

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

T.P., Appellant)
and) Docket No. 17-1892
U.S. POSTAL SERVICE, POST OFFICE,) Issued: February 7, 2018
Urbana, IL, Employer)

)

Appearances:

Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 7, 2017 appellant, through counsel, filed a timely appeal from a July 13, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The record provided the Board includes evidence received after OWCP issued its July 13, 2017 decision. The Board's jurisdiction is limited to the evidence that was in the case record before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c)(1). Therefore, the Board is precluded from reviewing evidence not before OWCP at the time of the July 13, 2017 decision for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to establish more than 37 percent permanent impairment of each lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On September 22, 1993 appellant, then a 42-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained bilateral hip osteoarthritis due to performing his assigned duties over a period of time. He indicated that he first became aware of his claimed condition in January 1993 and first realized on August 31, 1993 that it was caused or aggravated by factors of his federal employment. Appellant did not stop work.

OWCP accepted appellant's claim for aggravation of bilateral hip osteoarthritis.⁴

Appellant stopped work on November 16, 1993 and, on that date, Dr. Henry A. Finn, an attending Board-certified orthopedic surgeon, performed OWCP-approved left total hip replacement surgery. On February 22, 1994 he returned to modified duty for the employment establishment. Appellant stopped work on April 23, 1996 and, on that date, Dr. Finn performed OWCP-approved right total hip replacement surgery. On March 3, 1997 he again returned to modified duty for the employment establishment.⁵

On December 18, 1998 appellant filed a claim for compensation (Form CA-7) seeking a schedule award for permanent impairment of his lower extremities due to his accepted employment condition.

In a report dated April 22, 2001, Dr. Mark G. Stewart, an attending orthopedic surgeon, indicated that he had reviewed recent reports of examination findings, including those of Dr. Finn. He found that appellant had 37 percent permanent impairment of each lower extremity under the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁶

In an August 2, 2001 decision, OWCP granted appellant a schedule award for 37 percent permanent impairment of each lower extremity. The award ran for 213.12 weeks from July 23, 1996 to August 22, 2000 and was based on the opinion of Dr. Stewart.

Appellant stopped work on April 10, 2012. He received disability compensation on the daily rolls beginning April 10, 2012 and on the periodic rolls beginning August 26, 2012.

⁴ OWCP later expanded the accepted conditions to include long-term use of anti-coagulants.

⁵ Appellant received appropriate wage-loss compensation for periods of disability from work.

⁶ A.M.A., *Guides* (5th ed. 2001).

On October 18, 2012 Dr. Finn performed an OWCP-approved surgical exchange of hardware (polyethylene liner and femoral head) for appellant's prior left total hip replacement. On June 10, 2013 appellant returned to work in a modified position.

Appellant stopped work January 14, 2014 and, on that date, Dr. Finn performed an OWCP-approved surgical exchange of hardware (polyethylene liner) for appellant's prior right total hip replacement.

Appellant retired from the employing establishment effective April 30, 2014, and elected to receive retirement benefits from the Office of Personnel Management rather than FECA benefits for wage loss.

In a January 30, 2014 report, Richard Jean, an attending certified athletic trainer, noted that appellant reported hip pain of 2 on a scale of 10. Appellant continued to submit periodic reports of attending certified athletic trainers.

On April 26, 2016 appellant filed a claim for compensation (Form CA-7) seeking an increased schedule award for permanent impairment of his lower extremities due to his accepted employment condition.

In a May 6, 2016 development letter, OWCP requested that, within 30 days, appellant submit a lower extremity permanent impairment rating from an attending physician derived in accordance with the standards of the sixth edition of the A.M.A., *Guides*.

OWCP did not receive any new medical evidence within the allotted time period.

In a November 15, 2016 decision, OWCP determined that appellant had not met his burden of proof to establish more than 37 percent permanent impairment of each lower extremity, for which he previously received a schedule award. It found that he had not submitted medical evidence showing a higher degree of permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*.

The findings of November 30, 2016 x-ray testing of appellant's hips showed bilateral hip arthroplasties in stable anatomic alignment without periprosthetic lucency to suggest hardware loosening.

In a November 30, 2016 progress report, Dr. Finn indicated that appellant was now 23 years after his left hip replacement, 5 years after his right bearing exchange, and 3 years after his left bearing exchange. He noted that appellant reported that he felt wonderful and had no pain. Dr. Finn indicated that appellant had a normal gait and that both hips had excellent range of motion. Appellant's leg lengths were equal, skin appearance was normal, and neurovascular examination was intact. Dr. Finn indicated that recent x-rays "look fine" and advised that he would follow appellant's condition on an annual basis.⁷

⁷ In a November 30, 2016 note, Dr. Finn prescribed pain medication for appellant.

Appellant requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review regarding OWCP's November 15, 2016 decision. During the hearing, held on June 9, 2017, counsel indicated that he would obtain additional medical evidence in support of appellant's claim for increased schedule award compensation. The hearing representative indicated that the record would be held open for 30 days from the date of the hearing for the submission of additional evidence.

In a July 13, 2017 decision, OWCP's hearing representative affirmed the November 15, 2016 OWCP decision. She determined that appellant had not met his burden of proof to establish more than 37 percent permanent impairment of each lower extremity, for which he received a schedule award. The hearing representative found that the medical evidence of record, including the November 30, 2016 progress report of Dr. Finn, did not contain a medical opinion establishing a higher degree of permanent impairment under the sixth edition of the A.M.A., *Guides* than that previously awarded.

LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁸ FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁹ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides*.¹⁰

ANALYSIS

OWCP accepted that appellant sustained aggravation of bilateral hip osteoarthritis.¹¹ On November 16, 1993 appellant underwent OWCP-approved left total hip replacement surgery and, on April 23, 1996, he underwent OWCP-approved right total hip replacement surgery. In an August 2, 2001 decision, OWCP granted him a schedule award for 37 percent permanent impairment of each lower extremity. On October 18, 2012 appellant underwent an OWCP-approved surgical exchange of hardware (polyethylene liner and femoral head) for his prior left total hip replacement and, on January 14, 2014, he underwent an OWCP-approved surgical exchange of hardware (polyethylene liner) for his prior right total hip replacement. On April 26, 2016 he filed a claim for compensation (Form CA-7) seeking an increased schedule award for

⁸ 5 U.S.C. § 8107(c). For a total or 100 percent loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2).

⁹ 20 C.F.R. § 10.404.

¹⁰ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

¹¹ OWCP later expanded the accepted conditions to include long-term use of anti-coagulants.

permanent impairment of his lower extremities due to his accepted employment condition. By decisions dated November 15, 2016 and July 13, 2017, OWCP denied appellant's claim for an increased schedule award.

The Board finds that appellant has not met his burden of proof to establish more than 37 percent permanent impairment of each lower extremity, for which he received a schedule award. Appellant failed to submit medical evidence showing a higher degree of permanent impairment under the standards of the sixth edition of the A.M.A., *Guides* than that previously awarded.

In support of his claimed for increased schedule award compensation, appellant submitted a November 30, 2016 progress report from Dr. Finn, who discussed appellant's prior surgeries and noted that appellant reported that he felt wonderful and had no pain. Dr. Finn indicated that appellant had a normal gait and that both hips had excellent range of motion. Appellant's leg lengths were equal, skin appearance was normal, and neurovascular examination was intact. Dr. Finn indicated that recent x-rays "look fine."¹² He advised that he would follow appellant's condition on an annual basis.

The Board finds that Dr. Finn's November 30, 2016 progress report is of no probative value on the relevant issue of this case because it does not contain an opinion regarding the extent of appellant's lower extremity permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*. The Board has held that a medical report is of no probative value regarding permanent impairment if it does not contain a permanent impairment calculation derived in accordance with the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses.¹³

During the June 9, 2017 telephonic hearing with a hearing representative of OWCP's Branch of Hearings and Review, counsel indicated that he would obtain additional medical evidence in support of appellant's claim for increased schedule award compensation. However, no such evidence was submitted within the time period allotted by the hearing representative.

On appeal, counsel argues that appellant's permanent impairment should be calculated under the standards of the fifth edition of the A.M.A., *Guides*, rather than under the standards of the sixth edition of the A.M.A., *Guides*. However, OWCP has dictated, through its procedures, that the sixth edition of the A.M.A., *Guides* became effective May 1, 2009 for evaluating permanent impairment, and the Board notes that the determination of the extent of appellant's permanent impairment now being appealed was made after that date.¹⁴

¹² The findings of November 30, 2016 x-ray testing of appellant's hips showed bilateral hip arthroplasties in stable anatomic alignment without periprosthetic lucency to suggest hardware loosening.

¹³ See *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989).

¹⁴ See *supra* note 10. See also *D.L.*, Docket No. 17-1432 (issued November 20, 2017); *J.L.*, Docket No. 14-0898 (issued March 26, 2015). OWCP procedures from February 2013 provide that, if a claimant who has received a schedule award under a previous edition of the A.M.A., *Guides* claims increased permanent impairment, the claim will be calculated according to the sixth edition of the A.M.A., *Guides*. *Supra* note 10 at Chapter 2.808.9d (February 2013).

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

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish more than 37 percent permanent impairment of each lower extremity, for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the July 13, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 7, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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