

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

_____)	
T.M., Appellant)	
)	
and)	Docket No. 20-1143
)	Issued: December 14, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Boston, MA, Employer)	
_____)	

Appearances:
*John L. DeGeneres, Jr., Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 12, 2020 appellant, through counsel, filed a timely appeal from an April 8, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

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 Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, he asserted that oral argument should be granted because OWCP should not have afforded weight to the opinions of its impartial medical examiner (IME) as they were not rationalized. Given the disposition of the issue on appeal, the request for oral argument is denied.

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

ISSUE

The issue is whether appellant has met his burden of proof to establish permanent impairment of his right lower extremity due to his accepted employment injury for schedule award purposes.

FACTUAL HISTORY

On September 5, 2012 appellant, then a 43-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained a permanent aggravation of osteoarthritis of the right hip and knee causally related to factors of his federal employment.⁵ He advised that he had become aware of his condition and attributed it to his federal employment on June 28, 2012. Appellant did not stop work. OWCP accepted the claim for an aggravation of right hip osteoarthritis.

X-rays of the hips obtained on June 8, 2011 showed extensive arthropathy more on the right than the left. A June 22, 2011 magnetic resonance imaging (MRI) scan of the right hip revealed advanced osteoarthritis degenerative changes. A left hip MRI scan of even date showed mild osteoarthritic degenerative changes.

In an impairment evaluation dated December 17, 2012, Dr. Byron V. Hartunian, an orthopedic surgeon, diagnosed right hip degenerative arthritis with no cartilage interval. He advised that appellant's employment duties had permanently accelerated the underlying degenerative process. Dr. Hartunian, citing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁶ found that appellant had 50 percent permanent impairment of the right lower extremity.

On January 15, 2013 appellant filed a claim for a schedule award (Form CA-7).

On July 28, 2013 Dr. Robert Y. Pick, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), opined that appellant's employment duties had caused at most a temporary aggravation of his preexisting right hip osteoarthritis. He thus found that he had no permanent impairment warranting a schedule award.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the April 8, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

⁵ On December 4, 2012 appellant advised that his claim was for a right hip injury only.

⁶ A.M.A., *Guides* (6th ed. 2009).

OWCP referred appellant to Dr. Christopher B. Geary, a Board-certified orthopedic surgeon, for a second opinion examination regarding whether his employment duties had caused a permanent or temporary aggravation of his preexisting right hip arthritis.

In a report dated December 24, 2015, Dr. Geary discussed appellant's work history and provided findings on examination. He opined that the duties of his employment temporarily aggravated his right hip osteoarthritis, but that the aggravation would "cease two to three months after his work-related activities."

OWCP determined that a conflict existed between Dr. Geary and Dr. Hartunian regarding whether appellant's employment duties had either accelerated or caused a permanent or temporary aggravation of his preexisting right hip osteoarthritis. It referred him to Dr. Robert R. Pennell, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated September 13, 2016, Dr. Pennell obtained a history of appellant working as a letter carrier since 2000. He noted that, "Unknown to him, he did have slipped epiphyses in both of his hips during adolescence." Dr. Pennell advised that slipped epiphyses caused a deformed femur head and hip osteoarthritis. He explained that, "In the case of [appellant], the slipped epiphysis was greater on the right femoral head than on the left, and as a result, he has much greater osteoarthritis in his right hip joint than in the left." Dr. Pennell disagreed with Dr. Hartunian's diagnosis of degenerative right hip arthritis, finding instead that he had secondary osteoarthritis of the right hip due to a developmental deformity. He opined that appellant's employment duties had neither accelerated nor caused either a permanent or temporary aggravation of his right hip osteoarthritis.

By decision dated October 31, 2016, OWCP denied appellant's claim for a schedule award. It found that the opinion of Dr. Pennell, as the IME constituted the special weight of the evidence and established that his work duties had not accelerated or permanently aggravated his preexisting arthritis.

On November 4, 2016 counsel requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on March 29, 2017.

By decision dated June 13, 2017, OWCP's hearing representative vacated the October 31, 2016 decision. He remanded the case for OWCP to advise Dr. Pennell that it had accepted a temporary aggravation of underlying right hip arthritis and request a reasoned opinion of whether appellant's employment duties caused a permanent aggravation or acceleration of his condition.⁷

In a supplemental report dated September 15, 2017, Dr. Pennell opined that appellant's employment duties "at most caused a temporary aggravation of osteoarthritis in his right hip joint." He maintained that as he had not found a permanent acceleration or aggravation of right hip arthritis it was unnecessary to determine the extent of any permanent impairment.

⁷ Earlier in the decision OWCP's hearing representative noted that OWCP had accepted an aggravation of right hip osteoarthritis as employment related as opposed to a temporary aggravation of right hip osteoarthritis.

By decision dated November 28, 2017, OWCP denied appellant's claim for a schedule award.

In a report dated November 20, 2018, Dr. Hartunian advised that the acceleration of osteoarthritis was a permanent condition. He explained that when "continuous impact loading activities, such as those engaged on by [appellant] for his work, aggravate the arthritic process by a further degradation and deterioration of the articular cartilage, which is confirmed by x-ray, there is nothing that can be done to reverse that process."

On November 27, 2018 counsel requested reconsideration. He maintained that Dr. Pennell had failed to accept the condition of an aggravation of osteoarthritis of the right hip and that Dr. Geary had not supported his opinion that the aggravation of appellant's right hip arthritis was temporary with rationale.

OWCP determined that a new conflict in medical opinion had arisen between Dr. Hartunian and Dr. Geary regarding the extent of appellant's permanent impairment. It referred him to Dr. John Chaglassian, a Board-certified orthopedic surgeon, for an impartial medical examination. OWCP provided a statement of accepted facts (SOAF) indicating that it had accepted the claim for an aggravation of right hip osteoarthritis.

In a report dated March 4, 2019, Dr. Chaglassian opined that he strongly disagreed that appellant's right hip arthritis had resulted from his employment duties. He advised that medical literature failed to establish that working as a letter carrier caused, aggravated, or accelerated hip arthritis. Dr. Chaglassian maintained that appellant's history of slipped capital epiphysis resulted in his osteoarthritis. He further informed OWCP that he did not use the sixth edition of the A.M.A., *Guides* for impairment ratings.

On March 18, 2019 Dr. Chaglassian noted that OWCP had advised that he could not challenge causation. He noted his disagreement with the claim noting that there is "certainly a major professional issue when the condition is being forced to be accepted when it is not a valid opinion." Dr. Chaglassian again opined that medical literature failed to support that letter carriers required hip replacements or developed hip arthritis more than other professions. He reiterated that appellant's osteoarthritis had resulted from slipped capital epiphysis. Dr. Chaglassian concluded that his work duties had failed to cause, exacerbate, accelerate, precipitate, or aggravate his right hip arthritis and that he consequently had no ratable right hip impairment.

By decision dated March 26, 2019, OWCP denied modification of its November 28, 2017 decision.

On January 6, 2020 appellant, through counsel, requested reconsideration. In a January 3, 2020 statement, counsel contended that Dr. Chaglassian had failed to base his opinion on the SOAF or use a goniometer in measuring range of motion. He submitted a March 6, 2019 letter from Dr. Chaglassian advising that experienced surgeons did not use goniometers and a December 20, 2019 affidavit from appellant asserting that Dr. Chaglassian had not used a measuring device or obtain six different measurements of his hips.

By decision dated April 8, 2020, OWCP denied modification of its March 6, 2019 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA,⁸ and its implementing federal regulation,⁹ 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. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards 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*, published in 2009.¹⁰ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.¹¹

A schedule award can be paid only for a condition related to an employment injury. It is the claimant's burden of proof to establish permanent impairment of the scheduled member or function as a result of an employment injury.¹²

Section 8123(a) of FECA provides that, if there is disagreement between an OWCP-designated physician and the employee's own physician, OWCP shall appoint a third physician who shall make an examination.¹³ In situations where there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁴

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

⁸ *Id.*

⁹ 20 C.F.R. § 10.404.

¹⁰ For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

¹¹ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

¹² *D.F.*, Docket No. 18-1337 (issued February 11, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹³ 5 U.S.C. § 8123(a); *see also* 20 C.F.R. § 10.321.

¹⁴ *See K.D.*, Docket No. 19-0281 (issued June 30, 2020); *Y.A.*, 59 ECAB 701 (2008).

opinion.¹⁵ If the referral physician fails to respond or does not provide an adequate response, OWCP should refer appellant for a new IME examination.¹⁶

ANALYSIS

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

OWCP determined that a conflict arose between Dr. Hartunian, appellant's physician, and Dr. Geary, an OWCP referral physician, regarding the extent of his permanent impairment of the right lower extremity due to his accepted employment injury. In order to resolve the conflict, it referred him to Dr. Chaglassian, a Board-certified orthopedic surgeon, for an impartial medical examination. OWCP provided him with a SOAF indicating that it had accepted appellant's claim for an aggravation of right hip osteoarthritis.

In a March 4, 2019 report, Dr. Chaglassian disagreed that appellant had sustained right hip arthritis causally related to the accepted factors of his federal employment. On March 18, 2019 he indicated that OWCP had advised him that he could not challenge causation of the accepted condition. Dr. Chaglassian asserted that medical literature failed to support that working as a letter carrier caused any hip arthritis. He instead attributed appellant's temporary aggravation of right hip osteoarthritis to slipped capital epiphysis. Dr. Chaglassian opined that his employment duties had not caused, accelerated, or aggravated his right hip osteoarthritis. He consequently found that appellant had no employment-related permanent impairment due to his accepted right hip condition.

The Board finds that Dr. Chaglassian's opinion contradicts the SOAF, which makes clear that OWCP had accepted, as employment related, an aggravation of right hip osteoarthritis as a result of his federal employment. OWCP procedures provide that, when a referee physician selected by OWCP renders a medical opinion based on a SOAF which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.¹⁷ Dr. Chaglassian disregarded the accepted condition noted in the SOAF and opined that appellant's temporary aggravation of his right hip osteoarthritis was unrelated to his federal employment. OWCP, however, has accepted that appellant's work-related activities resulted in the accepted right hip condition. The Board has held that, if a referee physician does not base his or her opinion on the SOAF, the opinion lacks a proper factual background and, thus, is not rationalized.¹⁸ As Dr. Chaglassian's opinion is inconsistent with the SOAF, it is insufficient to resolve the existing conflict in medical opinion.¹⁹

¹⁵ *W.H.*, Docket No. 16-0806 (issued December 15, 2016); *supra* note 11 at Chapter 2.810.11(e) (September 2010).

¹⁶ *Id.*; *see also R.W.*, Docket No. 18-1457 (issued February 1, 2019).

¹⁷ *Supra* note 11 at Chapter 2.810.11 (September 2010); *see R.T.*, Docket No. 20-0081 (issued June 24, 2020); *Roger W. Griffith*, 51 ECAB 491 (2000).

¹⁸ *P.C.*, Docket No. 19-1468 (issued September 9, 2020); *D.M.*, Docket No. 17-1563 (issued January 15, 2019).

¹⁹ *Id.*

Accordingly, there remains an unresolved conflict in medical evidence. On remand, OWCP shall refer appellant and a SOAF to a physician in the appropriate field of medicine to resolve the existing conflict as to the extent of permanent impairment, if any, due to the accepted osteoarthritis condition. After this and such other development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 8, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 14, 2020
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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