



Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

### **ISSUE**

The issue is whether appellant has met his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

### **FACTUAL HISTORY**

On May 13, 2013 appellant, then a 52-year-old health aide, filed a traumatic injury claim (Form CA-1) alleging that on May 9, 2013 he injured his left groin pushing a patient in a high back chair while in the performance of duty.<sup>4</sup>

By decision dated July 22, 2013, OWCP accepted the claim for left groin sprain and on January 17, 2014 it expanded acceptance of the claim to include the additional conditions of sprain of other specified sites on the left, and left hip and thigh sprain. Appellant returned to work on March 4, 2014 as an information receptionist. OWCP issued a loss of wage-earning capacity (LWEC) decision on September 9, 2014 terminating appellant's wage-loss compensation benefits as his actual earnings as an information specialist either met or exceeded "the current wages of the job held when injured."<sup>5</sup>

On September 23, 2015 Dr. Christopher D. Mudd, a Board-certified orthopedic surgeon, reported that appellant had undergone a right total hip arthroplasty on October 2, 2009 and a left hip arthroplasty on October 1, 2010. He noted that appellant had increasing hip pain since the May 9, 2013 employment injury. Dr. Mudd diagnosed failed left hip arthroplasty, with loosening of the acetabular component and medial migration through the quadrilateral plate with suspicion of pelvic discontinuity, and significant acetabular bone loss. He also diagnosed failed right hip arthroplasty, with loosening of the acetabular component and superior medial migration.

In a December 2, 2013 report, Dr. Michael Ralph, a Board-certified orthopedic surgeon and treating physician, noted that he suspected that appellant sustained a nondisplaced pelvic

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the August 5, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

<sup>4</sup> The record reflects that appellant has nonwork-related medical conditions to include obesity, left hip replacement on October 1, 2010, right hip replacement and hernia surgery on February 23, 2009, and right knee meniscus tear and repair in December 1982. Appellant also had a prior claim for a slip and fall on December 12, 1997 under OWCP File No. xxxxxx696. OWCP noted that this was a minor injury and appellant returned to his regular duties on December 15, 1997.

<sup>5</sup> On May 12, 2016 OWCP denied modification of appellant's LWEC decision.

fracture. He completed a work capacity evaluation (Form OWCP-5c) and diagnosed fractured acetabular, status post left hip replacement.

In a December 27, 2013 report, Dr. Ronald Zimmerman, Board-certified in physical medicine and rehabilitation and serving as a district medical adviser (DMA), advised that the diagnosis of a nondisplaced fracture could not be accepted as it was not supported by diagnostic studies.

On February 18, 2014 OWCP referred appellant's claim, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Robert Sciortino, a Board-certified orthopedic surgeon, for a second opinion examination to assess the work-related conditions in the claim.

In a March 7, 2014 report, Dr. Sciortino noted that he had reviewed appellant's history of injury, including the SOAF. He also noted that he obtained new x-rays of appellant's hips, which showed bilateral hip replacements, and he noted that the hip replacements were not work related, but had instead been performed for osteoarthritic conditions. Dr. Sciortino examined appellant and diagnosed painful total hip replacement. He explained that appellant sustained a left groin strain which triggered his hip pain. Dr. Sciortino opined that appellant "may have some problem with his acetabular component of his total hip replacement. The etiology of this is not clear, but is most likely not work related." Dr. Sciortino reiterated his opinion that appellant had a problem with his "acetabular component which is not related." He recommended additional testing to determine if there was some component of metallosis that was causing appellant's symptoms.

On September 28, 2015 OWCP found a conflict in the medical opinion evidence and referred appellant for an impartial medical examination. It explained that Dr. Ralph, the attending physician, diagnosed a nondisplaced pelvic fracture that was causally related to appellant's work injury; however, Dr. Sciortino, the second opinion physician, diagnosed an issue with the acetabular component of appellant's total hip replacement that was not work related.

In an October 22, 2015 report, Dr. Richard Lehman, a Board-certified orthopedic surgeon serving as an impartial medical examiner, reviewed appellant's history of injury and medical records. He examined appellant and noted that he had difficulty ambulating, walked with two crutches, and had significant left and right hip pain. Dr. Lehman determined that appellant had a failed hip replacement on the left. He noted that the components had dislodged and were a post-operative complication. Dr. Lehman opined that appellant's condition was not related to his May 9, 2013 work injury and instead was directly related to loosening of the total hip metallosis and dislocation of the total hip. He further opined that there was nothing in appellant's medical history to suggest a work-related impairment and that the work injury on May 9, 2013 did not alter or affect the failed hip replacement and did not exacerbate appellant's underlying symptoms and hip condition. Dr. Lehman explained that the strain from the work injury would have resolved within six to eight weeks and that appellant had returned to base line. He advised that appellant required a revision of the total hip replacement.

On August 2, 2016 appellant filed a claim for a schedule award (Form CA-7).

In an August 5, 2016 development letter, OWCP advised appellant of the deficiencies of his claim and requested medical evidence containing a detailed description of his permanent impairment specific to the accepted work-related conditions, a date of maximum medical improvement (MMI), a final rating of permanent impairment, and a discussion of the rationale for the calculation of the impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>6</sup> It afforded him 30 days to submit the necessary evidence. No further evidence was submitted.

By decision dated December 8, 2016, OWCP denied appellant's schedule award claim, finding that he had not submitted medical evidence to establish permanent impairment causally related to an accepted condition.

On December 19, 2016 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on May 17, 2017. Appellant provided testimony and OWCP's hearing representative held the case record open for 30 days for the submission of additional evidence on the issue of permanent impairment. No additional evidence was received.

By decision dated July 27, 2017, OWCP's hearing representative affirmed the December 8, 2016 decision.

In an August 4, 2017 report, Dr. Neil Allen, a Board-certified internist and neurologist, utilized the A.M.A., *Guides*, examined appellant, and provided findings. He noted that the diagnosed-based impairment (DBI) method was used to calculate the left hip impairment. Dr. Allen referred to the Hip Regional Grid, Table 16-3, page 515, and determined that appellant had aseptic loosening resulting in arthroplasty revision and physical examination findings of a mild motion deficit, a class of diagnosis (CDX) of 3 for impairment, and opined that appellant had a default value of 67 percent for total hip replacement, poor result, which resulted in 67 percent left lower extremity permanent impairment (grade C).

On December 1, 2017 appellant filed a claim for a schedule award (Form CA-7).<sup>7</sup>

In a December 1, 2017 development letter, OWCP advised appellant of the deficiencies of his claim and afforded him 30 days to submit the necessary evidence.

In a letter dated January 22, 2018, counsel noted that a permanent impairment rating had been provided and requested a decision on the rating already of record.

By decision dated February 19, 2019, OWCP denied appellant's schedule award claim, finding that he had not submitted medical evidence to establish permanent impairment causally related to an accepted condition in his claim. It explained that his claim was accepted for two soft

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<sup>6</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

<sup>7</sup> In a November 1, 2017 letter, OWCP noted receipt of Dr. Allen's August 4, 2017 report and requested that appellant submit a Form CA-7 claim.

tissue injuries, a left hip strain and a left groin strain, and those were the only conditions eligible for a schedule award.<sup>8</sup> OWCP also explained that expansion of the acceptance of appellant's claim to include bilateral hip replacement was considered and found to be unrelated to the accepted work injury. It noted that special weight of the medical evidence had been accorded to the opinion of Dr. Lehman, the impartial medical specialist.

On February 25, 2019 counsel for appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on June 7, 2019.

By decision dated August 5, 2019, OWCP's hearing representative affirmed the February 19, 2019 decision, finding that Dr. Lehman's referee opinion represented the special weight of the medical evidence.

### **LEGAL PRECEDENT**

The schedule award provision of FECA,<sup>9</sup> and its implementing federal regulations,<sup>10</sup> 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. 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.<sup>11</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>12</sup> The claimant has the burden of proof to establish that the condition for which a schedule award is sought is causally related to his or her employment.<sup>13</sup>

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.<sup>14</sup> This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the

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<sup>8</sup> OWCP noted that appellant had a right hip replacement on February 23, 2009, a left hip replacement on October 1, 2010 and a revision of the failed left hip replacement on December 17, 2015, and that these surgeries were not authorized by OWCP and were not accepted as work related.

<sup>9</sup> 5 U.S.C. § 8107.

<sup>10</sup> 20 C.F.R. § 10.404.

<sup>11</sup> *Id.* at § 10.404(a).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>13</sup> *See G.S.*, Docket No. 18-0827 (issued May 9, 2019); *Veronica Williams*, 56 ECAB 367 (2005).

<sup>14</sup> 5 U.S.C. § 8123(a); *K.W.*, Docket No. 20-0047 (issued November 12, 2020); *see B.M.*, Docket No. 19-1069 (issued November 21, 2019); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

case.<sup>15</sup> When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>16</sup>

When determining entitlement to a schedule award, preexisting impairment to a scheduled member should be included.<sup>17</sup> Impairment ratings for schedule awards include those conditions accepted by OWCP as job related, and any preexisting permanent impairment of the same member or function.<sup>18</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a permanent impairment of a scheduled member or function of the body, warranting a schedule award.

OWCP found a conflict in the medical opinion evidence between Dr. Ralph, the attending physician, who found that appellant had a nondisplaced pelvic fracture that was causally related to the accepted May 9, 2013 employment injury, and Dr. Sciortino, the second opinion physician, who found that appellant had an issue with the acetabular component of his total left hip replacement that was not work related.

OWCP properly referred appellant's case to Dr. Lehman for an impartial medical examination to resolve the conflict in medical opinion, pursuant to 5 U.S.C. § 8123(a). In his October 22, 2015 report, Dr. Lehman reviewed appellant's history of injury, the relevant medical evidence, and provided physical examination findings. He found appellant's accepted conditions had resolved and there was no permanent impairment due to the accepted conditions. Dr. Lehman advised that appellant's hip condition was the result of a failed hip replacement and that a revision was needed. He also found that appellant's failed left hip replacement was not work related.

The Board finds that Dr. Lehman's October 22, 2015 report is entitled to special weight and establishes that appellant's preexisting total left hip replacement, and its sequelae, were not work related, and that appellant's accepted employment conditions had resolved without permanent impairment. Dr. Lehman's opinion was based on a proper factual and medical history. As noted, when a case is referred to an impartial medical specialist for the purpose of resolving a

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<sup>15</sup> 20 C.F.R. § 10.321.

<sup>16</sup> *V.H.*, Docket No. 20-0012 (issued November 5, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

<sup>17</sup> *See K.C.*, Docket No. 19-0785 (issued October 1, 2019); *C.T.*, Docket No. 18-0544 (issued May 22, 2019); *J.H.*, Docket No. 17-1916 (issued January 19, 2019); *Carol A. Smart*, 57 ECAB 340 (2006); *Michael C. Milner*, 53 ECAB 446, 450 (2002).

<sup>18</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 3.700.3(a)(3) (January 2010).

conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>19</sup>

Subsequent to the receipt of Dr. Lehman's October 22, 2015 report, appellant submitted an August 4, 2017 report from Dr. Allen who referred to the Hip Regional Grid, Table 16-3, page 515 and provided an impairment rating of 67 percent based upon a total hip replacement, poor result. However, the Board notes that this report pertains to a condition that has not been accepted as work related in this claim. As noted, a schedule award can be granted for those conditions accepted by OWCP as work related, and any preexisting permanent impairment of the same member or function.<sup>20</sup> The Board has previously explained that a preexisting, underlying condition should be considered for rating impairment only to the extent that the work-related injury has affected any residual usefulness, in whole or in part, of the scheduled member.<sup>21</sup> Since appellant has not established permanent impairment of his work-related conditions, the Board finds that he is not entitled to a schedule award for his nonwork-related condition.<sup>22</sup>

The claimant has the burden of proof to establish that the condition for which a schedule award is sought is causally related to his or her employment.<sup>23</sup> The Board finds that appellant has not established permanent impairment due to his accepted work-related conditions.

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 his burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

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<sup>19</sup> *J.B.*, Docket No. 18-0116 (issued October 2, 2020); see *B.M.*, *supra* note 14; *Darlene R. Kennedy*, *supra* note 16; *Gloria J. Godfrey*, *supra* note 16.

<sup>20</sup> *Supra* note 18.

<sup>21</sup> *Supra* note 12 at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5d; *S.M.*, Docket No. 20-0469 (issued September 3, 2020): see also *F.T.*, Docket No. 16-1326 (issued March 12, 2018).

<sup>22</sup> See *S.M.*, *id.*

<sup>23</sup> See *G.S.*, *supra* note 13; *Veronica Williams*, *supra* note 13.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 5, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 18, 2020  
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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