

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

K.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Hartford, CT, Employer**

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**Docket No. 13-1153
Issued: October 24, 2013**

Appearances:

Daniel B. Shapiro, Esq., for appellant

Paul J. Klingenberg, Esq., for the Director

Oral Argument June 25, 2013

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 12, 2013 appellant, through counsel, filed a timely appeal from a March 29, 2013 decision of the Office of Workers' Compensation Programs (OWCP) regarding 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 this case.

ISSUE

The issue is whether OWCP properly determined the date of maximum medical improvement for appellant's schedule award.

On appeal, counsel asserts that OWCP should utilize a retroactive date of maximum medical improvement in March 2001 to allow appellant to receive the entire amount of the schedule award. Counsel does not contest the percentage of impairment awarded or the method of calculation.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on or before March 8, 2001 appellant, then a 53-year-old letter carrier, sustained an aggravation of preexisting osteoarthritis of the left hip and knee. Dr. F. Lincoln Avery, an attending Board-certified orthopedic surgeon, diagnosed a congenital dislocation of the right hip and presumptively the left hip, on March 8, 2001. He noted that the left hip condition caused left knee pain. Appellant remained under medical treatment. Dr. Brian J. McGrory, an attending Board-certified orthopedic surgeon, opined on January 6, 2006 that appellant had worsening degenerative arthritis of the left hip.

On August 22, 2011 appellant claimed a schedule award. He submitted an August 15, 2011 report from Dr. Byron V. Hartunian, an attending Board-certified orthopedic surgeon. Appellant stated that clinical findings from a March 1, 2010 examination demonstrated 25 percent impairment of the left lower extremity 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."² Dr. Hartunian opined that appellant reached maximum medical improvement of the left hip and knee upon diagnosis on March 31, 2001. He noted that appellant's left hip and knee continued to degenerate after March 31, 2001.

In a May 7, 2012 report, Dr. Robert Y. Pick, an orthopedic surgeon and an OWCP medical adviser, opined that appellant's degenerative osteoarthritis was not caused or aggravated by work factors. OWCP found a conflict of medical opinion between Dr. Hartunian and Dr. Pick. To resolve the conflict, it selected Dr. John J. Walsh, Jr., a Board-certified orthopedic surgeon, as the impartial medical examiner. Dr. Walsh submitted a January 11, 2013 report finding a 20 percent permanent impairment of the left hip and 6 percent permanent impairment of the left knee, combined to equal a 25 percent impairment of the left lower extremity. He found that appellant attained maximum medical improvement on diagnosis in 2001 as his condition subsequently worsened to end stage, bone-on-bone arthritis as of January 11, 2013 and could not worsen further.

Dr. Morley Slutsky, an OWCP medical adviser, reviewed the record on February 18, 2013. He found 26 percent impairment of the left lower extremity due to an additional one percent impairment for the left knee. The medical adviser otherwise concurred with Dr. Hartunian's and Dr. Walsh's calculations. As appellant's arthritis continued to worsen after diagnosis, he reached maximum medical improvement as of January 11, 2013, when Dr. Walsh opined that appellant's condition had reached end stage and could not worsen further.

By decision dated March 29, 2013, OWCP granted appellant a schedule award for 26 percent impairment of the left leg. It utilized January 11, 2013 as the date of maximum medical improvement, the date of Dr. Walsh's rating examination. The period of the award ran from January 11, 2013 to June 19, 2014.

Counsel filed an appeal with the Board on April 12, 2013. On June 24, 2013 the Director of OWCP filed a request to allow filing a motion to remand, asserting that Dr. Hartunian's

² Dr. Hartunian found 20 percent permanent impairment of the left hip and 6 percent permanent impairment of the left knee due to degenerative osteoarthritis. He combined the impairments to equal 25 percent.

finding of a March 2001 date for maximum medical improvement was not supported by the medical evidence. The Director noted that there were no x-ray reports of record dated at any time in 2001. Therefore, Dr. Walsh's concurrence with a March 2001 date was not based on sufficient medical evidence. The Director requested that the Board remand the case to OWCP to obtain a clarifying report from Dr. Walsh regarding the date of maximum medical improvement.

Oral argument was held on June 25, 2013. At oral argument, counsel submitted a supplemental memorandum asserting that appellant reached maximum medical improvement no later than March 31, 2001, the date he was diagnosed with osteoarthritis of the left hip and knee.

On July 5, 2013 the Board issued an order allowing submission of supplemental pleadings. In response, counsel submitted a supplemental pleading on August 26, 2013, reasserting that appellant attained maximum medical improvement on March 8, 2001, the date he was diagnosed with osteoarthritis.³

LEGAL PRECEDENT

The schedule award provisions of FECA⁴ 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.⁵ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2008.⁶

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.⁷ The determination of the date of maximum medical improvement is factual in nature and depends primarily on the medical evidence.⁸ The

³ In his August 26, 2013 pleading, counsel requested a second oral argument in 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.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁷ *Adela Hernandez-Piris*, 35 ECAB 839 (1984).

⁸ *J.B.*, Docket No. 11-1469 (issued February 14, 2012); *Franklin L. Armfield*, 28 ECAB 445 (1977).

date of maximum medical improvement is usually considered to be the date of the evaluation accepted as definitive by OWCP.⁹ The Board has 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.¹⁰

ANALYSIS

OWCP accepted that appellant sustained an aggravation of preexisting osteoarthritis of the left hip and knee on or before March 8, 2001. Dr. Avery, an attending Board-certified orthopedic surgeon, diagnosed a presumptive congenital dislocation of the left hip on March 8, 2001, noting that the condition caused left knee pain.

Appellant claimed a schedule award on August 22, 2011. In an August 15, 2011 report, Dr. Hartunian, an attending Board-certified orthopedic surgeon, found 25 percent impairment of the left lower extremity according to the A.M.A., *Guides*, based on a March 1, 2010 examination. He asserted that appellant had attained maximum medical improvement on diagnosis on March 31, 2001. Dr. Hartunian noted, however, that appellant's degenerative arthritis continued to progress after the date of diagnosis. Dr. Walsh, a Board-certified orthopedic surgeon and impartial medical examiner, found 26 percent impairment of the left lower extremity based on a January 11, 2013 examination. He opined that appellant reached maximum medical improvement in 2001 because his condition only deteriorated after that date until it reached end stage.

Dr. Slutsky concurred with Dr. Walsh's impairment rating. He found that appellant reached maximum medical improvement as of January 11, 2013, the date of Dr. Walsh's examination. OWCP based its March 29, 2013 schedule award on Dr. Walsh's impairment rating as reviewed by OWCP's medical adviser. It therefore utilized January 11, 2013 as the date of maximum medical improvement. The Board finds that the issue of when appellant reached maximum medical improvement requires additional development.

Dr. Hartunian and Dr. Walsh both opined that appellant reached maximum medical improvement upon diagnosis in March 2001. However, appellant was not diagnosed with osteoarthritis in 2001. Rather, on March 8, 2001, Dr. Avery diagnosed a congenital left hip dislocation affecting the left knee. An additional question with Dr. Walsh's use of the March 2001 date is his acknowledgement that appellant's condition worsened after that date, indicating that the condition had not stabilized. The Board notes that Dr. McGrory, an attending Board-certified orthopedic surgeon, opined on January 6, 2006 that appellant's left knee and hip arthritis had continued to worsen since 2001.

⁹ *Supra* note 6 at 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).

¹⁰ *C.S.*, Docket No. 12-1574 (issued April 12, 2013); *P.C.*, 58 ECAB 561 (2007); *James E. Earle*, 51 ECAB 567 (2000).

Dr. Walsh opined both that appellant reached maximum medical improvement in March 2001, prior to his diagnosis of osteoarthritis. He also found that appellant's condition deteriorated after March 2001. Dr. Walsh's reason for selecting March 2001 as the date of maximum medical improvement remains unclear. The case will be remanded to OWCP to obtain a supplemental report from Dr. Walsh, clarifying his opinion as to the date appellant attained maximum medical improvement. Following this and any other development deemed necessary, OWCP shall issue a *de novo* decision in the case.

On appeal counsel asserts that OWCP should have recognized March 31, 2001 as the date of maximum medical improvement for the left lower extremity, the date the arthritic condition was diagnosed. As noted, the record does not support that appellant was diagnosed with osteoarthritis of the left hip and knee in March 2001. The case will be remanded to OWCP for additional development to determine the appropriate date of maximum medical improvement.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 29, 2013 is set aside and the case remanded to OWCP for additional development consistent with this decision.

Issued: October 24, 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