

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish permanent impairment of a scheduled member entitling him to a schedule award; and (2) whether an OWCP hearing representative properly denied appellant's request for subpoenas.

FACTUAL HISTORY

On July 10, 2013 appellant, then a 67-year-old retired letter carrier, filed an occupational disease claim (Form CA-2) alleging that on June 24, 2013 he first realized that his job duties caused a permanent acceleration of his left knee osteoarthritis. On the back of the form the employing establishment noted that appellant's date of last exposure was October 1, 2010, the date he retired.⁴ OWCP accepted the claim for aggravation of preexisting left knee osteoarthritis on October 7, 2013.

In a letter dated October 17, 2013, counsel disagreed with OWCP's acceptance of an aggravation rather than an acceleration of appellant's preexisting left knee osteoarthritis. He requested that OWCP adjudicate appellant's claim for an acceleration of his left knee condition.

On October 22, 2013 appellant filed a claim for a schedule award (Form CA-7). He submitted a report from Dr. Bryon D. Hartunian, a treating orthopedic surgeon, in support of his request.

In an October 10, 2013 report, Dr. Hartunian provided examination findings and reviewed appellant's medical record, employment history, and a statement regarding appellant's work duties. He reported that appellant denied any significant trauma to his knees. Diagnoses included primary left knee joint arthritis and left knee patellofemoral arthritis, which he attributed to his employment duties. Dr. Hartunian opined that the work duties caused a permanent, rather than a temporary aggravation of appellant's preexisting left knee arthritis. Using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*⁵ (6th ed.), he determined that appellant had 20 percent permanent impairment of the left lower extremity.

In a May 31, 2014 report, a district medical adviser (DMA) reviewed the medical evidence of record and noted that appellant's claim had been accepted for aggravation of preexisting left knee osteoarthritis. He opined that the aggravation had been temporary as there was no evidence that appellant's work duties accelerated the osteoarthritic process. The DMA noted that osteoarthritis was a natural and progressive condition and was only related to a specific event when there was significant trauma, such as dislocation or fracture of a joint. He also explained that activities had no impact on osteoarthritis as it was a progressive and natural condition.

⁴ A March 5, 2014 statement of accepted facts (SOAF) noted that appellant had right knee total arthroscopic surgery on April 14, 2010, stopped work that day, and retired in October 2010.

⁵ See A.M.A., *Guides* (6th ed. 2009).

On July 9, 2014 OWCP referred appellant to Dr. Joseph Abate, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Hartunian and the DMA on the issue of appellant's work capacity. It informed appellant that the date of examination was at 10:00 a.m. on July 2, 2014.

By correspondence dated November 10, 2014, counsel noted an appointment with Dr. Abate had been scheduled for July 2, 2014 with no narrative report submitted. He requested a follow-up with Dr. Abate. If Dr. Abate was unable to comply with submitting a report, counsel requested that OWCP refer appellant for another impartial medical examination.

On January 21, 2015 OWCP noted in e-mail correspondence that appellant did not attend the scheduled July 2, 2014 appointment with Dr. Abate.

By letter dated January 22, 2015, OWCP referred appellant to Dr. Christopher B. Geary, a Board-certified orthopedic surgeon, for a second opinion evaluation. It provided a list of questions for the second opinion physician which included questions regarding the extent and duration of any work-related aggravation of appellant's preexisting left knee osteoarthritis, whether the aggravation was temporary or permanent, and whether appellant's work duties caused an acceleration of the preexisting left knee osteoarthritis. If the aggravation was temporary, OWCP requested that Dr. Geary define the period of temporary aggravation.

In a report dated February 9, 2015, Dr. Geary, based upon a review of the SOAF, employment injury history, review of medical records, and physical examination, diagnosed left knee osteoarthritis. He opined that appellant sustained a temporary aggravation of the preexisting left knee osteoarthritis from his work and that any aggravation ceased after appellant's retirement in 2010. Next, Dr. Geary opined that appellant's work activities did not cause an acceleration of the preexisting left knee arthritis due to the lack of any discrete work injury. In addition, he noted that there was no evidence that the progress of appellant's arthritis would have been slower if appellant had not been performing his usual work duties. Dr. Geary determined that appellant reached maximum medical improvement (MMI) when he retired from work in either May or June 2010.

On June 16, 2015 OWCP referred appellant to Dr. Abate to resolve the conflict in the medical opinion evidence between Dr. Geary and Dr. Hartunian as to whether the aggravation of appellant's preexisting left knee osteoarthritis was temporary or permanent.

In an August 6, 2015 report, Dr. Abate, based upon a review of the medical record, SOAF, and physical examination, diagnosed mild left knee degenerative arthritis and status post total right knee arthroplasty. Appellant related that he began to have bilateral knee discomfort in 2008 without any work injury and that April 13, 2010 was the last day he worked. Dr. Abate noted that on March 20, 2008 appellant was diagnosed with bilateral degenerative arthritis. He opined that appellant sustained a temporary aggravation of his preexisting left knee osteoarthritis, as the aggravation was related to the extensive walking required in his job, and any aggravation ceased at the time of appellant's retirement. In support of this conclusion, Dr. Abate noted that appellant had not had any left knee treatment or medical evaluation for several years as his last left knee evaluation with his treating physician was in February 2013. Next, he opined that appellant's current condition was due to the natural progression of the preexisting left knee

osteoarthritis, which his work duties had not accelerated or aggravated. Dr. Abate opined that appellant reached MMI on the date of retirement in 2010. He provided an impairment rating of 18 percent permanent impairment of the left lower extremity, pursuant to the sixth edition of the A.M.A., *Guides*.

By decision dated April 8, 2016, OWCP accepted appellant's claim for a temporary aggravation of preexisting left knee osteoarthritis.

In a separate decision dated April 8, 2016, OWCP denied appellant's claim for a schedule award as it found that he had not established permanent impairment of a scheduled member causally related to the accepted condition. It found that the opinion of Dr. Abate was entitled to special weight. OWCP noted that Dr. Abate had been selected to resolve the conflict in medical opinion evidence between Dr. Geary and Dr. Hartunian on the issue of whether appellant sustained a temporary or permanent aggravation of left knee osteoarthritis.

On April 26, 2016 OWCP received appellant's request for an oral hearing before an OWCP hearing representative, which was held on October 27, 2016.

By letter dated June 8, 2016, counsel requested OWCP issue subpoenas to both Dr. Geary and Dr. Abate. By letter dated September 23, 2016, an OWCP hearing representative denied counsel's request for subpoenas of Dr. Geary and Dr. Abate as he found it unnecessary.

By decision dated January 11, 2017, an OWCP hearing representative affirmed the denial of appellant's claim for a permanent aggravation of his preexisting left knee osteoarthritis and his entitlement to a schedule award. The hearing representative accorded special weight to Dr. Abate based on his status as an impartial medical examiner and referred to Dr. Geary as an OWCP referral physician. He also noted that he had denied appellant's request for subpoenas finding that compelling the testimony of Dr. Abate and Dr. Geary was unnecessary as it was not the only or best method to obtain additional information from the physicians.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁶ and its implementing regulations⁷ 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 standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁸ Effective May 1, 2009, OWCP adopted the

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404.

⁸ *Id.*

sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.⁹

Not all medical conditions accepted by OWCP result in permanent impairment to a scheduled member.¹⁰ It is the claimant's burden of proof to establish that he sustained a permanent impairment of a scheduled member or function as a result of an employment injury.¹¹ OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred.¹² An impairment description must be in sufficient detail so the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its restrictions and limitations.¹³

Section 8123(a) of FECA¹⁴ provides that, if there is 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.¹⁵ The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination.¹⁶ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.

ANALYSIS -- ISSUE 1

On October 7, 2013 OWCP accepted appellant's occupational disease claim for aggravation of preexisting left knee osteoarthritis. Due to a conflict between appellant's physician, Dr. Hartunian, and Dr. Geary, an OWCP referral physician, regarding permanent aggravation of appellant's preexisting left knee osteoarthritis, OWCP referred appellant to Dr. Abate as the impartial medical specialist, to resolve the conflict in medical opinion, pursuant to 5 U.S.C. § 8123(a). By decision dated April 8, 2016, OWCP found that the aggravation was temporary and not permanent as alleged by appellant. As the aggravation was temporary and not permanent, it denied appellant's claim for a schedule award on April 8, 2016. An OWCP

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); Part 3 -- *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

¹⁰ *G.E.*, Docket No. 09-1412 (issued February 17, 2010); *Thomas P. Lavin*, 57 ECAB 353 (2006).

¹¹ *D.F.*, Docket No. 09-1463 (issued August 12, 2010); *Tammy L. Meehan*, 53 ECAB 130 (2001).

¹² *See D.S.*, Docket No. 08-0885 (issued March 17, 2009); *Patricia J. Penney-Guzman*, 55 ECAB 757 (2004).

¹³ *C.A.*, Docket No. 13-0762 (issued April 1, 2014); *Peter C. Belkind*, 56 ECAB 580 (2005).

¹⁴ 5 U.S.C. § 8123(a).

¹⁵ *J.J.*, Docket No. 09-0027 (issued February 10, 2009); *F.R.*, 58 ECAB 607 (2007); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹⁶ 20 C.F.R. § 10.321.

hearing representative affirmed the denial and the finding that appellant's left knee osteoarthritis had been temporarily aggravated by his work duties.

The Board finds that appellant has not established a permanent impairment of a scheduled member entitling him to a schedule award.

In his June 22, 2012 report, Dr. Abate reviewed the medical records and the SOAF and discussed appellant's employment duties and his medical history, and provided examination findings. Dr. Abate opined that appellant sustained a temporary aggravation of his preexisting left knee osteoarthritis which ended when he stopped work in October 2010. In support of this conclusion, Dr. Abate explained that appellant's extensive walking was the cause of the aggravation and when he retired the aggravation ceased. He observed that appellant's current condition was due to the natural progression of the preexisting left knee osteoarthritis, which his work duties had not accelerated or aggravated. This finding was supported by the fact that he last saw his treating physician for his left knee in February 2013. In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹⁷ The Board finds Dr. Abate's report to be sufficiently detailed and well reasoned to resolve the conflict of medical opinion evidence and established that appellant sustained a temporary rather than a permanent aggravation of a preexisting condition, and, thus was not entitled to a schedule award. The Board finds that his report is entitled to the special weight of the medical evidence, afforded an impartial medical examiner, with regard to whether appellant sustained a temporary or permanent aggravation and entitlement to a schedule award for employment-related permanent impairment.

The Board finds that appellant has not established that his work duties caused a permanent aggravation of his left knee preexisting osteoarthritis, and thus, is not entitled to a schedule award.

On appeal counsel contends that there was no conflict in the medical opinion evidence as Dr. Geary's opinion was speculative. Contrary to counsel's contention, the Board found Dr. Geary's opinion was not speculative in nature and was sufficient to create a conflict in the medical opinion evidence.

Appellant may, at any time, request a schedule award based on medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of FECA provides that the Secretary of Labor, on any matter within his jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of

¹⁷ *S.R.*, Docket No. 09-2332 (issued August 16, 2010); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Anna M. Delaney*, 53 ECAB 384 (2002).

witnesses within a radius of 100 miles.¹⁸ The implementing regulations provide that a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, who may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers, or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means and for witnesses only where oral testimony is the best way to ascertain the facts.¹⁹ In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.²⁰ Section 10.619(a) of the implementing regulations provide that a claimant may request a subpoena only as a part of the hearings process and no subpoena will be issued under any other part of the claims process.

To request a subpoena, the requestor must submit the request in writing and send it to the hearing representative as early as possible, but no later than 60 days (as evidenced by postmark, electronic marker, or other objective date mark) after the date of the original hearing request.²¹ The hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion.²² Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deduction from established facts.²³

ANALYSIS -- ISSUE 2

Counsel requested that OWCP's hearing representative issue subpoenas to Dr. Geary and Dr. Abate. The hearing representative denied the request, finding that counsel had not established that clarification from these physicians could not be obtained by other means.

As noted above, the hearing representative has discretion with respect to the issuance of subpoenas. Appellant argued that subpoenas were necessary to compel the attendance of Dr. Abate and Dr. Geary. However, counsel did not provide a valid explanation as to why testimony from Dr. Abate and Dr. Geary was the best method rather than obtaining clarification of their opinions in writing. The hearing representative reasonably determined that subpoenas were unnecessary. There was no evidence presented to support that subpoenas were necessary with respect to the opinions of Dr. Geary and Dr. Abate that appellant only sustained a temporary

¹⁸ 5 U.S.C. § 8126.

¹⁹ 20 C.F.R. § 10.619; *Gregorio E. Conde*, 52 ECAB 410 (2001).

²⁰ *Id.*

²¹ 20 C.F.R. § 10.619(a)(1).

²² *Gregorio E. Conde*, *supra* note 19.

²³ *Claudia Vazquez*, 52 ECAB 496 (2001).

aggravation of his preexisting left knee osteoarthritis. The Board therefore finds no abuse of discretion related to the denial of a subpoena request.²⁴

On appeal counsel argues that the refusal to issue the requested subpoenas was an abuse of discretion as appellant's claim for a permanent aggravation would have been accepted if the subpoenas had been issued. Contrary to counsel's contention, there was no abuse of discretion. Supplemental reports from the physicians could have been obtained and the issuance of a subpoena was not the only or best method to obtain the information counsel sought.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish permanent impairment of a scheduled member entitling him to a schedule award. The Board further finds that an OWCP hearing representative properly denied appellant's request for subpoenas.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 11, 2017 is affirmed.

Issued: December 7, 2017
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

²⁴ *J.M.*, Docket No. 16-1575 (issued May 25, 2017); *D.O.*, Docket No. 15-1368 (issued October 22, 2015).