

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

A.I., Appellant	)	
	)	
and	)	Docket No. 19-0193
	)	Issued: May 1, 2019
U.S. POSTAL SERVICE, POST OFFICE,	)	
Chicago, IL, Employer	)	
	)	

*Appearances:*  
Daniel B. Shapiro, Esq., for the appellant<sup>1</sup>  
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 November 5, 2018 appellant, through counsel, filed a timely appeal from an October 4, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> Pursuant to the Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

---

<sup>1</sup> 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.

<sup>2</sup> Appellant submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). By order dated March 13, 2019, the Board exercised its discretion and denied the request as his 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. 19-0193 (issued March 13, 2019).

<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 31 percent permanent impairment of the left lower extremity, for which he previously received schedule award compensation.<sup>4</sup>

## FACTUAL HISTORY

On February 20, 2015 appellant, then a 65-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained an acceleration of bilateral hip osteoarthritis causally related to factors of his federal employment. On the reverse side of the claim form, the employing establishment indicated that he had retired effective January 1, 2015. OWCP accepted the claim for an aggravation of bilateral hip arthritis.

Appellant underwent a left hip arthroplasty on March 5, 2002 and a right hip arthroplasty on February 8, 2011.

On December 20, 2016 appellant filed a claim for a schedule award (Form CA-7).

In a development letter dated December 27, 2016, OWCP requested that appellant submit an impairment evaluation from his attending physician addressing the extent of his employment-related permanent impairment, if any, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).<sup>5</sup>

Thereafter, appellant submitted an impairment evaluation dated July 21, 2016 from Dr. Neil Allen, a Board-certified internist and neurologist. Dr. Allen diagnosed bilateral primary arthritis and joint pain of the pelvic region and thigh. He applied the Hip Regional Grid set forth in Table 16-4 on page 515 of the A.M.A., *Guides* to find 25 percent permanent impairment of the right lower extremity and 37 percent permanent impairment of the left lower extremity.

On February 18, 2017 Dr. Eric M. Orenstein, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), reviewed Dr. Allen's findings and concluded that appellant had 23 percent permanent impairment of the right lower extremity and 31 percent permanent impairment of the left lower extremity.

OWCP determined that a conflict existed between Dr. Allen and Dr. Orenstein regarding the extent of appellant's bilateral lower extremity impairment. It referred appellant to Dr. Bruce C. Summerville, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated May 31, 2017, Dr. Summerville reviewed appellant's work history and history of bilateral hip arthroplasties. On examination of the left hip, he found mild tenderness to

---

<sup>4</sup> OWCP granted appellant a schedule award for 23 percent permanent impairment of the right lower extremity and 31 percent permanent impairment of the left lower extremity. Appellant, through counsel, has only appealed the finding of 31 percent permanent impairment of the left lower extremity. Consequently, the issue of the extent of his right lower extremity impairment is not before the Board as this time. 20 C.F.R. § 501.2(c).

<sup>5</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

palpation and active range of motion (ROM) “to 50 degrees and passively to 100 degrees.” Dr. Summerville further measured ROM of 20 degrees extension, 30 degrees internal rotation, 50 degrees external rotation, and 30 degrees abduction. He noted that x-rays showed excellent alignment with no apparent loosening or osteolysis. Dr. Summerville found full strength for hip flexion, abduction, and adduction and intact sensation of the lower extremities. For the left hip, he identified the diagnosis as class 3 hip replacement using Table 16-4 on page 515 of the A.M.A., *Guides*, which yielded a default impairment value of 37 percent. In determining the impairment class, Dr. Summerville noted that class 3 was used for total hip replacements with fair results, fair position, mild instability and/or a mild motion deficit. He related that appellant had a fair result from surgery “based on flexion between 50 and 79 degrees with all other motion measurements within the normal range. Appellant was not rated as class 4 (moderate to severe motion deficit), but motion was used as a nonkey adjustment factor in [p]hysical [e]xamination.” He applied grade modifiers of one for functional history (GMFH) and two for physical examination (GMPE) findings, and determined that a grade modifier for clinical studies (GMCS) was not applicable as it was used to determine class placement. Dr. Summerville used the net adjustment formula to find a total left lower extremity permanent impairment of 34 percent. He further found a right lower extremity impairment of 21 percent.

On August 14, 2017 Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a DMA, reviewed Dr. Summerville’s report and found that appellant had 31 percent permanent impairment of the left lower extremity and 23 percent permanent impairment of the right lower extremity. For the left lower extremity, he concurred with Dr. Summerville’s finding of a class 3 impairment, but determined that a GMPE was inapplicable as ROM had been used to determine class placement. Dr. Katz applied the net adjustment formula, (GMFH - CDX), or (1-3) to find a negative adjustment of two and thus 31 percent permanent impairment of the left lower extremity.

By decision dated August 15, 2017, OWCP granted appellant a schedule award for 23 percent permanent impairment of the right lower extremity and 31 percent permanent impairment of the left lower extremity. The period of the award ran for 155.52 weeks from May 31, 2017 to May 23, 2020.

On August 24, 2017 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

Following a preliminary review, by decision dated December 6, 2017, an OWCP hearing representative vacated the August 15, 2017 decision. She found that Dr. Summerville as the impartial medical examiner (IME) was responsible for resolving the conflict in medical opinion, not the DMA. The hearing representative remanded the case for OWCP to obtain a supplemental report from Dr. Summerville clarifying his impairment rating and also addressing whether appellant’s bilateral total hip arthroplasties were causally related to his accepted employment injury.

In a supplemental report dated January 19, 2018, Dr. Summerville concurred with Dr. Katz’ finding of 31 percent permanent impairment of the left lower extremity. He advised that Dr. Katz had properly found ROM could not be used as a grade modifier as it was a key factor in reaching the class identification. Dr. Summerville opined that appellant’s total hip replacements

were causally related to his accepted employment injury. He found that appellant had reached maximum medical improvement.

Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as a DMA, reviewed Dr. Summerville's report on February 5, 2018 and concurred with his findings. He noted that Table 16-4 did not provide an alternative rating based on ROM for a hip arthroplasty.

By decision dated February 5, 2018, OWCP found that appellant had no more than the previously awarded 23 percent permanent impairment of the right lower extremity and 31 percent permanent impairment of the left lower extremity.

On February 15, 2018 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

In a report dated July 8, 2018, Dr. Byron V. Hartunian, an orthopedic surgeon, reviewed Dr. Summerville's report and noted that he had measured 50 degrees of flexion. He opined that appellant had class 4 impairment due to his left hip replacement, which yielded a default impairment rating of 67 percent. Dr. Hartunian applied a GMFH of one and a GMPE of two for findings other than ROM to find a net adjustment of negative three and a total left lower extremity impairment of 59 percent.

At the hearing, held on July 25, 2018, counsel advised that he was challenging only the left lower extremity impairment rating. He argued that Dr. Summerville had erred in identifying the diagnosis as class 3 rather than class 4 as he found moderate motion loss. Counsel noted that he had measured 50 degrees of flexion, which yielded moderate motion loss pursuant to Table 16-24 on page 549.<sup>6</sup>

By decision dated October 4, 2018, OWCP's hearing representative affirmed the February 5, 2018 decision. She found that the opinion of Dr. Summerville constituted the weight of the evidence and established that appellant had 23 percent permanent impairment of the right lower extremity and 31 percent permanent impairment of the left lower extremity. The hearing representative determined that Dr. Summerville had explained that he did not rate the impairment as class 4 as the only abnormal ROM measurement was flexion. She noted that he also found good alignment after arthroplasty with no evidence of loosening.

On appeal appellant, through counsel, argues that appellant is entitled to a greater award for the left lower extremity based upon a class 4 placement, rather than class 3, for rating appellant's left total hip replacement based upon the finding of 50 degrees of active ROM of the left hip.

---

<sup>6</sup> Subsequent to the hearing, counsel resubmitted the July 8, 2018 report from Dr. Hartunian with some typographical errors corrected.

## LEGAL PRECEDENT

The schedule award provisions of FECA,<sup>7</sup> and its implementing federal regulations,<sup>8</sup> 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>9</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>10</sup>

In determining impairment for the lower extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the left hip, the relevant portion of the leg for the present case, reference is made to Table 16-4 (Hip Regional Grid) beginning on page 512.<sup>11</sup> After the class of diagnosis (CDX) is determined from the Hip Regional Grid (including identification of a default grade value), the net adjustment formula is applied using the GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).<sup>12</sup>

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.<sup>13</sup> For a conflict to arise, the opposing physicians' viewpoints must be of "virtually equal weight and rationale."<sup>14</sup> Where OWCP has referred the case to an IME 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.<sup>15</sup>

When OWCP obtains an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the IME's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the examiner for the purpose of correcting the defect in the original

---

<sup>7</sup> 5 U.S.C. § 8107.

<sup>8</sup> 20 C.F.R. § 10.404.

<sup>9</sup> *Id.* at § 10.404(a).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also id.* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>11</sup> A.M.A., *Guides* 509-11.

<sup>12</sup> *Id.* at 515-22.

<sup>13</sup> 5 U.S.C. § 8123(a); *A.R.*, Docket No. 18-0632 (issued October 19, 2018).

<sup>14</sup> *C.H.*, Docket No. 18-1065 (issued November 29, 2018).

<sup>15</sup> *W.M.*, Docket No. 18-0957 (issued October 15, 2018).

opinion.<sup>16</sup> If the referral physician fails to respond or does not provide an adequate response, OWCP should refer appellant for a new IME examination.<sup>17</sup>

### ANALYSIS

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

OWCP properly determined that a conflict arose between Dr. Allen, an attending physician, and Dr. Orenstein, a DMA, regarding the extent of appellant's permanent impairment of the lower extremities. It referred him to Dr. Summerville, a Board-certified orthopedic surgeon, for an impartial medical examination.

When a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a prior factual and medical background, must be given special weight.<sup>18</sup> The Board finds, however, that Dr. Summerville's opinion is insufficiently reasoned to be entitled to the special weight accorded an IME.

Dr. Summerville evaluated appellant on May 31, 2017. On examination he found mild tenderness to palpation of the left hip and ROM of 50 degrees flexion, 20 degrees extension, 30 degrees internal rotation, 50 degrees external rotation, and 30 degrees abduction. Dr. Summerville determined that x-rays revealed good alignment after hip arthroplasty with no loosening or osteolysis.

For the left lower extremity, Dr. Summerville identified the diagnosis as class 3 hip replacement using the Hip Regional Grid set forth in Table 16-4 on page 515 of the A.M.A., *Guides*, which yielded a default impairment value of 37 percent. Table 16-4 provides a class 3 impairment with a default value of 37 percent for a fair result after a hip replacement with "fair position, mild instability and/or mild motion deficit." A class 4 impairment is categorized as a poor result after a hip replacement with "poor position, moderate to severe instability, and/or moderate to severe motion deficit."

Dr. Summerville explained that he identified the impairment as class 3, for fair results with mild motion loss, rather than class 4, for moderate to severe motion deficits, as all ROM measurements were normal except for hip flexion. Under Table 16-24 on page 549 of the A.M.A., *Guides*, Hip Motion Impairments, 50 degrees flexion constitutes a moderate impairment in ROM. However, Dr. Summerville measured 20 degrees of extension, which also constitutes a moderate ROM impairment under Table 16-24.<sup>19</sup> Consequently, his placement of appellant in class 3, rather than class 4 is insufficiently rationalized. In addition, Dr. Summerville provided no citation to the

---

<sup>16</sup> *P.E.*, Docket No. 18-0745 (issued February 6, 2019).

<sup>17</sup> *Supra* note 10 at Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11(e) (September 2010); *see also R.W.*, Docket No. 18-1457 (issued February 1, 2019).

<sup>18</sup> *J.M.*, Docket No. 18-1387 (issued February 1, 2019).

<sup>19</sup> The remaining ROM measurements, 30 degrees internal rotation, 50 degrees external rotation, and 30 degrees abduction, yielded no impairment under Table 16-24.

A.M.A., *Guides* for use of ROM as a grade modifier as opposed to use in class assignment. Therefore, the Board finds that his opinion is insufficient to resolve the conflict regarding the extent of appellant's left lower extremity permanent impairment.<sup>20</sup>

Once OWCP undertakes development of the medical evidence, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.<sup>21</sup> As noted above, when it obtains an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the IME's opinion requires clarification or elaboration, it must secure a supplemental report from the specialist to correct the defect in his original report.<sup>22</sup> If the IME is unable to clarify or elaborate on his original report or if his supplemental report does not sufficiently address the issues, OWCP should refer the claimant to a second IME.<sup>23</sup> Following such development as deemed necessary, it should issue a *de novo* decision.

### **CONCLUSION**

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

---

<sup>20</sup> See *R.B.*, Docket No. 17-1995 (issued August 13, 2018).

<sup>21</sup> See *K.S.*, Docket No. 18-0845 (issued October 26, 2018).

<sup>22</sup> *R.W.*, *supra* note 17.

<sup>23</sup> See *R.H.*, Docket No. 17-1903 (issued July 5, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 4, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: May 1, 2019  
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