

FACTUAL HISTORY

OWCP accepted that on or before June 30, 2010 appellant, then a 57-year-old letter carrier, sustained aggravation/acceleration of bilateral hip osteoarthritis. He underwent bilateral total hip arthroplasties with noncemented prostheses on March 8, 2005. OWCP accepted that the procedures were necessitated by the accepted hip conditions.

On November 22, 2010 appellant claimed a schedule award. He submitted an October 29, 2010 report of Dr. Byron V. Hartunian, a Board-certified orthopedic surgeon, who stated that the clinical findings on an October 19, 2010 examination demonstrated 59 percent permanent impairment of appellant's right leg and 31 percent permanent impairment of his left 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 postsurgical status. Dr. Hartunian opined that appellant "most probably reached maximum medical improvement from the bilateral hip arthroplasties in March 2006."

In a March 16, 2011 report, OWCP's medical adviser concurred with Dr. Hartunian's impairment rating and posited 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 March 2006."

By decision dated August 8, 2012, OWCP granted appellant a schedule award for 59 percent permanent impairment of his right leg and 31 percent permanent impairment of his left leg. The decision noted the date of maximum medical improvement as "March 2006." The period of the award ran from October 19, 2010 to October 7, 2015.

On June 21, 2013 the Director filed a request to file a motion to remand at a later date, contending that there was insufficient medical rationale to support that appellant reached maximum medical improvement one year after surgery. Oral argument was held on June 25, 2013. At oral argument, counsel submitted a memorandum asserting that appellant attained maximum medical improvement of his hips on March 1, 2006 and that the schedule should have started running on that date.

The Board issued an Order Allowing Supplemental Pleading on July 5, 2013. Neither the Director nor appellant submitted any additional pleadings within the allotted time.

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

concurrent in such adoption.² For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2008.³

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.⁴ The determination of the date of maximum medical improvement is factual in nature and depends primarily on the medical evidence.⁵ The date of maximum medical improvement is usually considered to be the date of the evaluation accepted as definitive by OWCP.⁶ 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.⁷

ANALYSIS

OWCP accepted that appellant sustained aggravation/acceleration of bilateral hip osteoarthritis, necessitating bilateral total hip arthroplasties with noncemented prostheses on March 8, 2005. Appellant claimed a schedule award on November 22, 2010. In support of his claim, he submitted an October 29, 2010 report of Dr. Hartunian, a Board-certified orthopedic surgeon, finding 59 percent permanent impairment of his right leg and 31 percent permanent impairment of his left leg according to the A.M.A., *Guides*, based on an October 19, 2010 examination. OWCP's medical adviser concurred with Dr. Hartunian's impairment rating and the date of maximum medical improvement. OWCP based its August 8, 2012 schedule award on Dr. Hartunian's impairment rating as reviewed by the medical adviser. It listed the date of maximum medical improvement on the schedule award as "March 2006," but it effectively determined that the date of maximum medical improvement was October 19, 2010, the date of Dr. Hartunian's impairment rating examination, by commencing of the schedule award on October 19, 2010.

Counsel asserted that appellant attained maximum medical improvement on March 1, 2006 and that his schedule should have started running on that date. The Board is reluctant to

² *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

³ 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).

⁴ *Adela Hernandez-Piris*, 35 ECAB 839 (1984).

⁵ *J.B.*, Docket No. 11-1469 (issued February 14, 2012); *Franklin L. Armfield*, 28 ECAB 445 (1977).

⁶ 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).

⁷ *C.S.*, Docket No. 12-1574 (issued April 12, 2013); *P.C.*, 58 ECAB 539(2007); *James E. Earle*, 51 ECAB 567 (2000).

find a retroactive date of maximum medical improvement as retroactive awards often result in payment of less compensation benefits.⁸ In this case, there is insufficient medical evidence to establish March 1, 2006 as the appropriate date of maximum medical improvement.

In his October 29, 2010 report, Dr. Hartunian concluded that appellant's hips reached maximum medical improvement in "March 2006," about one year after his bilateral hip surgery on March 8, 2005. However, he did not specify the objective findings supporting that appellant's hips had stabilized as of the period he identified. Dr. Hartunian did not indicate if appellant's condition worsened after this period. While OWCP's medical adviser concurred with Dr. Hartunian's statement on the date of maximum medical improvement, he did not explain the medical reasoning behind his agreement. Both physicians failed to provide clear, convincing evidence supporting that appellant attained maximum medical improvement of his hips in March 2006. Therefore, a March 2006 date cannot be used to determine the appropriate date on which to commence the schedule award.⁹

The case will be remanded to OWCP for further development to determine the appropriate date of maximum medical improvement for appellant's hips. Following this and any other development deemed necessary, OWCP will issue a *de novo* decision in the case.

On appeal, counsel asserts that appellant attained maximum medical improvement on March 1, 2006 and that his schedule should have started running on that date. As stated, the case will be remanded to OWCP for further development on the issue of maximum medical improvement.

CONCLUSION

The Board finds that the case is not in posture for a decision.

⁸ *C.S.*, *supra* note 7 and *P.C.*, *supra* note 7.

⁹ *P.C.*, *supra* note 7; *L.H.*, 58 ECAB 561 (2007).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 8, 2012 is set aside, and the case remanded for additional development consistent with this decision and order.

Issued: October 25, 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