

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

R.H., Appellant

and

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

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**Docket No. 13-303
Issued: September 23, 2013**

Appearances:

Daniel B. Shapiro, Esq., for the 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 November 5, 2012 appellant, through counsel, filed a timely appeal from a September 19, 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 September 13, 2003 as the date of maximum medical improvement (MMI) for the left hip and December 31, 2005 for the left ankle. He also contended that evidence in another of appellant's claims indicates that July 13, 2010 is the date of MMI. Counsel does not contest the percentage of impairment awarded or its method of calculation.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on or before May 6, 2011 appellant, then a 59-year-old letter carrier, sustained a permanent aggravation of preexisting osteoarthritis of the left hip and ankle. Appellant underwent a total arthroplasty of the left hip on September 13, 2002 and a left ankle fusion on October 4, 2004. OWCP accepted that both procedures were necessitated by the accepted left hip and ankle conditions.

On July 9, 2012 appellant claimed a schedule award. He submitted a May 25, 2012 report from Dr. Byron V. Hartunian, an attending Board-certified orthopedic surgeon, who stated that clinical findings on a May 6, 2011 examination demonstrated 69 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 He opined that appellant reached MMI after the left hip arthroplasty in September 2003. Dr. Hartunian also found that appellant “reached maximum medical improvement from his plantar fusion of the left ankle one year after the procedure which would be December 31, 2005 at the latest.”

In an August 26, 2012 report, Dr. Robert Y. Pick, an orthopedic surgeon and an OWCP medical adviser, agreed with the dates of MMI offered by Dr. Hartunian.

By decision dated September 19, 2012, OWCP granted appellant a schedule award for a 69 percent impairment of the left leg. The decision noted the date of medical improvement as May 6, 2011, the date of the clinical examination on which Dr. Hartunian based his May 25, 2012 impairment rating. The period of the award ran from May 6, 2011 to February 25, 2015.

After the filing of the present appeal, on June 24, 2013, the Director filed a request for leave to file a motion to remand, contending that there was insufficient medical rationale supporting that appellant reached MMI one year after surgery. Oral argument was held on June 25, 2013. At oral argument, counsel submitted a memorandum asserting that appellant attained MMI of the left hip in September 2003 and of the left ankle on December 31, 2005, one year after surgery.

The Board issued an Order Allowing Supplemental Pleading on July 5, 2013. On July 19, 2013 the Director submitted a supplemental pleading renewing the prior motion to remand. The Director noted that OWCP would double the present claim with File No. xxxxxx057, accepted for a nondisplaced proximal fracture of the left fifth metatarsal, with File No. xxxxxx946, accepted for a closed fracture of one or more phalanges of the left foot. In response, counsel submitted a supplemental pleading on August 23, 2013, asserting that the medical evidence was adequate to establish the September 2003 and December 31, 2005 dates of

² Dr. Hartunian found 50 percent permanent impairment of the left ankle and 37 percent permanent impairment of the left hip due to postsurgical status. He combined the two impairments to equal 69 percent.

MMI.³ Alternatively, he argued that medical evidence in File No. xxxxxx057 supported that appellant reached MMI on July 13, 2010.

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 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 MMI from the residuals of the employment injury. MMI 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 MMI is factual in nature and depends primarily on the medical evidence.⁷ The date of MMI is usually considered to be the date of the evaluation accepted as definitive by OWCP.⁸ The Board has also noted a reluctance to find a date of MMI which is retroactive to the award, as retroactive awards often result in payment of less compensation benefits. The Board, therefore, requires persuasive proof of MMI if OWCP selects a retroactive date.⁹

ANALYSIS

OWCP accepted that appellant sustained a permanent aggravation of preexisting osteoarthritis of the left hip and ankle, necessitating a left hip arthroplasty on September 13,

³ In his August 23, 2013 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.

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).

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

⁸ 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 MMI was the date of the audiologic examination used as the basis of the schedule award).

⁹ *C.S.*, Docket No. 12-1574 (issued April 12, 2013); *P.C.*, 58 ECAB 561 (2007); *James E. Earle*, 51 ECAB 567 (2000).

2002 and left ankle fusion on October 4, 2004. He claimed a schedule award on July 9, 2012. In a May 25, 2012 report, Dr. Hartunian, an attending Board-certified orthopedic surgeon, rated 69 percent impairment of the left leg according to the A.M.A., *Guides*, based on a May 6, 2011 examination. He stated that appellant's left hip reached MMI in September 2003 and the left ankle on December 31, 2005, one year after each surgery. Dr. Pick, an OWCP medical adviser, concurred with Dr. Hartunian's impairment rating and dates of MMI. OWCP based its September 19, 2012 schedule award on Dr. Hartunian's impairment rating as reviewed by OWCP's medical adviser, but utilized May 6, 2011 as the date of MMI.

OWCP found that the date of MMI was May 6, 2011, the date of Dr. Hartunian's impairment rating, with the period of the schedule award running from May 6, 2011 to February 25, 2015. As noted, the Board is reluctant to find a retroactive date of MMI as retroactive awards often result in payment of less compensation benefits.¹⁰ In this case, there is insufficient medical evidence to establish either September 2003 or December 31, 2005 as appropriate dates of MMI.

Dr. Hartunian concluded that appellant reached MMI after the left hip arthroplasty in September 2003, one year after surgery. He also found that appellant "reached [MMI] from his plantar fusion of the left ankle one year after the procedure which would be December 31, 2005 at the latest." However, Dr. Hartunian did not specify objective clinical findings to establish that appellant's left hip and ankle had stabilized as of the dates mentioned. He did not address the issue of whether appellant's condition worsened after the dates listed. While an OWCP medical adviser concurred with Dr. Hartunian's dates of MMI, he did not explain the medical reasoning behind his conclusion. Both physicians failed to provide clear, convincing medical opinions addressing why appellant attained MMI of the left hip in September 2003 or the left ankle on December 31, 2005. Therefore, the dates cannot be used to determine the appropriate date on which to commence the schedule award.¹¹

The case will be remanded to OWCP for further development to determine the appropriate dates of MMI for the left hip and ankle. OWCP will also determine if the present claim should be doubled with File Nos. xxxxxx057 and xxxxxx946, accepted for left foot fractures. Following this and any other development deemed necessary, OWCP will issue a *de novo* decision in the case.

On appeal, counsel asserts that OWCP should have recognized September 13, 2003 as the date of MMI for the left hip and December 31, 2005 for the left ankle. He also contends that evidence in another of appellant's claims indicates that July 13, 2010 is the date of MMI. As stated, the case will be remanded to OWCP for further development on the issue of MMI and consideration of the doubling of appellant's claims.

CONCLUSION

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

¹⁰ *C.S., id.; P.C., id.*

¹¹ *P.C., supra* note 9; *L.H.*, 58 ECAB 561 (2007).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 19, 2012 is set aside and the case remanded for additional development consistent with this decision.

Issued: September 23, 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