

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 factors of his federal employment.³

On September 28, 2012 OWCP obtained a second opinion regarding the appropriate percentage of permanent impairment from Dr. Stanley Hom, a Board-certified orthopedic surgeon, who diagnosed a temporary aggravation of underlying bilateral hip arthritis that had not resulted in permanent impairment.

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) for a schedule award. In support of his claim, appellant submitted a December 31, 2012 report by Dr. Byron V. Hartunian, a Board-certified orthopedic surgeon, who examined appellant on January 5, 2012, and utilized the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)⁴ to calculate a 63 percent permanent impairment of the left lower extremity and 26 percent permanent impairment of the right lower extremity.

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. It referred appellant to Dr. Alan Solomon, a Board-certified orthopedic surgeon, for an impartial medical examination. In a September 25, 2013 report, Dr. Solomon calculated a 25 percent permanent impairment of the left lower extremity for total hip arthroplasty with a good result and a 7 percent permanent impairment of the right lower extremity for osteoarthritis.

On January 28, 2015 OWCP expanded the accepted conditions to include acceleration of left hip osteoarthritis.

Following additional development and referral of the record to an OWCP district medical adviser (DMA), 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 through December 11, 2014.

On February 2, 2016 appellant, through counsel requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. In a February 9, 2016 letter, counsel requested that OWCP issue subpoenas to compel the attendance of Dr. Hom, Dr. Solomon, and OWCP's DMA.

By decision dated February 12, 2016, 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.

³ Appellant underwent total left hip arthroplasty on June 30, 2010.

⁴ A.M.A., *Guides* (6th ed. 2009).

Appellant, through counsel requested a hearing before a representative of OWCP's Branch of Hearings and Review from its February 12, 2016 decision. Counsel again requested the issuance of subpoenas.

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

OWCP received a September 24, 2016 report by Dr. Justin W. Kung, a Board-certified radiologist, who opined that September 13, 2016 right hip x-rays demonstrated severe degenerative change in the right femoroacetabular compartment, with a 1.0 millimeter joint measurement, subchondral sclerosis, cystic changes, and osteophyte formation.

During the hearing, held on October 27, 2016 counsel argued that OWCP should expand its acceptance of the claim to include permanent aggravation of right hip arthritis, and that Dr. Solomon's opinion was insufficiently rationalized to be accorded the special weight of the medical evidence.

By decision dated April 12, 2017, OWCP's hearing representative affirmed its February 12, 2016 decision and denied appellant's request for the issuance of subpoenas. Appellant, through counsel, appealed to the Board.

By decision dated May 22, 2018,⁵ the Board affirmed OWCP's April 12, 2017 decision with respect to the denial of appellant's claim for permanent aggravation of right hip osteoarthritis and his request for subpoenas. The Board set aside the April 12, 2017 decision, in part, with respect to his claim for a schedule award for the right lower extremity, and remanded the case for further development to be followed by a *de novo* decision.

By decision dated November 9, 2018, OWCP denied appellant's claim for a schedule award for permanent impairment of the right lower extremity.

On November 16, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, held March 20, 2019.

By decision dated May 1, 2019, an OWCP hearing representative affirmed the November 9, 2018 decision.

By decision dated January 9, 2020, OWCP granted appellant a schedule award for an 8 percent permanent impairment of the left lower extremity in addition to the 23 percent previously awarded, for a total 31 percent permanent impairment. The period of the award ran for 23.04 weeks, from October 7, 2019 through March 16, 2020.

⁵ *Supra* note 2.

On March 12, 2020 appellant, through counsel, requested reconsideration of the May 1, 2019 and January 9, 2020 OWCP decisions. Counsel submitted a detailed series of arguments as to the insufficiency of the opinions of OWCP referral physicians. He also submitted a March 2, 2019 x-ray report by Dr. Kung, as well as a duplicate copy of the September 24, 2016 x-ray report by Dr. Kung.

By decision dated March 8, 2021, OWCP denied appellant's request for reconsideration of the merits of his claim. It found counsel's arguments repetitive of his prior statements and Dr. Kung's report duplicative, and thus insufficient to warrant a review of the merits of the claim.

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

On March 12, 2020 appellant, through counsel, filed a request for reconsideration of OWCP's May 1, 2019 and January 9, 2020 merit decisions. However, it was not until March 8, 2021, 361 days after he filed his request for reconsideration, that OWCP issued a decision finding that the evidence submitted in support of his March 12, 2020 request for reconsideration was insufficient to warrant a merit review.

OWCP's procedures provide a timeliness goal for issuing reconsideration decisions within 90 days from the receipt of the request.⁶ As OWCP's March 8, 2021 nonmerit decision was issued more than 90 days after it received appellant's request for reconsideration on March 12, 2020, the question becomes whether the delay has impacted appellant's ability to file a timely request for reconsideration of the merits of his case under 5 U.S.C. § 8128(a).⁷ The 180-day period to appeal the May 1, 2019 merit decision to the Board expired on October 28, 2019, prior to appellant's request for reconsideration on March 12, 2020.⁸ However, had OWCP issued the reconsideration decision within its 90-day timeliness goal, appellant would have had additional time to request reconsideration of the merits of the claim from either the May 1, 2019 or January 9, 2020 decisions under the criteria set forth for a timely request for reconsideration with OWCP, or to appeal the January 9, 2020 merit decision to the Board.

Therefore, the Board finds that this case is not in posture for decision.⁹ To preserve appellant's right to file a timely appeal to the Board or request reconsideration with OWCP, the case will be remanded to OWCP for a merit review of the evidence of record followed by an appropriate decision. Following such further development as OWCP deems necessary, it shall issue an appropriate merit decision.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2(c) (September 2020).

⁷ *S.P.*, Docket No. 20-0211 (*Order Remanding Case*, issued December 2, 2020); *K.B.*, Docket No. 20-0037 (issued June 23, 2020); *see G.D.*, Docket No. 19-0815 (issued January 16, 2020); *E.I.*, Docket No. 18-0634 (issued January 23, 2019) (the Board ordered a merit review where OWCP delayed its reconsideration decision more than 90 days from the receipt of the request).

⁸ For final adverse decisions of OWCP issued on or after November 19, 2008, the Board's review authority is limited to appeals which are filed within 180 days from the date of issuance of OWCP's decision. 20 C.F.R. §§ 501.3(e).

⁹ *S.P.*, *supra* note 7; *K.B.*, *supra* note 7; *see G.D.*, *supra* note 7.

IT IS HEREBY ORDERED THAT the March 8, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: February 15, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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