United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	**Docket No. 15-1091**
	)	**Issued: October 23, 2015**
U.S. POSTAL SERVICE, INSPECTION SERVICE, Oakland, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 9, 2015 appellant filed a timely appeal from a February 18, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 appellant has more than 37 percent impairment of each lower extremity, for which he has received a schedule award.

On appeal, appellant discussed his hip surgeries and the residual effects of his injury. He argued that since he had two new surgeries to his hips, it was inconceivable that he would not have a higher permanent impairment rating than that which was previously awarded. Appellant argued that his physician's report established his entitlement to a greater schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 6, 1998 appellant, then a 44-year-old postal inspector, filed an occupational disease claim alleging that he suffered from degenerative arthritis in both of his hip joints causally related to the duties of his federal employment. He noted that he had been a participant in the physical fitness program of the employing establishment since he was appointed inspector in March 1987, and that during this program, he has jogged, played competitive basketball and racquetball, and participated in other physical activities during on the clock hours. Appellant also noted that prior to becoming an inspector, he was a mail carrier for four years and would walk as much as 10 miles daily. On October 26, 1998 OWCP accepted his claim for aggravation of bilateral hip arthritis. It later accepted the claim for permanent aggravation of bilateral hip arthritis and bilateral total hip replacement. Appellant underwent a right hip replacement on May 25, 1999 and a left hip replacement on September 24, 1999. On July 20, 2000 OWCP issued a schedule award for a 37 percent impairment of both the right and left leg. Appellant underwent revision surgery on his right hip on May 3, 2011 and on his left hip on August 16, 2011.

By claim for compensation and by letter, both dated December 2, 2011, appellant requested an increased schedule award. He noted that he had various surgeries to correct his prior hip replacement surgeries; that both new surgeries required him to adhere to posterior hip precautions; and that he will have permanent impairments including pain, weakness, limited motion, increased risk of infection, and instability. Appellant noted that he cannot participate in any activities which would cause hip dislocation. He noted that as a result of his injury he walks with a limp, sometimes is forced to utilize a cane, and has permanent 12-inch surgical scars on his right and left hips. Appellant noted that his artificial hips severely limit his flexibility and that he has difficulty with activities of daily living. He noted that he still has pain and soreness, difficulty sleeping, and continues to use pain medication.

In a February 16, 2012 report, Dr. Ron James, appellant's treating Board-certified orthopedic surgeon, noted that appellant had reached maximum medical recovery and that there was no further intervention to perform at this time. He noted that appellant walked quite well and that his range of motion was good. Dr. James noted that appellant felt that his left lower extremity was shorter, and indicated that although appellant's body habitus makes it somewhat difficult to measure, from his ASAS down to medial malleolus, he measures 94 centimeters (cm) on the right and just over 93 cm on the left, which would give him a 9- to 10-millimeter difference. He recommended a shoe lift if he was going to walk long distances, but that otherwise he appeared to have good appearance of ligament of his hips and no pain. Appellant submitted a letter dated February 24, 2012 wherein he noted his disagreement with Dr. James' statement that he had no pain, stating that at the end of the day he was sore and stiff. He also contended that Dr. James could not comment on his range of motion as he did not take measurements, and reiterated that he walks with a limp.

OWCP referred the case to an OWCP medical adviser, and in an April 9, 2012 report, Dr. Leonard A. Simpson, the medical adviser and an orthopedic surgeon, utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A.,

Guides), Table 16-4 for Hip, Regional Grid-Lower Extremity Impairment,[2] for a total hip replacement with a good result, and noted that appellant had a Class of Diagnosis (CDX) of 2 which equaled a 25 percent default rating. He then noted a Functional History (GMFH) adjustment of 0, or a -2 net adjustment, a Physical Examination (GMPE) adjustment of 0 for a -2 net adjustment, and that Clinical Studies (GMCS) adjustment would not be applicable. Dr. Simpson noted that the total net adjustment would be -4 and would move the impairment in class 2, category A, or 21 percent impairment of each lower extremity or leg.

In a medical report dated November 9, 2012, Dr. Mark Bernhard, an osteopath, examined appellant. He reviewed the medical evidence and conducted a physical examination. Dr. Bernhard made range of motion measurements. He noted a leg length discrepancy in that appellant's left leg was 1.5 cm shorter. Dr. Bernhard diagnosed bilateral osteoarthritis of the hip joints and bilateral total hip in addition to total hip revisions. Utilizing Table 16-4 of the A.M.A., *Guides*, he noted that appellant met the criteria for category 3 with regard to the left hip because of the complications from the prosthesis, and the mid-range diagnostic criteria key factor is 37 percent. Dr. Bernhard noted a grade modifier of 1 for functional history due to a limp observed on physical examination as well as clinical studies resulting in net adjustment of two positions to the right resulting in a final impairment of 43 percent under the total hip replacement CDX 3. He also found that the right hip fell under the diagnosis-based impairment CDX 3 using the hip regional grid 16-4 on page 515, and resulted in a default mid position of 37 percent with fair position, mild instability and/or mild motion deficit, with a functional history, physical examination, clinical studies indicating a grade modifier of 0 for no adjustment with regard to the right hip. Therefore, Dr. Bernhard found that appellant had 43 percent impairment to his left hip and 37 percent impairment to his right hip.

On December 18, 2012 OWCP referred the case to an OWCP medical adviser. In a December 31, 2012 opinion, Dr. Simpson disagreed with Dr. Bernhard's determination that appellant had a CDX 3 impairment for each lower extremity. He noted that a CDX 2 rating is given for a fair result (fair position mild instability, and/or mild motion deficit). Dr. Simpson further noted that the records indicated no roetgenographic evidence of abnormal position of the prosthetic component and did not document any instability or motion deficit, and that accordingly, he would conclude that appellant would fit into the class 2 rating for good result, as he determined previously. He also reiterated that appellant had a functional history adjustment of grade modifier 2 or a 0 percent adjustment of each lower extremity. Dr. Simpson changed his original opinion, however, with regard to physical examination adjustment, as he noted mild tenderness and muscle strength which would equal a modifier 1 or a -1 net adjustment. He also noted that the leg length discrepancy of less than 1.9 cm pursuant to Table 16-7 would be a grade modifier of 0, so there would be no additional adjustment for left lower extremity shortening of 1.5 cm. Dr. Simpson noted clinical adjustment not applicable. He found the total net adjustment of -1 would move the impairment to a class 2, or category B, for a 23 percent impairment of the bilateral lower extremities, which was higher than the 21 percent bilateral impairment he assessed previously.

[2] A.M.A., *Guides* 515.

By memorandum dated January 25, 2013, OWCP informed and requested another OWCP medical adviser to reconsider appellant's impairment in light of the fact that OWCP did not make the previous OWCP medical adviser aware that appellant was previously awarded 37 percent impairment of each lower extremity. In a February 1, 2013 response, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon and an OWCP medical adviser, agreed with Dr. Simpson, the prior OWCP medical adviser, that appellant had 23 percent impairment of the right lower extremity and 23 percent impairment of the left lower extremity pursuant to Table 16-4 of the A.M.A., *Guides*. Dr. Harris noted that as appellant was previously awarded a schedule award for 37 percent partial loss of use of his right lower extremity and 37 percent permanent loss of use of his left extremity, there had been no increased impairment in appellant's bilateral lower extremity impairments.

By decision dated March 19, 2013, OWCP denied appellant's claim for an increased schedule award.

In a July 23, 2013 supplemental report, Dr. Bernhard noted that appellant had a grade 2 modifier based on loss of motion. He reiterated that pursuant to Table 16-4 of the A.M.A., *Guides*, appellant had a CDX of 3. Dr. Bernhard also noted that current x-rays would be helpful.

On September 17, 2013 appellant requested reconsideration.

On October 3, 2013 OWCP referred Dr. Bernhard's latest report to the prior OWCP medical adviser. In an October 9, 2013 report, Dr. Harris noted that Dr. Bernhard documented in his examination of November 9, 2012, as well as his report of July 23, 2013, that appellant walked with an antalgic gait consistent with a grade modifier of 2 for functional history. He also opined that as x-rays do not demonstrate any obvious problems with his prosthesis, this would be consistent with grade modifier 1 for clinical studies. For appellant's right hip, Dr. Harris determined that a modifier of functional history of 2 subtracted from 2 for CDX would equal 0, that a modifier for physical examination of 1 minus 2 for CDX would equal -1, and a 0 clinical studies modifier of 1 minus 1 would equal a net adjustment of -1. He noted that the calculations resulted in a class 2 adjustment of -1, which equaled class 2, grade B, or a 23 percent impairment of appellant's right lower extremity. Dr. Harris applied the same calculations to appellant's left lower extremity, and determined that he had 23 percent impairment of the left lower extremity.

By decision dated October 30, 2013, OWCP denied modification of its September 27, 2013 decision. This decision was reissued on December 12, 2013, as OWCP had not included appeal rights with the October 30, 2013 decision.

On January 21, 2014 appellant requested reconsideration. He submitted an affidavit describing his job duties, his participation in the fitness program, and the progression of the pain in his hips. Appellant discussed his surgeries. He again alleged that he walks with a pronounced limp and as his left leg is shorter than his right, and that his mobility is much more limited and pain is noticeable. Appellant noted issues with his activities of daily living. He also resubmitted a copy of an x-ray dated February 15, 2012, a note dated January 28, 2000 wherein his physician discussed his treatment, and operative notes from his May 3 and August 16, 2011 hip surgeries.

In a decision dated April 24, 2013, OWCP denied modification of its prior decision.

In an August 5, 2014 supplemental report, Dr. Bernhard opined that a physical examination would be required to make an accurate assessment of the revised impairment rating. He reiterated that he believed appellant had 43 percent impairment of the left hip and 37 percent impairment of the right hip.

On September 29, 2014 appellant requested reconsideration. In support of his reconsideration request he resubmitted the November 9, 2012 report by Dr. Bernhard as well as his supplemental report of August 5, 2014, a curriculum vitae for Dr. Bernhard, prior correspondence with OWCP, and a copy of his position description for his job with the employing establishment. Appellant also submitted September 13, 2014 notes by Dr. Robert Helsten, a general practitioner, indicating that x-rays of both hips on September 13, 2014 showed hardware in place with no fractures or hardware failure. He also noted that the left hip also had two screws supporting the left hip and pelvis.

By decision dated February 18, 2015, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

The schedule award provision of FECA[3] and its implementing regulations[4] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform stands applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[5] The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[6] For impairment ratings calculated on or after May 1, 2009, OWCP should advise any physician evaluating per impairment to use the sixth edition.[7]

The sixth edition requires identifying the impairment CDX, which is then adjusted by grade modifiers based on functional history, physical examination, and clinical studies.[8] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[9] The sixth edition of

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

[6] *See id.; Jacqueline S. Harris*, 54 ECAB 139 (2002).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

[8] A.M.A., *Guides* 494-531.

[9] *Id.* at 521.

the A.M.A., *Guides* also provides that range of motion may be selected as an alternative approach in rating impairment under certain circumstances. A rating that is calculated using range of motion may not be combined with a diagnosis-based impairment and stands alone as a rating.[10]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides* with the medical adviser providing rationale for the percentage of impairment specified.[11]

Section 8123(a) provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[12]

ANALYSIS

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

In 1999, appellant underwent bilateral hip replacement surgeries. On July 20, 2000 OWCP issued a schedule award for 37 percent impairment to both his right and left lower extremities. Appellant underwent revision surgery on his right hip on May 3, 2011 and on his left hip on August 16, 2011. He now contends that, due the revision surgeries, he has a greater impairment and should be entitled to an increased schedule award.

Dr. James, appellant's treating physician, in a February 16, 2012 report, discussed appellant's treatment and residuals from the surgery. He did not make an impairment rating. OWCP therefore referred appellant's record to Dr. Simpson, an OWCP medical adviser, who initially found that appellant had 21 percent impairment of each lower extremity. Dr. Simpson reviewed his calculations in his December 31, 2012 opinion, adjusted his findings with regard to grade modifiers, and determined that appellant had 23 percent impairment to each lower extremity. His opinion is based on Table 16-4 on page 515 of the A.M.A., *Guides*. Dr. Simpson, looking at the diagnostic criteria for partial or total hip replacements, determined that appellant had a CDX of 2 for good result. The default rating for this class is 25 percent. Dr. Simpson modified this rating with a net adjustment of -1, based on a functional history adjustment of 2 and a physical examination adjustment of 1. He therefore concluded that appellant had a CDX of 2, class B, which equaled 23 percent impairment.

Dr. Bernhard, appellant's physician, assigned a different impairment rating. He disagreed with Dr. Simpson, and opined that, pursuant to Table 16-4 of the A.M.A., *Guides*, appellant had a CDX of 3, which had a default impairment rating of 37 percent. Class 3 is described as fair result, as opposed to class 2 which is described as good result. Dr. Bernard then

[10] *L.B.*, Docket No. 12-910 (issued October 5, 2012).

[11] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

[12] *R.C.*, Docket No. 12-437 (issued October 23, 2012).

applied grade modifiers for appellant's left hip of 1 for functional history and 1 for clinical studies, which he found yielded a class 3 grade E impairment of 43 percent impairment of appellant's left extremity. With regard to appellant's right hip, he determined that appellant also had a class 3 CDX, but noted that as all grade modifiers were zero, appellant had 37 percent impairment of the right lower extremity based on the default rating. Dr. Bernhard reviewed his opinion on July 23, 2013 and August 5, 2014, but did not change his conclusion that appellant had 43 percent impairment to his left hip and 37 percent impairment to his right hip.

The calculations of the medical adviser were also further reviewed, and in a February 1, 2013 report, Dr. Harris noted his agreement with Dr. Simpson that appellant had 23 percent impairment to each lower extremity. Dr. Harris noted that as appellant had previously received a schedule award for 37 percent impairment to each lower extremity, he was not entitled to a greater award.

Dr. Bernhard, appellant's treating physician, and OWCP medical advisers, Drs. Simpson and Harris, disagreed with regard to appellant's degree of impairment. Although all physicians applied Table 16-4 of the A.M.A., *Guides*, Dr. Bernhard opined that appellant was entitled to be evaluated under the criteria for class 3 as he believed that appellant had a fair result from his hip replacement surgeries. The medical advisers disagreed, and would categorize appellant using the criteria for class 2, which indicated a good result from surgery. Therefore, the Board finds that a conflict in medical opinion exists between Dr. Bernhard and OWCP medical advisers as to the appropriate diagnostic criteria to calculate appellant's impairment.

The Board has long held that an OWCP medical adviser may create a conflict in medical opinion with an examining physician.[13] Accordingly, the Board will set aside OWCP's decision and remand this case for referral of appellant to an impartial medical examiner to resolve the conflict between Dr. Bernhard and OWCP medical advisers, Drs. Simpson and Harris. After such further development of the case record as OWCP deems necessary, a *de novo* decision shall be issued.

CONCLUSION

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

[13] *D.H.*, Docket No. 12-1857 (issued February 26, 2013).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 18, 2015 is set aside, and the case is remanded for further action consistent with this decision.

Issued: October 23, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board