United States Department of Labor
Employees' Compensation Appeals Board

B.M., Appellant	)	
and	)	**Docket No. 17-1157**
	)	**Issued: May 22, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Dedham, MA, Employer	)	

Appearances:
Benjamin R. Zimmermann, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 4, 2017 appellant, through counsel, filed a timely appeal from an April 12, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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] Together with his appeal request, appellant submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). After exercising its discretion, by order dated September 22, 2017, the Board denied the request as appellant's arguments on appeal could be adequately addressed in a decision based on a review of the case as submitted on the record. *Order Denying Request for Oral Argument*, Docket No. 17-1157 (issued September 22, 2017).

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish his claim of permanent aggravation of right hip osteoarthritis; (2) whether OWCP properly denied appellant's claim for a schedule award for his right lower extremity; and (3) whether OWCP properly denied appellant's request for subpoenas.

FACTUAL HISTORY

On April 23, 2012 appellant, then a 49-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained permanent acceleration of bilateral hip osteoarthritis due to his work duties. He indicated that he first realized on January 5, 2012 that he had a medical condition aggravated by factors of his federal employment. Appellant did not stop work.

In an accompanying statement, appellant indicated that, with respect to his current mail delivery route, he sorted mail for one and a half to two hours in the morning, and then went on the road for six hours of mail delivery.[4] He worked one to one and a half hours of overtime as well. Appellant indicated that he had measured his route with a pedometer and walked eight miles per day. On the average, he delivered 6 to 7 trays of mail and 15 to 20 packages per day. While sorting mail, appellant stood for the entire time, and he had to bend down and pick up bundles of circulars and trays of mail, lifting them to waist level. He indicated that he was constantly twisting and turning his body while lifting these items, and repeatedly raised and lowered his arm while reaching above shoulder height in order to place mail in slots. Appellant had to lift mail tubs weighing up to 35 pounds and packages weighing up to 70 pounds. He indicated that delivering mail required significant lifting, bending, and twisting.

In an April 11, 2012 report, Dr. Byron V. Hartunian, an attending Board-certified orthopedic surgeon, discussed appellant's factual and medical history and the findings of the physical examination he conducted on January 5, 2012. He provided a diagnosis of right hip degenerative arthritis with one millimeter of cartilage interval and status post left total hip arthroplasty for end-stage degenerative arthritis.[5] Dr. Hartunian opined that the repetitive heavy physical activities that appellant performed for 25 years permanently aggravated, accelerated, and hastened the arthritic condition of the left hip, necessitating the left total hip replacement, and causing a more rapid progression of the arthritis condition affecting the right hip.

OWCP referred the case record for review to Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser. It asked him to provide an opinion regarding whether the evidence of record was sufficient to establish a work-related aggravation or acceleration of appellant's underlying left or right hip osteoarthritis.

In a report dated August 17, 2012, Dr. Slutsky explained that osteoarthritis is a ubiquitous disease and, regardless of work-associated factors, the condition has a prevalence of 80 percent in individuals 55 years of age and older. He noted that there is a strong link between being

[4] Appellant indicated that he had worked for the employing establishment since November 1986.

[5] The record contains a report of the left total hip arthroplasty appellant underwent on June 30, 2010. The procedure was not approved by OWCP.

overweight and the development of this condition and noted that other factors such as gender and family history were also important when discussing this issue. Dr. Slutsky argued that Dr. Hartunian had not provided a sufficiently thorough evaluation of appellant's medical history, as he had not discussed the nonwork-related factors which are scientifically shown to have the highest association with development of osteoarthritis. He opined that there was therefore insufficient objective evidence of record to support a causal relationship between appellant's bilateral hip osteoarthritis and his work duties.

OWCP initiated further development of the claim and referred appellant for a second opinion examination with Dr. Stanley Hom, a Board-certified orthopedic surgeon, to address whether there was a causal relationship between appellant's federal employment duties and the claimed bilateral hip condition. Dr. Hom received a copy of the statement of accepted facts (SOAF) and the medical evidence of record, to be used as a basis for his evaluation of appellant and medical opinion.

In a September 28, 2012 report, Dr. Hom discussed appellant's factual and medical history and reported the findings of his September 27, 2012 physical examination. He noted that appellant underwent total left hip replacement surgery on June 30, 2010 and was able to return to his regular work approximately 10 weeks later.[6] Dr. Hom opined that appellant's work activities temporarily aggravated his underlying bilateral hip arthritis, with durations lasting anywhere from days to weeks. He indicated, however, that appellant's work activities did not represent a cause of the left hip arthritis.

On November 7, 2012 OWCP accepted that appellant sustained temporary aggravation of preexisting osteoarthritis of both hips.

On February 21, 2013 appellant filed a claim for compensation (Form CA-7) seeking a schedule award due to his accepted employment conditions.

Appellant submitted a December 31, 2012 report in which Dr. Hartunian provided his physical examination findings including range of motion for the lower extremities. Using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[7] Dr. Hartunian opined that appellant had sustained 63 percent permanent impairment of the left lower extremity and 26 percent permanent impairment of the right lower extremity. He indicated that appellant reached maximum medical improvement (MMI) of the right hip in September 2007 when x-rays confirmed the diagnosis. Dr. Hartunian concluded that MMI of the left hip was reached in June 2011, one year after the left total hip replacement.

OWCP found a conflict in the medical opinion evidence between Dr. Hartunian and Dr. Hom regarding whether appellant sustained a temporary or permanent work-related aggravation of preexisting bilateral hip osteoarthritis and referred him to Dr. Alan Solomon, a Board-certified orthopedic surgeon, for an impartial medical examination. OWCP was also asked

[6] Dr. Hom indicated that it was reasonable for appellant to undergo the June 30, 2010 left hip arthroplasty.

[7] A.M.A., *Guides* (6th ed. 2009).

to address whether the June 30, 2010 left hip arthroplasty was reasonable and necessary due to appellant's work duties as a letter carrier.

In a September 25, 2013 report, Dr. Solomon discussed appellant's factual and medical history and reported the findings of his physical examination on that date. He noted that appellant worked as a letter carrier for over 26 years without any significant loss of time from work or reports of acute illness or injury. Although appellant identified the onset of symptoms as sometime around 2003 with stiffness and aching at the end of the workday, there were no reports of imaging or visits to a physician prior to 2007. Dr. Solomon noted that appellant noticed increasing left hip pain approximately two years prior to his treatment in 2007. At that time, x-rays of the left hip and bilateral hips were obtained and were significant for advanced osteoarthritis. Dr. Solomon indicated that, although there were signs of degenerative osteoarthritis in the right hip at that time, right hip symptoms were not significant and did not affect function. After appellant underwent left hip replacement, he returned to his full-duty job as a letter carrier about 10 weeks later, carrying his bag on his left shoulder. Dr. Solomon indicated that he had reviewed the SOAF and he discussed appellant's work duties. He noted that, upon examination, appellant had a one-inch leg length discrepancy between the left and right legs, with a shortened left hip. There were no signs of atrophy, but osteoarthritis caused a motion restriction of both hips. Appellant was able to walk without antalgic limp or weakness.[8] He could walk on heels and toes without difficulty or pain. There were no neurological findings and review of the most recent x-rays of the hips demonstrated a well-seated, well-constructed total left hip replacement and significant osteoarthritis on the right with no visible cartilage interface.

Dr. Solomon opined that appellant's left hip symptoms and the need for total hip replacement on the left side were accelerated by his employment. He concluded that repetitive pressure on the left hip from carrying a mailbag on the left side gradually became less bearable leading to aggravation of his cartilage erosion and the premature need for total hip replacement. Dr. Solomon noted that the predicted replacement of a total hip replacement was approximately 20 years and that appellant's left total hip replacement was needed 7 years prematurely. He indicated that the x-rays of the right hip were strongly suggestive of an aggressive form of arthritis. Dr. Solomon opined that appellant's right hip had not been significantly affected by his work duties and remained a "benchmark" for the natural progression of his disease. He explained appellant had been walking while shifting his weight to the left hip, leaving the right hip with less pressure and less cause for synovial and cartilaginous erosion/destruction. Dr. Solomon explained that appellant's left hip symptoms began in 2003 and gradually increased over a period of approximately seven years before he came to require surgery. He opined that this would be the expected course for the right hip, projecting severe disabling hip osteoarthritis at age 56 with or without the letter carrier route.

Dr. Solomon also provided a permanent partial impairment evaluation of appellant's lower extremities based on his bilateral hip condition. Using Table 16-4 of the sixth edition of the A.M.A, *Guides*, he assigned class 2 impairment for the left total hip replacement with moderate problem, good result. The functional history adjustment for moderate problem with use of cane was a grade modifier 2. Physical examination adjustment for moderate problem was a grade modifier 2. Dr. Solomon noted that clinical studies adjustment was not used as clinical studies

[8] Dr. Solomon noted that appellant did not have a positive Trendelenburg sign.

were not available. He found a net adjustment of 0, yielding class 2, grade C permanent impairment of 25 percent of the left lower extremity. For the right hip, Dr. Solomon assigned class 1 for right hip arthritis (mild problem) and applied grade modifiers of 1 for functional history, physical examination, and clinical studies adjustments. He utilized the net adjustment formula to find a 0 net adjustment, yielding class 1, grade C permanent impairment of 7 percent for the right lower extremity.

OWCP referred the case file to Dr. David I. Krohn, a Board-certified internist serving as its medical adviser, for review and opinion on whether the evidence of record was sufficient to demonstrate appellant had reached MMI, and had sustained permanent impairment of a scheduled member due to the accepted work conditions.

In a report dated April 6, 2014, Dr. Krohn opined that Dr. Solomon's assignment of functional history modifier 2 for the left hip was not correct in light of his report on examination of no antalgic limp or Trendelenburg sign. He argued that Dr. Solomon's description "use of cane" was discrepant from the physical examination findings presented in his report. Dr. Krohn also asserted that Dr. Solomon's assignment of physical examination modifier 2 was not correct as range of motion of the left hip correlated with a "mild" not "moderate" problem based on the reported examination findings according to Table 16-24 of the A.M.A., *Guides*. For the right hip, he noted that the class 1 key factor was based on a three millimeter cartilage interval or full thickness articular cartilage defect. Since there was no reported radiologic documentation, this was the correct class. Dr. Krohn indicated that a functional history grade modifier of 1 was not correct in the absence of antalgic gait or need for orthotics.

By letter dated July 16, 2014, OWCP requested an addendum report from Dr. Solomon addressing the discrepancies in his opinion noted by Dr. Krohn.

In a July 28, 2014 report, Dr. Solomon indicated that he corrected his prior report to reflect that appellant could walk with a slight antalgic limp with no signs of the Trendelenburg gait/weakness. On this basis, appellant qualified for grade modifier 2 for functional history with the use of a cane and an antalgic gait. Dr. Solomon agreed with the opinion of Dr. Krohn, that the physical examination grade modifier should be changed to 1. He recalculated the left lower extremity impairment as 23 percent after applying the net adjustment formula, which yielded an adjustment of -1. For the right hip, Dr. Solomon noted that the x-ray findings were "close to bone on bone radiologic appearance," but did not provide a measurement of cartilage interval determined by a radiologist, and he updated his report to reflect this. He noted that the functional history grade modifier was 1 for slight antalgic limp and the physical examination grade modifier was 1, due to one inch leg length discrepancy. The net adjustment therefore was 0, yielding grade C or seven percent permanent impairment of the right lower extremity. Dr. Solomon indicated that there was no reason to incorporate the right hip osteoarthritis as work related since appellant was asymptomatic and had not been symptomatic or disabled within the time period before 2016, the anticipated time for the aggressive osteoarthritis to surface and become disabling.

On January 28, 2015 OWCP expanded the accepted conditions to include acceleration of left hip osteoarthritis, based on the opinion of the impartial medical specialist, Dr. Solomon. It continued to find that appellant only had temporary aggravation of preexisting right hip osteoarthritis.

OWCP referred the case file back to Dr. Krohn in his capacity as an OWCP medical adviser for review and an opinion on whether the evidence of record was sufficient to demonstrate appellant had reached MMI, and had sustained permanent impairment of a scheduled member due to the accepted work injury.

In a report dated February 16, 2015, Dr. Krohn concurred with Dr. Solomon's finding of 23 percent permanent impairment of the left lower extremity. He indicated that there was no ratable impairment for the right lower extremity, as Dr. Solomon opined that the right hip had not been significantly affected by appellant's work and remained a "benchmark" for the natural progression of his disease.

On January 27, 2016 OWCP granted appellant a schedule award for 23 percent permanent impairment of his left lower extremity. The award ran for 66.24 weeks from September 4, 2013 to December 11, 2014 and was based on the opinions of Dr. Solomon and Dr. Krohn.[9]

In a February 12, 2016 decision, OWCP denied appellant's claim for a right lower extremity schedule award, noting Dr. Solomon's finding of temporary work-related aggravation of preexisting right hip osteoarthritis.

Appellant disagreed with the decision denying a schedule award based on permanent impairment of the right lower extremity and, through counsel, requested a hearing with a representative of OWCP's Branch of Hearings and Review. Counsel provided a written statement dated February 24, 2016 arguing for issuance of subpoenas to the second opinion physician, Dr. Hom, and the impartial medical specialist, Dr. Solomon, to compel their attendance and testimony at the hearing.

In a letter dated September 23, 2016, OWCP advised appellant and counsel that the request for subpoena was denied, in that they had failed to prove that a subpoena was the best means or only method to obtain additional information from Dr. Hom or Dr. Solomon, if warranted. It indicated that supplemental written reports could be obtained from these physicians if additional information was found necessary.

During the hearing held on October 27, 2016, appellant testified that he had worked as a letter carrier for 30 years and he detailed the course of his hip problems, which began approximately 14 years ago. Appellant discussed his work duties over the past 30 years. Counsel argued that the current claim should be accepted for permanent aggravation of right hip arthritis. He further argued that the opinion of Dr. Solomon was not sufficiently well rationalized to be afforded special weight regarding the nature and cause of appellant's medical conditions.

In an April 12, 2017 decision, OWCP's hearing representative affirmed OWCP's February 12, 2016 decision and denied appellant's request for the issuance of subpoenas. He found that OWCP properly denied appellant's claim for a right lower extremity schedule award based on Dr. Solomon's finding of a temporary work-related aggravation of preexisting right hip

[9] With respect to the January 27, 2016 schedule award, appellant requested a hearing with a representative of OWCP's Branch of Hearings and Review. Prior to a hearing being held, OWCP's hearing representative issued a May 4, 2016 decision setting aside OWCP's January 27, 2016 decision and remanding the case to OWCP for further development of the matter of left lower extremity permanent impairment. This matter is not currently before the Board.

osteoarthritis. The hearing representative also found that OWCP properly determined that appellant's claim should not be expanded to include permanent aggravation of right hip osteoarthritis, noting that Dr. Solomon's opinion showed that such expansion was not warranted. He exercised his discretion and denied appellant's request for subpoenas, finding that he could obtain any desired evidence in support of his claim through other means.[10]

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged, and that any specific condition and/or disability for which compensation is claimed are causally related to the employment injury.[11] In general the term disability under FECA means incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury.[12] This meaning, for brevity, is expressed as disability for work.[13]

The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[14]

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that there was a conflict in the medical opinion between Dr. Hartunian, appellant's attending physician, and the government physician, Dr. Hom, OWCP's referral physician, on the issue of whether appellant had permanent aggravation of right hip osteoarthritis.[15] In order to resolve the conflict, OWCP properly referred appellant, pursuant to section 8123(a) of FECA, to Dr. Solomon for an impartial medical examination and an opinion on the matter.

[10] The hearing representative indicated that Dr. Solomon and Dr. Hom had already provided detailed medical reasoning explaining their opinions regarding how they arrived at their conclusions that work duties temporarily aggravated appellant's underlying right hip condition.

[11] *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

[12] *See* 20 C.F.R. § 10.5(f).

[13] *Roberta L. Kaaumoana,* 54 ECAB 150 (2002); *see also A.M.,* Docket No. 09-1895 (issued April 23, 2010).

[14] *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

[15] Dr. Hartunian found permanent aggravation in a December 31, 2012 report and Dr. Hom found temporary aggravation in a September 28, 2012 report.

FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[16] For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[17] Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well reasoned and based upon a proper factual background, must be given special weight.[18]

The Board finds that the weight of the medical evidence with respect to a permanent aggravation of right hip osteoarthritis is represented by the thorough, well-rationalized opinion of Dr. Solomon.[19] The September 25, 2013 report of Dr. Solomon establishes that appellant did not sustain a work-related permanent aggravation of right hip osteoarthritis.

In his September 25, 2013 report, Dr. Solomon indicated that the x-rays of the right hip were strongly suggestive of an aggressive form of arthritis. He opined that appellant's right hip had not been significantly affected by his work duties and remained a "benchmark" for the natural progression of his disease. Dr. Solomon explained that appellant had been walking while shifting his weight to the left hip, leaving the right hip with less pressure and less cause for synovial and cartilaginous erosion/destruction.

The Board has carefully reviewed the opinion of Dr. Solomon and notes that it has reliability, probative value, and convincing quality with respect to its conclusions regarding the relevant issue which was the basis of the conflict. Dr. Solomon provided a thorough factual and medical history and accurately summarized the relevant medical evidence.[20] He provided medical rationale for his opinion by explaining that the worsening of appellant's right hip condition was due to the natural progression of the underlying degenerative condition.

For these reasons, appellant has met his burden of proof to establish his claim of permanent aggravation of right hip osteoarthritis.

LEGAL PRECEDENT -- ISSUE 2

The schedule award provisions of FECA[21] and its implementing regulations[22] 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

[16] 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[17] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[18] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[19] *See supra* note 17.

[20] *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

[21] 5 U.S.C. § 8107.

[22] 20 C.F.R. § 10.404 (1999).

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.[23] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[24]

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.[25] A schedule award is not payable for the loss, or loss of use, of a part of the body that is not specifically enumerated under FECA.[26] Moreover, neither FECA nor its implementing regulations provides for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under FECA.[27]

In 1960, amendments to FECA modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[28]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures indicate that *The Guides Newsletter*, "Rating Spinal Nerve Extremity Impairment Using the Sixth Edition" (July/August 2009) is to be applied.[29] The Board has long recognized the discretion of OWCP to adopt and utilize various editions of the A.M.A., *Guides* for assessing permanent impairment.[30] In particular, the Board has recognized the adoption of this methodology for rating extremity impairment, including the use of *The Guides Newsletter*, as proper in order to provide a uniform standard applicable to each claimant for a schedule award for extremity impairment originating in the spine.[31]

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[23] *Id*.

[24] *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 (March 2017).

[25] *Pamela J. Darling*, 49 ECAB 286 (1998).

[26] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[27] *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

[28] *See supra* note 25.

[29] *See G.N.*, Docket No. 10-850 (issued November 12, 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, note 5 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

[30] *D.S.*, Docket No. 14-12 (issued March 18, 2014).

[31] *See E.D.*, Docket No. 13-2024 (issued April 24, 2014); *D.S.*, Docket No. 13-2011 (issued February 18, 2014).

ANALYSIS -- ISSUE 2

The Board finds that it was improper for OWCP to assign the weight of the medical evidence with respect to appellant's right lower extremity impairment to the opinion of Dr. Solomon and to deny appellant's claim for a schedule award for the right lower extremity on this basis. The Board finds that, with respect to the issue of appellant's right lower extremity permanent impairment, Dr. Solomon served as an OWCP referral physician rather than an impartial medical specialist because appellant was not referred to Dr. Solomon to resolve a conflict in the medical evidence regarding his right lower extremity permanent impairment.[32]

In reports dated September 25, 2013 and July 28, 2014, Dr. Solomon provided an opinion that appellant had seven permanent impairment of his right lower extremity based on the standards of the sixth edition of the A.M.A, *Guides*. For the right hip, he assigned class 1 for right hip arthritis (mild problem) and applied grade modifiers of 1 for functional history, physical examination, and clinical studies adjustments. Dr. Solomon utilized the net adjustment formula to find a 0 net adjustment, yielding class 1, grade C permanent impairment of seven percent for the right lower extremity. The Board finds that the medical opinion of Dr. Solomon is insufficiently rationalized as to his application of the A.M.A., *Guides* in particular his use of grade modifiers.

Given Dr. Solomon's findings in this regard, the question of appellant's right lower extremity permanent impairment is not in posture for decision. The case is remanded to OWCP for referral back to Dr. Solomon, to include referral of appellant for examination if necessary, for an opinion clarifying his opinion on appellant's right lower extremity permanent impairment.

LEGAL PRECEDENT -- ISSUE 3

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.[33] The hearing representative of OWCP's Branch of Hearings and Review has discretion to approve or deny a subpoena request.[34] 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 deductions from established facts.[35]

ANALYSIS -- ISSUE 3

The Board finds that OWCP's hearing representative did not abuse his discretion when he denied counsel's subpoena requests for the testimony of Dr. Solomon and Dr. Hom. The hearing representative noted that counsel failed to establish a sufficient basis to warrant issuance of such a subpoena when he did not prove that oral testimony was the best or only way to obtain additional information from those physicians. He pointed out that Dr. Solomon and Dr. Hom had already

[32] *See supra* notes 15 and 16.

[33] *See* 20 C.F.R. § 10.619.

[34] *See id*.

[35] *Gerald A. Carr*, 55 ECAB 225 (2004).

provided detailed medical reasoning explaining their opinions regarding how they arrived at their conclusions that work duties temporarily aggravated appellant's underlying right hip condition. The Board finds that that there is no reason to find that the hearing representative's denial of counsel's request for subpoenas constituted as abuse of discretion under the above-noted standard.[36]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish his claim of permanent aggravation of right hip osteoarthritis and that OWCP properly denied his request for subpoenas. The Board further finds that the case is not in posture for decision regarding appellant's claim for a schedule award for his right lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2017 decision of the Office of Workers' Compensation Programs is affirmed with respect to appellant's claim for permanent aggravation of right hip osteoarthritis and his request for subpoenas. The April 12, 2017 decision is set aside

[36] *See supra* note 34.

with respect to appellant's claim for a schedule award for his right lower extremity and the case is remanded for further development to be followed by a *de novo* decision.

Issued: May 22, 2018
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