

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

G.L., Appellant

and

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

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**Docket No. 12-1795
Issued: September 24, 2013**

Appearances:

Daniel B. Shapiro, Esq., for the appellant
Catherine P. Carter, 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 August 29, 2012 appellant, through counsel, filed a timely appeal from a March 8, 2012 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 asserted that OWCP should have recognized January 1, 2001 as the date of maximum medical improvement, based on the opinion of Dr. Byron Hartunian, an attending Board-certified orthopedic surgeon. He contends that OWCP erred in finding that appellant reached maximum medical improvement on October 22, 2010, based on a medical evaluation finding that her bilateral lower extremity condition had stabilized. Counsel argued

¹ 5 U.S.C. § 8101 *et seq.*

that using a retroactive maximum medical improvement date would allow appellant to receive wage-loss compensation for any recurrences of disability during the schedule award period October 22, 2010 to April 28, 2016, and would give appellant more money using a four percent lump-sum compounding formula. He also disagreed with the combining of an award for both lower extremities into one award.

FACTUAL HISTORY

OWCP accepted that on or before September 13, 2008 appellant, then a 50-year-old letter carrier, sustained an aggravation of osteoarthritis of both knees due to prolonged walking and carrying mail in the performance of duty. Appellant continued to work as a letter carrier through October 22, 2010. On October 13, 2010 bilateral knee x-rays showed the progression of degenerative arthritis when compared to films from 2009.

On November 19, 2010 appellant claimed a schedule award. She submitted November 12, 2010 reports from Dr. Hartunian, who stated that clinical findings on an October 22, 2010 examination represented 59 percent impairment of each 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 degenerative arthritis of both knees.

In a December 17, 2010 report, an OWCP medical adviser found 50 percent impairment of the right leg due to degenerative osteoarthritis of the right knee. In a January 26, 2011 report, an OWCP medical adviser found 50 percent impairment of the left leg due to degenerative osteoarthritis of the left knee.

In an August 12, 2011 report, Dr. Hartunian stated that appellant “reached maximum medical improvement for her left lower extremity condition in January 2000 and for her right lower extremity condition in January 2001.” He noted that, after appellant first experienced knee pain in 1998, “her medical records showed a continuous progression of her degenerative arthritic disease, which [was] a normal course for one with this malady.” Counsel asserted in an August 15, 2011 letter that OWCP should accept Dr. Hartunian’s dates of maximum medical improvement. Dr. David Krohn, an OWCP medical adviser, reviewed the record on February 1, 2012. He explained that x-rays and clinical findings documented the worsening of appellant’s degenerative arthritis of both knees through March 2011. Dr. Krohn stated that “the progression seen in x-rays from May 15, 1998 ... to the most recent x-rays ... demonstrated objective evidence for worsening of her bilateral knee arthritis.”

By decision dated March 8, 2012, OWCP granted appellant schedule awards for 50 percent impairment of the left lower extremity and 50 percent impairment of the right lower extremity. The decision noted the date of medical improvement as October 22, 2010, the date appellant was last exposed to injurious work factors as a letter carrier. The period of the award ran from October 22, 2010 to April 28, 2016.

Oral argument was held on June 25, 2013. Counsel submitted a June 25, 2013 supplemental memorandum, contending that there was no evidence of record to establish a date of maximum medical improvement later than January 1, 2001. He asserted that OWCP

committed legal error by finding the date of maximum medical improvement as October 22, 2010.²

On July 5, 2013 the Board issued an Order Allowing Supplemental Pleadings. On August 5, 2013 the Director requested that the Board affirm the March 8, 2012 schedule award as issued. The Director asserted that selecting a retroactive date of compensation was speculative, whereas the October 22, 2010 date was supported by objective factual and medical evidence. Counsel submitted a September 9, 2013 memorandum, contending that OWCP committed legal error by using October 22, 2010 as the date of maximum medical improvement. He argued that, as appellant had a degenerative condition that would never improve after diagnosis, maximum medical improvement was attained at “the date of initial diagnosis, or, at the latest, the first date following diagnosis that the employee is exposed to the injurious work factors.”³

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 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.⁴ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2008.⁵

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.⁶ The determination of the date of maximum

² Counsel also contended that as appellant desired a lump-sum schedule award, using October 22, 2010 as the date of maximum improvement “forced” her to pay the four percent premium under 5 U.S.C. § 8135(a). However, as appellant’s election of a lump-sum payment occurred in October 2012, after counsel filed his appeal, the Board cannot address this aspect of the pleadings on the present appeal as OWCP did not issue a decision regarding this prior to the filing of this appeal. *See* 20 C.F.R. § 501.2(c).

³ In his September 9, 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 serve to delay the issuance of a decision in the case.

⁴ *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁶ *Adela Hernandez-Piris*, 35 ECAB 839 (1984).

medical improvement is factual in nature and depends primarily on the medical evidence.⁷ The date of maximum medical improvement is usually considered to be the date of the evaluation accepted as definitive by OWCP.⁸ In a case where a claimant continues to be exposed to injurious work factors, and the medical evidence documents continued worsening of the claimed condition, OWCP selects the date of last exposure to injurious work factors as the date of injury and of maximum medical improvement.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 degenerative arthritis of both knees due to prolonged walking and carrying mail in the performance of duty. Appellant continued to be exposed to the accepted injurious work factors until October 22, 2010. She claimed a schedule award on November 19, 2010.

In support of her claim, appellant submitted November 12, 2010 reports from Dr. Hartunian, an attending Board-certified orthopedic surgeon, who examined appellant on October 22, 2010, the date of her last exposure to work factors. Based on that examination, Dr. Hartunian found 59 percent impairment of each lower extremity according to the A.M.A., *Guides*. He stated in an August 12, 2011 report that appellant's left knee reached maximum medical improvement in January 2000 and that her right knee reached maximum medical improvement as of January 2001. Dr. Hartunian noted, however, that objective imaging studies documented a continuous worsening of both knees through 2010. He clearly and unequivocally stated that appellant's knee conditions did not stabilize in January 2000 or January 2001. Moreover, appellant continued to be exposed to injurious work factors through October 22, 2010, the date of Dr. Hartunian's examination. Under these circumstances, the Board finds that OWCP properly utilized October 22, 2010 as the date of maximum medical improvement in its March 8, 2012 schedule award.¹¹

On appeal, counsel asserted that OWCP should utilize January 1, 2001, a retroactive date of maximum medical improvement, to allow appellant to receive wage-loss compensation if she were to sustain a recurrence of disability before the expiration of the award on April 28, 2016. Counsel did not submit sufficient medical or factual evidence to establish that appellant attained

⁷ *J.B.*, Docket No. 11-1469 (issued February 14, 2012); *Franklin L. Armfield*, 28 ECAB 445 (1977).

⁸ Federal (FECA) Procedure Manual, *supra* note 5 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).

⁹ *Barbara A. Dunnavant*, 48 ECAB 517 (1997).

¹⁰ *James E. Earle*, 51 ECAB 567 (2000).

¹¹ Federal (FECA) Procedure Manual, *supra* note 5. *Id.*

maximum medical improvement as of January 1, 2001. Dr. Hartunian clearly advised that appellant's condition continued to deteriorate through October 22, 2010, the date of last exposure to injurious work factors. Therefore, a retroactive date of maximum medical improvement is inappropriate in this case.

CONCLUSION

The Board finds that OWCP properly utilized October 22, 2010 as the date of maximum medical improvement.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 8, 2012 is affirmed.

Issued: September 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