dr. Rothaermel opined that appellant had no impairment of the lower extremities due to his accepted conditions.

An OWCP medical adviser reviewed Dr. Rothaermel's report on December 18, 2014 and concurred with his finding that appellant did not have a ratable impairment of the lower extremity from a spinal nerve pursuant to *The Guides Newsletter*. Dr. Rothaermel noted that appellant previously had received schedule awards for 37 percent permanent impairment of each lower extremity.

By decision dated April 20, 2015, OWCP denied appellant's claim for an increased schedule award.

On May 27, 2015 appellant requested a review of the written record before an OWCP hearing representative. He disagreed with Dr. Rothaermel's finding, asserting that his injury caused nerve damage. Appellant maintained that he experienced a consequential injury as a result of his right hip surgery and that his claim should be expanded. He asserted that he had more than 37 percent permanent impairment as a result of his hip replacements.

In a decision dated November 23, 2015, an OWCP hearing representative affirmed the April 20, 2015 decision. He found that the opinion of Dr. Rothaermel constituted the weight of the evidence and established that appellant had no more than the previously awarded 37 percent permanent impairment of each lower extremity.

On appeal appellant disagrees with Dr. Rothaermel's finding that he did not have an impairment of the lower extremities. He relates that he experienced difficulty with falls after his right hip surgery and that he underwent back surgery due to a pinched nerve and reduced muscle of the left leg. Appellant asserts that he sustained a consequential injury as a result of an unsatisfactory result from his right hip replacement. He further maintains that he had more than 37 percent permanent impairment of the right hip due to his consequential injury to his back.

LEGAL PRECEDENT

The schedule award provision of FECA,[7] and its implementing federal regulation,[8] 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,

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404.

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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[9] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[10]

The sixth edition requires identifying the impairment Class of Diagnosis (CDX) condition, which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).[11] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter*, "Rating Spinal Nerve Impairment Using the Sixth Edition" (July/August 2009) is to be applied.[12]

ANALYSIS

OWCP accepted that appellant sustained a permanent aggravation of bilateral hip osteoarthritis, sacroilitis, and lumbosacral spondylosis. He underwent a total left hip replacement in 1991 and a total right hip replacement in 1997. OWCP granted appellant schedule awards for 37 percent permanent impairment of each leg resulting from the total hip replacements. By decision dated July 22, 2002, the Board affirmed OWCP's finding that he had no more than 37 percent impairment of each lower extremity.

Appellant underwent a bilateral L3 to L5 decompression, fusion, and internal fixation on June 7, 2011. He subsequently submitted an impairment evaluation from Dr. Cormier. Dr. Cormier, in a report dated February 20, 2014, found that appellant had 20 to 23 percent whole person impairment. He referenced the diagnosis-based tables of the A.M.A., *Guides* relevant to determining impairments of the lumbar spine. FECA, however, does not authorize schedule awards for impairments of the whole person or spine.[13] Consequently, Dr. Cormier's report is of little probative value as it is not in accordance with the standards adopted by OWCP.[14]

[9] 20 C.F.R. § 10.404(a).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[11] A.M.A., *Guides* 494-531.

[12] *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also* Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[13] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); *see J.G.*, Docket No. 13-0223 (issued April 15, 2013).

[14] *See L.G.*, Docket No. 14-1786 (issued December 10, 2014); *James Kennedy, Jr.*, 40 ECAB 620 (1989).

OWCP requested that Dr. Cormier evaluate the extent of any lower extremity impairment arising from appellant's back condition using *The Guides Newsletter*. He did not, however, respond to the request. OWCP thus referred appellant to Dr. Rothaermel for a second opinion examination. In a report dated November 17, 2014, Dr. Rothaermel reviewed his history of total hip replacements and a laminectomy and fusion at L3 through L5. He found that appellant had no swelling, reduced sensation, or loss of strength in the lower extremities bilaterally but had mild loss of motion from his total hip replacements. On examination Dr. Rothaermel found a positive straight leg raise. He reviewed the method for evaluating an impairment of the lower extremities arising from a spinal nerve, noting that the evaluator identified both the affected nerve and the extent of any sensory or motor deficit. Dr. Rothaermel found that, while appellant had objective findings on electrodiagnostic testing, he had normal sensory and strength findings on examination of his legs. He consequently concluded that appellant had no impairment of either lower extremity due to his back condition. On December 18, 2014 an OWCP medical adviser concurred with Dr. Rothaermel's finding that he had no ratable impairment arising from a spinal nerve under the provisions of *The Guides Newsletter*.

The Board finds that Dr. Rothaermel and OWCP's medical adviser properly determined that appellant had no ratable lower extremity impairment originating from a spinal nerve. Electrodiagnostic results alone are not sufficient to establish impairment of the lower extremity.[15] Without objective evidence of sensory and/or motor deficits on neurological examination, appellant has no impairment under *The Guides Newsletter*.[16]

On appeal appellant maintains that since undergoing right hip surgery he had problems with falling. His back surgery caused a loss of left leg muscle mass. Appellant maintains that his physician determined that he sustained nerve damage. He has the burden, however, to submit probative medical evidence showing more than 37 percent permanent impairment of each leg.[17] Appellant did not submit such evidence and thus did not meet his burden of proof.

Appellant additionally contends that he has more than 37 percent permanent impairment of his right hip due to a poor result from his hip replacement. He did not, however, submit any evidence addressing the extent of his hip impairment or showing a greater impairment than permanently awarded.

Appellant asserts that he sustained a consequential injury due to his right hip replacement. The Board's jurisdiction is limited to reviewing final decisions of OWCP.[18] OWCP has not issued a final decision on this issue. Thus, it is not before the Board at this time.

[15] *See E.M.*, Docket No. 14-0178 (issued September 28, 2015); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

[16] *Id*.

[17] *See K.S.*, Docket No. 15-0741 (issued August 10, 2015); *D.H.*, 58 ECAB 358 (2007).

[18] 20 C.F.R. § 501.2(c).

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 no more than 37 percent permanent impairment of each lower extremity, for which he received schedule awards.

ORDER

IT IS HEREBY ORDERED THAT the November 23, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 16, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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