United States Department of Labor
Employees' Compensation Appeals Board

M.C., Appellant	)	
and	)	**Docket No. 20-1656**
	)	**Issued: June 2, 2021**
U.S. POSTAL SERVICE, WALPOLE POST OFFICE, Walpole, 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:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 23, 2020 appellant, through counsel, filed a timely appeal from a July 15, 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 through counsel submitted a timely request for 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 it would provide appellant an opportunity to explain to the Board significant recurring issues he sought to resolve. The Board, in exercising its discretion, denies appellant's request for oral argument because this matter requires an evaluation of the medical evidence presented. As such, the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 31 percent permanent impairment of his right lower extremity, for which he previously received a schedule award.

FACTUAL HISTORY

On March 27, 2017 appellant, then a 54-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that factors of his federal employment contributed to his right hip osteoarthritis. He noted that he became aware of his condition and realized that it was caused or aggravated by his federal employment on February 8, 2017. OWCP accepted the claim for permanent aggravation of preexisting degenerative joint disease, right hip. Appellant did not immediately stop work.

On April 17, 2015 appellant underwent a computerized tomography (CT) scan of the lower extremity, which revealed moderate-to-severe osteoarthritis of the right hip.

On April 27, 2015 Dr. Susan M. Chabot, a Board-certified orthopedist, performed an OWCP-approved right total hip replacement and diagnosed end-stage arthritis of the right hip.

On November 15, 2018 appellant filed a claim for a schedule award (Form CA-7). In support of his claim, he submitted an October 17, 2018 impairment evaluation from Dr. Byron V. Hartunian, a Board-certified orthopedic surgeon. Dr. Hartunian provided right hip examination findings, noting no discomfort at the combined flexion and rotation. He reported that the range of motion (ROM) of right hip was measured with a goniometer and performed three times with the highest range recorded, which amounted to 103 degrees flexion, 8 degrees extension, 12 degrees internal rotation, 23 degrees external rotation, 35 degrees abduction, and 22 degrees adduction. Dr. Hartunian diagnosed status post right total hip replacement for end stage degenerative arthritis and determined that appellant reached maximum medical improvement (MMI).

In accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*),[4] Table 16-4 on page 515, he identified the class of diagnosis (CDX) as class 3 hip replacement with a default impairment value of 37 percent. When determining the impairment class, Dr. Hartunian noted a class 3 CDX was used for total hip replacement due to mild motion deficit based on the right hip ROM findings of 103 degrees flexion, 12 degrees internal rotation, and 23 degrees external rotation.[5] He discussed grade modifiers and explained that a grade modifier for functional history (GMFH) would amount to zero, as appellant ambulates without a limp. Dr. Hartunian reported that appellant's American

[3] 5 U.S.C. § 8101 *et seq.*

[4] A.M.A., *Guides* (2009).

[5] *Id*. at 549, Table 16-24.

Academy of Orthopedic Surgery (AAOS) Lower Limb Questionnaire indicated a grade two modifier due to moderate deficit, explaining that the higher grade modifier should be used in the calculation based on the A.M.A., *Guides*.[6] He did not assign a grade modifier for physical examination (GMPE) as it was used to determine class placement. Dr. Hartunian further explained that grade modifier for clinical studies (GMCS) was excluded from the net adjustment formula as postoperative x-rays taken at the one year follow-up merely confirmed the diagnosis. He noted that when the GMFH differs by two or more, from the clinical study adjustment or physical examination adjustment modifiers, both not applicable (N/A) for purpose of modifier determination, the functional history adjustment is considered unreliable and excluded from the calculation. Dr. Hartunian utilized the net adjustment formula which resulted in a grade C default value of 37 percent permanent impairment of the right lower extremity. Dr. Hartunian determined that MMI was reached on July 22, 2015, the date he returned to work after having been evaluated by Dr. Chabot with x-rays confirming good position of the prosthesis.

In a July 18, 2019 report, Dr. Michael M. Katz, an OWCP district medical adviser (DMA), reviewed Dr. Hartunian's October 17, 2018 report and disagreed with his findings. In arriving at his impairment determination, Dr. Hartunian asserted that the GMCS and GMPE were used for grid placement and were therefore excluded from the net adjustment calculation. He assigned a value of zero for these studies, asserting that this established a net difference of two or more from his GMFH of 2, and excluded the GMFH from the net adjustment calculation, leaving no grade modifiers and a default value of 3C. The DMA opined that this application was not consistent with the methodology set forth by the A.M.A., *Guides.* He opined that the x-rays described by Dr. Hartunian show "good position" of the prosthesis, which meets the criterion for a GMCS of 2 and was not used for grid placement, as the key factor in the GMCS of 3 grid placement per Dr. Hartunian.[7] The DMA further noted that the fact that a grade modifier was excluded from the net adjustment calculation does not reduce its value to zero noting that this logic was not supported by the A.M.A., *Guides.* Dr. Katz assigned a CDX of 3 for right hip arthroplasty with a fair result, and applying the net adjustment formula he calculated 31 percent permanent impairment of the right lower extremity.[8]

In a report dated November 1, 2019, Dr. Hartunian reviewed the DMA's recommendation and disagreed with the 31 percent impairment rating of the right hip. He asserted that the GMCS was properly noted as "N/A" finding that clinical studies should be excluded as they were used to merely confirm the diagnosis, to assess prosthesis positioning in class placement or use of clinical study x-ray interval analysis, which was not appropriate in arthroplasty situations. Dr. Hartunian indicated that the A.M.A., *Guides* has many inconsistencies and the proper application of the GMCS in the lower extremity arthroplasty situation is one example. He further disagreed with the DMA with regard to whether exclusion from the net adjustment calculation reduces its value to zero.

[6] *Id*. at 515, Table 16-4.

[7] The GMPE, range of motion deficit, was a key factor in the Grade 3 grid placement and would not be used in the net adjustment formula. The GMFH would be 2 for a moderate problem.

[8] Applying the net adjustment formula: (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX) = (2-3) + (N/A) + (2-3) = -2 or 31 percent impairment.

On November 6, 2019 OWCP identified a conflict in medical opinion between Dr. Hartunian for appellant and the DMA.

OWCP referred appellant to Dr. Alan Solomon, a Board-certified orthopedic surgeon, for an impartial medical examination on December 4, 2019 to resolve the conflict in the case. In his December 4, 2019 report, Dr. Solomon reported that ROM of right hip was measured with a goniometer and performed three times with the highest range recorded. He noted that right hip ROM testing revealed 105 degrees flexion, 10 degrees extension, 10 degrees internal rotation, 25 degrees external rotation, 30 degrees abduction, and 10 degrees adduction. Dr. Solomon further noted a well-healed surgical wound, no pain swelling or tenderness in the groin or outer hip area, no palpatory findings or swelling or inflammation in the groin or hip surgical area, no clicking, cracking or thigh atrophy, and no antalgic gait. He reported that impairment was assessed based upon the need for a hip replacement. Dr. Solomon assigned a CDX of 3 for total hip replacement with fair results.[9] He assigned a GMFH of 1, GMPE of 1, and found that GMCS was not applicable. Dr. Solomon utilized the net adjustment formula, which resulted in a grade A or 31[10] percent permanent impairment of the right lower extremity.[11]

By decision dated July 15, 2020, OWCP granted appellant a schedule award for 31 percent permanent impairment of the right lower extremity. It indicated that the special weight of medical evidence rested with Dr. Solomon, serving as the impartial medical examiner (IME), who indicated that appellant had no more than 31 percent permanent impairment of the right lower extremity. The period of the award ran from December 4, 2019 through August 19, 2021.

LEGAL PRECEDENT

The schedule award provision of FECA and its implementing regulations 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.[12] 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 use of a single set of tables so that there may be uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate

[9] Dr. Solomon opined that the level of impairment could be a Class 2 or Class 3. He indicated that since both examiners, Dr. Katz and Dr. Hartunian agreed on Class 3 and he agreed with this determination.

[10] Applying the net adjustment formula: (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX) = (1-3) + (1-3) + (N/A) = -4 or 31 percent impairment.

[11] *Id*. at 515, Table 16-4.

[12] 5 U.S.C. § 8107; 20 C.F.R. § 10.404.

standard for evaluating schedule losses.[13] As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[14]

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 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.[15] 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).[16]

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.[17] For a conflict to arise, the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[18] 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.[19]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish more than 31 percent permanent impairment of his right lower extremity, for which he previously received a schedule award.

OWCP properly found a conflict in the medical opinion evidence between appellant's attending physician, Dr. Hartunian, and the DMA, regarding permanent impairment of the right lower extremity due to his accepted hip injury. It referred appellant's case to Dr. Solomon pursuant to 5 U.S.C. § 8123(a) for an impartial medical examination in order to resolve the conflict in medical opinion. In his December 4, 2019 report, the IME, Dr. Solomon, reviewed appellant's history of injury, the relevant medical evidence, and provided physical examination findings. He noted appellant's accepted permanent aggravation of preexisting degenerative joint disease, right hip. Dr. Solomon assigned a CDX of 3 for total hip replacement with fair results, he assigned a

[13] 20 C.F.R. § 10.404; *L.T.*, Docket No. 18-1031 (March 5, 2019); *see also Ronald R. Kraynak*, 53 ECAB 130 (2001).

[14] *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 2.808.5(a) (March 2017).

[15] A.M.A., *Guides* 512-15.

[16] *Id*. at 515-22.

[17] 5 U.S.C. § 8123(a); *A.R.*, Docket No. 18-0632 (issued October 19, 2018).

[18] *C.H.*, Docket No. 18-1065 (issued November 29, 2018.

[19] *W.M.*, Docket No. 18-0957 (issued October 15, 2018).

GMFH of 1 and a GMPE of 1, and found that a GMCS was not applicable. Dr. Solomon utilized the net adjustment formula, which resulted in a grade A or 31 percent permanent impairment of the right lower extremity. Dr. Solomon indicated that there was nothing in the medical record to suggest a greater impairment of the right lower extremity.

As noted above, when a 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.[20] The Board finds that Dr. Solomon's December 4, 2019 report is entitled to special weight and established that appellant had 31 percent permanent impairment of the right lower extremity.[21] Dr. Solomon's opinion was based on a proper factual and medical history, which he reviewed, and on the proper tables and procedures in the A.M.A., *Guides*. He based his impairment rating on the medical evidence in the record, correctly applied the A.M.A., *Guides* and provided medical rationale for his impairment rating.[22] As appellant has not provided a rationalized medical opinion sufficient to overcome the special weight accorded to Dr. Solomon's impairment rating, the Board finds that he has not established more than 31 percent permanent impairment of his right lower extremity due to his accepted right hip condition.

On appeal, counsel argues that OWCP's decision was contrary to fact and law. He asserted that Dr. Solomon's rating was improperly based on his physical examination findings on December 4, 2019 rather than the data considered by Dr. Hartunian and the DMA. Appellant asserts that the original conflict has not been resolved by Dr. Solomon and that appellant has been denied due process. The Board finds this argument without merit. The governing statute in this case, 5 U.S.C. § 8123(a), clearly states that when there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination. As explained above, The Board finds that OWCP properly found a conflict in the medical opinion evidence between Dr. Hartunian and the DMA and the special weight of the medical evidence rests with the IME Dr. Solomon. Accordingly, appellant has not met his burden of proof to establish that he is entitled to a schedule award greater than that previously awarded.

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

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish more than 31 percent permanent impairment of his right lower extremity, for which he previously received a schedule award.

[20] *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[21] *D.S.*, Docket No. 18-0336 (issued May 29, 2019); *T.C.*, Docket No. 17-1741 (issued October 9, 2018).

[22] *See D.B.*, Docket No. 17-0930 (issued July 11, 2018).

ORDER

IT IS HEREBY ORDERED THAT the July 15, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 2, 2021
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