



## **FACTUAL HISTORY**

In a February 2011 occupational disease claim, appellant, then a 41-year-old letter carrier, alleged that he sustained aggravation of bilateral hip osteoarthritis due to the extensive walking and bending required by his job. OWCP accepted that he sustained aggravation of bilateral hip osteoarthritis. Appellant worked regular duty on a full-time basis at the time he filed his occupational disease claims and continued to do so thereafter. In a statement accompanying his claim, he indicated that he first learned that he had bilateral hip arthritis when he had abdominal x-rays taken in September 2000 to evaluate a kidney stone condition.<sup>2</sup>

The findings of August 22, 2006 x-ray testing of appellant's hips list a diagnostic impression of "mild osteoarthritis bilateral hips" with mild superior joint narrowing and mild osteophytes, right greater than left. On November 18, 2008 Dr. Deborah Wald, an attending Board-certified internist, noted that appellant reported experiencing increased bilateral hip pain, right worse than left. X-ray testing obtained on that date revealed moderate degenerative changes of the hips, with superior acetabular osteophytes and decreased femoral head neck offset bilaterally.<sup>3</sup> The results of July 14, 2009 x-ray testing of both hips showed "bilateral severe [degenerative joint disease] of the hips" with severe loss of articular cartilage on the right side, moderate-to-severe loss of articular cartilage on the left side and large bilateral osteophytes. On November 19, 2010 Dr. Wald stated that appellant's job as a letter carrier had increased the wear and tear on his hip joints and contributed to the pace of the progression of his arthritis. She noted that appellant wished to hold off on undergoing hip surgery as long as possible.

On June 30, 2011 appellant claimed a schedule award. He submitted a February 11, 2011 report from Dr. Hartunian who discussed his medical history and reported findings from an examination conducted that date. Dr. Hartunian noted that appellant's July 2009 hip x-rays showed progressive arthritis relative to that shown in August 2006 x-rays. He diagnosed severe degenerative arthritis of the right hip with zero millimeter cartilage intervals on x-ray and moderate degenerative arthritis of the left hip with one millimeter cartilage intervals on x-ray.<sup>4</sup> Dr. Hartunian stated, "[Appellant] suffered the classic symptoms of progressive degenerative arthritis during which time he continued to perform his duties as a letter carrier. The continual performance of his job duties on diseased hips worsened and accelerated the progression of the disease process and was a causative factor in that disease process."

In a March 4, 2011 report, Dr. Hartunian stated that the clinical findings of a February 3, 2011 examination demonstrated a 50 percent permanent impairment of appellant's right leg according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*), due to degenerative arthritis of his right

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<sup>2</sup> The record does not appear to contain copies of diagnostic testing of appellant's hips from this period.

<sup>3</sup> Magnetic resonance imaging (MRI) scan testing from December 28, 2008 showed "moderate/severe degenerative joint disease of the hips bilaterally."

<sup>4</sup> Dr. Hartunian obtained x-ray testing of appellant's hips on January 20, 2011. He indicated that the findings were consistent with end-stage degenerative arthritis on the right and near end-stage arthritis on the left.

hip.<sup>5</sup> He opined that appellant reached maximum medical improvement for his right hip condition in September 2000 at the time when the arthritis was first detected on x-ray. Dr. Hartunian indicated that appellant was suffering from degenerative arthritis of his right hip and noted that his condition had deteriorated since the time of first diagnosis. He stated, “While he may have had some temporary symptomatic relief, this did not have any effect on the continued progression of the underlying disease process.”

In a March 11, 2011 report, Dr. Hartunian stated that the clinical findings on a February 3, 2011 examination demonstrated a 28 percent permanent impairment of appellant’s left leg according to the sixth edition of the A.M.A., *Guides*, due to degenerative arthritis of his left hip.<sup>6</sup> He opined that appellant reached maximum medical improvement for his left hip condition in September 2000 at the time when the arthritis was first detected on x-ray. Dr. Hartunian indicated that appellant was suffering from degenerative arthritis of his left hip and noted that his condition had only deteriorated since the time of first diagnosis. He stated, “While he may have had some temporary symptomatic relief, this did not have any effect on the continued progression of the underlying disease process.”

In December 2011, OWCP requested that Dr. Craig M. Uejo, a Board-certified occupational medicine physician serving as an OWCP medical adviser, reviewed Dr. Hartunian’s impairment rating. In a January 11, 2012 report, Dr. Uejo concurred with Dr. Hartunian’s impairment rating and noted that appellant’s ratable condition had stabilized and was unlikely to change substantially in the next year, with or without medical treatment. He stated, “Absent other information, it is probable that the date of maximum medical improvement is September 2000, the date opined by Dr. Hartunian, which is the time when the arthritis was detected by x-ray.”

On December 27, 2011 OWCP asked Dr. David I. Krohn, a Board-certified internist serving as an OWCP medical adviser, to determine appellant’s date of maximum medical improvement and to provide supporting medical rationale.<sup>7</sup> In an April 29, 2012 report, Dr. Krohn discussed the diagnostic testing over the years of appellant’s hips and stated:

“From September 2000 through February 3, 2011 there was clear worsening of the claimant’s bilateral hip osteoarthritis both symptomatically and radiologically. That is well supported by the medical record.

“Date of maximum medical improvement, that date from which further recovery or deterioration is not reasonably anticipated, was the last date on which the claimant was seen. That date was that last date on which Dr. Hartunian evaluated the claimant, February 3, 2011.”

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<sup>5</sup> Dr. Hartunian referenced Table 16-4 (Hip Regional Grid) on page 514 of the sixth edition of the A.M.A., *Guides*.

<sup>6</sup> Dr. Hartunian again referenced Table 16-4 of the A.M.A., *Guides*.

<sup>7</sup> OWCP indicated that maximum medical improvement refers to a date from which further recovery or deterioration is not anticipated or clinical findings indicate that the medical condition is static and well stabilized.

By decision dated May 9, 2012, OWCP granted appellant schedule awards for a 50 percent permanent impairment of his right leg and a 28 percent permanent impairment of his left leg. The date of maximum medical improvement was February 3, 2011. The period of the award ran from February 3, 2011 to May 25, 2015.

On August 17, 2012 appellant received, at his request, a lump-sum payment of \$119,236.83 constituting the remainder of the schedule awards for his hips.

Appellant requested a hearing with an OWCP hearing representative regarding his schedule award. At the September 24, 2012 hearing, counsel argued that OWCP should have recognized September 30, 2000 as the date of maximum medical improvement, based on the opinions of Dr. Hartunian and Dr. Uejo.

In a December 14, 2012 decision, an OWCP hearing representative affirmed the May 9, 2012 schedule award decision. He found that OWCP properly determined that appellant reached maximum medical improvement on February 3, 2011, the date of the comprehensive impairment rating examination by Dr. Hartunian.

Oral argument was held before the Board on June 25, 2013. At oral argument, counsel submitted a memorandum asserting that appellant attained maximum medical improvement on September 30, 2000 and that the schedule award should have started running on that date.

The Board issued an Order Allowing Supplemental Pleading on July 5, 2013. On August 5, 2013 the Director filed a Memorandum in Justification arguing that OWCP's schedule award determination should be affirmed. The Director asserted that OWCP properly found that appellant's date of maximum medical improvement was February 3, 2011, the date of Dr. Hartunian's examination. On September 9, 2012 counsel filed a pleading arguing that the date of maximum medical improvement was September 30, 2000.<sup>8</sup>

### **LEGAL PRECEDENT**

The schedule award provisions of FECA provide for compensation to employees sustaining impairment from loss or loss of use of specified members 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 determination is a matter which rests in the sound 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. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has

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<sup>8</sup> In his September 9, 2012 pleading, counsel requested a second oral argument on the present case. The Board, in its discretion, has considered counsel's request for oral argument and denies it on the grounds that it would serve no useful purpose and only serve to delay the issuance of a decision in the case.

concurrent in such adoption.<sup>9</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2008.<sup>10</sup>

The period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury. Maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further.<sup>11</sup> The determination of the date of maximum medical improvement is factual in nature and depends primarily on the medical evidence.<sup>12</sup> The date of maximum medical improvement is usually considered to be the date of the evaluation accepted as definitive by OWCP.<sup>13</sup> The Board has also noted a reluctance to find a date of maximum medical improvement which is retroactive to the award, as retroactive awards often result in payment of less compensation benefits. The Board, therefore, requires persuasive proof of maximum medical improvement if OWCP selects a retroactive date.<sup>14</sup>

### ANALYSIS

OWCP accepted that appellant sustained aggravation of bilateral hip osteoarthritis. He claimed a schedule award on June 30, 2011 and submitted the March 4 and 11, 2011 reports of Dr. Hartunian, a Board-certified orthopedic surgeon, who rated a 50 percent permanent impairment of his right leg and a 28 percent permanent impairment of his left leg according to the A.M.A., *Guides*, based on a February 3, 2011 examination. Appellant has not contested the percentage of impairment.

The Board finds that the medical evidence establishes that appellant reached maximum medical improvement of his hips on February 3, 2011, the date of Dr. Hartunian's impairment rating examination. The date of maximum medical improvement is usually considered to be the date of the evaluation accepted as definitive by OWCP.<sup>15</sup> In an April 29, 2012 report, Dr. Krohn, a Board-certified internist serving as an OWCP medical adviser properly concluded that appellant reached maximum medical improvement on February 3, 2011. He provided medical rationale for his opinion by explaining that the medical evidence of record showed that there was

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<sup>9</sup> *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.9.d (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>11</sup> *Adela Hernandez-Piris*, 35 ECAB 839 (1984).

<sup>12</sup> *J.B.*, Docket No. 11-1469 (issued February 14, 2012); *Franklin L. Armfield*, 28 ECAB 445 (1977).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.a (January 2010); *see Richard Larry Enders*, 48 ECAB 184 (1996) (the date of maximum medical improvement was the date of the audiologic examination used as the basis of the schedule award).

<sup>14</sup> *C.S.*, Docket No. 12-1574 (issued April 12, 2013); *P.C.*, 58 ECAB 539 (2007); *James E. Earle*, 51 ECAB 567 (2000).

<sup>15</sup> *See supra* note 13.

a clear worsening of appellant's bilateral hip osteoarthritis, both symptomatically and radiologically after it was first diagnosed, through February 3, 2011. Dr. Krohn stated, "Date of maximum medical improvement, that date from which further recovery or deterioration is not reasonably anticipated, was the last date on which the claimant was seen. That date was that last date on which Dr. Hartunian evaluated the claimant, February 3, 2011." The Board notes that this opinion is supported by the clinical medical records and by diagnostic tests from 2006, 2009 and 2011 which clearly show a progressive worsening of appellant's bilateral degenerative hip condition.

Counsel argued that OWCP should have recognized a date in September 2000, when appellant was first diagnosed with bilateral hip arthritis, as the date of maximum medical improvement as noted by Dr. Hartunian and Dr. Uejo, a Board-certified occupational medicine physician, who also served as an OWCP medical adviser. The Board is reluctant to find a retroactive date of maximum medical improvement absent persuasive proof. In this case, neither Dr. Hartunian nor Dr. Uejo provided adequate medical rationale for their opinion that appellant reached maximum medical improvement in 2000.<sup>16</sup> Both physicians clearly and unequivocally stated that appellant's bilateral hip condition did not stabilize prior to February 2011. As noted above, maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further.<sup>17</sup> Therefore, a retroactive date of maximum medical improvement is not appropriate in this case.

### CONCLUSION

The Board finds that OWCP properly determined the date of maximum medical improvement.

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<sup>16</sup> See *supra* note 14.

<sup>17</sup> See *supra* note 11. Counsel argued that OWCP should not have referred the case to Dr. Krohn for his opinion on maximum medical improvement. However, given the lack of a rationalized opinion on maximum medical improvement in the record, it was appropriate for OWCP to refer the case to Dr. Krohn.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 14, 2012 is affirmed.

Issued: November 8, 2013  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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