United States Department of Labor
Employees' Compensation Appeals Board

B.J., Appellant	)	
and	)	**Docket No. 19-1146**
	)	**Issued: September 21, 2020**
U.S. POSTAL SERVICE, POST OFFICE, Gloucester, MA, Employer	)	

Appearances:
Daniel B. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 22, 2019 appellant, through counsel, filed a timely appeal from an October 26, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated August 8, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review 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 the appeal request, appellant, though counsel, submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). After exercising its discretion, by order dated September 15, 2020, the Board denied the request as the 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. 19-1146 (issued September 15, 2020).

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 3, 2012 appellant, then a 61-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that his repetitive work duties had aggravated his bilateral hip osteoarthritis. He first became aware of his claimed condition and its relation to his federal employment on June 10, 2011. OWCP accepted appellant's claim for permanent aggravation and acceleration of bilateral hip arthritis.[4]

In a December 5, 2011 report, Dr. David C. Morley, Jr., a Board-certified orthopedic surgeon, advised that appellant's left hip reached maximum medical improvement (MMI) in January 2007 and his right hip reached MMI in January 2010. He applied the diagnosis-based impairment (DBI) rating method under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[5] Utilizing Table 16-4 (Hip Regional Guide) on page 515, Dr. Morley determined that appellant's bilateral total hip replacements fell under the class of diagnosis (CDX) of class 4 with a default value of 67 percent permanent impairment of each lower extremity. He determined that the grade modifier for functional history (GMFH) equaled 2 when based on appellant's answers to the American Academy of Orthopedic Surgeons (AAOS) lower limb questionnaire, but equaled 0 when based on his lack of gait derangement. Dr. Morley determined that the GMFH was excluded as unreliable because these two values differed by two grades. He further found that the grade modifier for physical examination (GMPE) and the grade modifier for clinical studies (GMCS) were excluded for both extremities because the physical examination and clinical studies were used to confirm the CDX. Therefore, the net adjustment formula was not applicable and appellant's permanent impairment remained at the default values for each lower extremity, *i.e.*, 67 percent permanent impairment.

On May 22, 2012 appellant filed a claim for a schedule award (Form CA-7).

On June 14, 2012 OWCP referred appellant's case, including Dr. Morley's December 5, 2011 report, to Dr. David I. Krohn, a Board-certified internist serving as an OWCP district medical adviser (DMA). It requested that he evaluate appellant's lower extremity permanent impairment under the sixth edition of the A.M.A., *Guides.*

On June 24, 2012 the DMA utilized Table 16-4 of the sixth edition of the A.M.A., *Guides* to find that appellant's bilateral hip condition fell under class 3 with a default value of 37 percent for each lower extremity. He found that appellant had a GMFH of 2 (due to his AAOS survey response of moderate symptoms) and GMCS of 3 (due to 50 percent cartilage loss), and that the GMPE was not applicable as it was used to confirm the class. Application of the net adjustment

[4] Appellant previously underwent a total left hip arthroplasty on January 4, 2006, total right hip arthroplasty on January 13, 2009, and total left hip revision arthroplasty on September 5, 2012.

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

formula required movement one space to the left of the default value for each lower extremity and, therefore, appellant had 34 percent permanent impairment of each lower extremity.

Appellant underwent OWCP-authorized total left hip revision arthroplasty on September 5, 2012.

On October 17, 2012 OWCP determined that there was a conflict in the medical opinion evidence regarding permanent impairment between Dr. Morley and the DMA. It referred appellant to Dr. Murray J. Goodman, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on permanent impairment. On November 12, 2012 Dr. Goodman indicated that it was premature to render a permanent impairment rating for either of appellant's hips as his left hip had not reached MMI and his altered gait also affected the assessment of his right hip condition.

OWCP determined, on September 30, 2014, that it was appropriate to refer appellant for an impartial medical examination and evaluation of permanent impairment to Dr. Robert R. Pennell, a Board-certified orthopedic surgeon, to resolve the conflict between Dr. Morley and Dr. Krohn. In a report dated October 21, 2014, Dr. Pennell indicated that appellant's right hip reached MMI on September 2, 2012 and his left hip reached MMI on September 5, 2013. Utilizing the DBI rating method under Table 16-4 of the sixth edition of the A.M.A., *Guides*, he determined that both of appellant's hip conditions fell under class 2 due to right and left total hip replacements with good results, thereby warranting a 25 percent default impairment value for each hip. For the right hip, appellant had a GMFH of 0 (due to no functional problem) and GMPE of 1. The GMCS was not applicable because the clinical studies were used to determine the class. For the left hip, appellant had a GMFH of 1 due to moderate difficulty getting on his left shoe, needing to carefully lift his left foot when going up stairs, and having difficulty completing his golf swing. The GMPE was 1 and the GMCS was not applicable. Dr. Pennell noted that application of the net adjustment formula required movement two spaces to the left of the default value on Table 16-4 for each lower extremity. Therefore, appellant had 21 percent permanent impairment of each lower extremity.

On March 17, 2015 OWCP referred Dr. Pennell's October 21, 2014 report to Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as a DMA. It requested that he review the report and provide an opinion on appellant's lower extremity permanent impairment. In a March 18, 2015 report, Dr. Slutsky utilized Table 16-4 of the sixth edition of the A.M.A., *Guides* to find that appellant's hip conditions fell under class 3 due to total hip replacements with fair results (including mild motion deficit), thereby warranting 37 percent default impairment value for each hip. He noted that the GMCS was excluded for both hips. For the right hip, appellant had a GMFH of 0 and GMPE of 0. For the left hip, he had a GMFH of 1 and GMPE of 1. The DMA advised that application of the net adjustment formula yielded a total of 31 percent permanent impairment of each lower extremity.

On July 9, 2015 OWCP forwarded the DMA's March 18, 2015 report to Dr. Pennell for his review and comments. In an addendum report dated July 28, 2015, Dr. Pennell advised that he agreed with the DMA that the fair results of appellant's total hip replacements warranted a CDX of class 3 with a default impairment value of 37 percent for each lower extremity. For the right hip, appellant had a GMFH of 0 (no limp or need for modified footwear), but the GMPE and GMCS were not applicable because the physical examination and clinical studies were used to determine the class. For the left hip, he had a GMFH of 1 (mild functional difficulties) and a GMPE of 1 (mild tenderness upon palpation), but the GMCS was not applicable. Dr. Pennell noted

that application of the net adjustment formula yielded a total of 31 percent permanent impairment of each lower extremity.

On June 6, 2016 OWCP referred the case back to Dr. Slutsky for further evaluation, and he indicated in a June 12, 2016 report that appellant had reached MMI on October 21, 2014 and that he concurred with Dr. Pennell's finding of 31 percent permanent impairment of each lower extremity.

By decision dated December 16, 2016, OWCP granted appellant a schedule award for 31 percent permanent impairment of each lower extremity (the hips). The award ran for 178.56 weeks from October 21, 2014 to March 23, 2018 and was based on the opinion of Dr. Pennell as confirmed by Dr. Slutsky.

On December 28, 2016 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. In a February 27, 2017 letter, counsel requested that Dr. Pennell be issued a subpoena to testify at the hearing, but OWCP later denied the subpoena request.

On March 8, 2017 appellant underwent a total left hip revision arthroplasty due to an infection.

During a May 24, 2017 hearing before OWCP's hearing representative, counsel argued that the evidence which served as the basis for the December 16, 2016 schedule award, including Dr. Pennell's October 2014 physical examination findings, should be considered stale medical evidence. Counsel indicated that new medical evidence would be submitted within 30 days.

On June 23, 2017 OWCP received a June 1, 2017 report from Dr. Morley who indicated that appellant was recovering from the total left hip revision replacement performed on March 8, 2017. Dr. Morley noted that appellant complained of continued achy discomfort in the left hip and stiffness in both hips, left more than right. Appellant reported using a handrail to negotiate stairs, using a cane, and walking for approximately 20 to 30 minutes (with a need to rest thereafter due to bilateral hip discomfort). Dr. Morley detailed the findings of his June 1, 2017 physical examination, including findings for range of motion (ROM) testing for both hips. He determined that appellant's right hip reached MMI on January 12, 2012. Utilizing Table 16-4 of the sixth edition of the A.M.A., *Guides*, Dr. Morley found that appellant's right hip condition fell under class 4 due to a moderate ROM deficit. He noted that GMFH was 0 as determined by gait derangement and was 2 as determined by the score on the AAOS lower limb questionnaire, but that the A.M.A., *Guides* indicated that the higher grade modifier 2 was to be used. Dr. Morley found that the GMPE was not applicable because the physical examination findings (including ROM findings) were used to determine the class and there were no other pertinent physical examination findings, and that the GMCS also was not applicable because the clinical studies were used to determine the class. He indicated that, per Chapter 16.3d on pages 521-22 of the sixth edition of the A.M.A., *Guides*, a value of +1 would be automatically added to each grade modifier because appellant's right hip condition fell under class 4. Application of the net adjustment formula necessitated no movement from the default impairment value of Table 16-4 and yielded 67 percent permanent impairment of the right lower extremity. With respect to the left hip, Dr. Morley determined that appellant had not yet reached MMI and no impairment rating was possible. Appellant also submitted hospital records dated from February 10 through March 8, 2017.

By decision dated August 8, 2017, OWCP's hearing representative affirmed the December 16, 2016 decision. She found that appellant had not met his burden of proof to establish more than 31 percent permanent impairment of each lower extremity, for which he previously received a schedule award. The hearing representative found that the special weight of the medical opinion evidence with respect to appellant's permanent impairment continued to rest with the opinion of Dr. Pennell, the impartial medical specialist.

On August 2, 2018 appellant requested reconsideration of his claim. In an August 2, 2018 statement, counsel argued that Dr. Pennell's October 21, 2014 examination findings, upon which OWCP based its granting of a schedule award, were stale and of little evidentiary value given that they were now almost four years old. He asserted that the attached July 10, 2018 impairment rating report of Dr. Morley, based on June 1, 2017 examination findings, required vacating OWCP's prior schedule award determination and presenting the report to a DMA for review, followed by the issuance of a new decision. Counsel argued that Dr. Morley's July 10, 2018 report contained new analysis not previously considered.

Appellant submitted a July 10, 2018 report from Dr. Morley who maintained that he correctly noted in his June 1, 2017 report that appellant's GMFH for the right hip was 0 as determined by gait derangement and was 2 as determined by the score on the AAOS lower limb questionnaire. However, Dr. Morley further advised that he also should have indicated that the GMFH was excluded as unreliable because these two values differed by two grades. He advised that OWCP's hearing representative noted in her August 8, 2017 decision that that the 67 percent permanent impairment rating of the right hip contained in his June 1, 2017 report was the same percent of impairment he found in his original December 5, 2011 report. Dr. Morley indicated that, although the percent of impairment was the same, the analysis was based on different, more recent medical findings from June 2017. He further noted that these medical findings were some 32 months more current than those of Dr. Pennell's October 21, 2014 examination upon which OWCP relied in granting schedule award compensation. Dr. Morley maintained that it was medically unacceptable to make decisions on outdated and stale medical findings while ignoring more current and updated findings. He advised that he would provide "the corrected and accurate impairment analysis from the most recent medical findings" and noted that, utilizing Table 16-4 of the sixth edition of the A.M.A., *Guides*, appellant's right hip condition fell under class 4 due to a moderate ROM deficit. Dr. Morley indicated that the GMFH was excluded as unreliable for the reasons discussed earlier in his report. He found that the GMPE was not applicable because the physical examination findings (including ROM findings) were used to determine the class and there were no other pertinent physical examination findings, and that the GMCS also was not applicable because the clinical studies were used to determine the class. Dr. Morley indicated that application of the net adjustment formula necessitated no movement from the default impairment value of Table 16-4 and yielded 67 percent permanent impairment of the right lower extremity. He noted, "My analysis of the left hip from my examination of [June 1, 2017], which are the most current examination findings for [appellant] by some 32 months, remains the same."

By decision dated October 26, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.[6]

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.[7]

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.[8] If it chooses to grant reconsideration, it reopens and reviews the case on its merits.[9] If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.[10]

The Board has held that a claimant 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.[11] When a claimant has requested reconsideration, and has submitted new and relevant evidence with respect to a permanent impairment or an increased permanent impairment, then he or she will be entitled to a merit decision on the issue.[12]

[6] 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

[7] 20 C.F.R. § 10.606(b)(3); *see M.S.*, Docket No. 18-1041 (issued October 25, 2018); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

[8] 20 C.F.R. § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

[9] *Id.* at § 10.608(a); *see D.C.*, Docket No. 19-0873 (issued January 27, 2020); *M.S.*, 59 ECAB 231 (2007).

[10] 20 C.F.R. § 10.608(b); *see T.V.*, Docket No. 19-1504 (issued January 23, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

[11] *R.D.*, Docket No. 18-0579 (September 14, 2018); *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

[12] *See C.W.*, Docket No. 18-1110 (issued December 28, 2018); *Linda T. Brown*, 51 ECAB 115 (1999); *Paul R. Reedy*, 45 ECAB 488 (1994); *see also B.K.*, 59 ECAB 228 (2007) (where it was evident that the claimant was seeking a schedule award based on new and current medical evidence, OWCP should have issued a merit decision on the schedule award claim rather than adjudicate a request for reconsideration).

ANALYSIS

The Board finds this case not in posture for decision.

By decision dated August 8, 2017, OWCP's hearing representative affirmed the December 16, 2016 schedule award decision, finding that appellant had not met his burden of proof to establish more than 31 percent permanent impairment of each lower extremity, for which he previously received a schedule award. Appellant subsequently requested reconsideration and submitted a July 10, 2018 report of Dr. Morley who again found 67 percent permanent impairment of the right lower extremity. He maintained that he correctly noted in his June 1, 2017 report that appellant's GMFH for the right hip was 0 as determined by gait derangement and was 2 as determined by the score on the AAOS lower limb questionnaire. However, he further advised that he also should have indicated that the GMFH was excluded as unreliable because these two values differed by two grades. Dr. Morley advised that OWCP's hearing representative noted in her August 8, 2017 decision that that the 67 percent permanent impairment rating of the right hip contained in his June 1, 2017 report was the same percent of impairment he found in his original December 5, 2011 report. He indicated that, although the percent of impairment was the same, the analysis was based on different, more recent medical findings from June 2017. Dr. Morley further noted that these medical findings were some 32 months more current than those of Dr. Pennell's October 21, 2014 examination upon which OWCP relied in granting schedule award compensation. He maintained that it was medically unacceptable to make decisions on outdated and stale medical findings while ignoring more current and updated findings. Dr. Morley advised that, utilizing Table 16-4 of the sixth edition of the A.M.A., *Guides*, appellant's right hip condition fell under class 4 due to a moderate ROM deficit. He indicated that the GMFH was excluded as unreliable for the reasons discussed earlier in his report. Dr. Morley found that the GMPE was not applicable because the physical examination findings (including ROM findings) were used to determine the class and there were no other pertinent physical examination findings, and that the GMCS also was not applicable because the clinical studies were used to determine the class. He indicated that application of the net adjustment formula necessitated no movement from the default impairment value of Table 16-4 and yielded 67 percent permanent impairment of the right lower extremity. Dr. Morley noted, "My analysis of the left hip from my examination of [June 1, 2017], which are the most current examination findings for [appellant] by some 32 months, remains the same." By decision dated October 26, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Dr. Morley's report addressed the pertinent issue of this case, *i.e.*, whether appellant was entitled to additional schedule award compensation, as it contained an amended analysis supporting increased impairment that referenced the A.M.A., *Guides*. Although appellant submitted a letter and form in which he requested reconsideration, it is evident that he was not simply seeking reconsideration of the August 8, 2017 decision, but was seeking an increased schedule award based on new medical evidence. As noted above, where a claimant has requested reconsideration, and has submitted new and relevant evidence with respect to a permanent impairment or an increased permanent impairment, then he or she will be entitled to a merit decision on the issue.

The case will therefore be remanded for OWCP to adjudicate this matter as a request for an increased schedule award. Following this and such other development as deemed necessary, OWCP shall issue an appropriate *de novo* decision on appellant's claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2018 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: September 21, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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