

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

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N.A., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,  
Attleboro, MA, Employer

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**Docket No. 12-1299  
Issued: September 16, 2013**

*Appearances:*  
*Daniel B. Shapiro, Esq.*, for the appellant  
*Paul J. Klingenberg, Esq.*, for the Director

Oral Argument June 25, 2013

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On May 23, 2012 appellant, through counsel, filed a timely appeal from a November 30, 2011 decision of the Office of Workers' Compensation Programs (OWCP) regarding a schedule award. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 OWCP properly determined the date of maximum medical improvement for appellant's schedule award.

On appeal, counsel asserts that OWCP erred by starting the period of the schedule award on the date of injury.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

OWCP accepted that on or before February 8, 2011 appellant, then a 50-year-old letter carrier, sustained an aggravation of degenerative arthritis of the left hip due to prolonged walking and carrying in the performance of duty. He continued to work as a letter carrier through February 28, 2011. The employing establishment noted that, as of February 8, 2011, appellant's annual base salary was \$55,530.00.

On May 10, 2011 appellant claimed a schedule award. He submitted a May 3, 2011 report from Dr. Byron V. Hartunian, an attending Board-certified orthopedic surgeon, assessing a 51 percent impairment of the left lower extremity due to a Class 4 arthritic impairment, according to Table 16-4 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*).<sup>2</sup> Dr. Hartunian opined that appellant reached maximum medical improvement "in May of 2007 at the time the arthritis of the left hip was first diagnosed. The condition has progressively worsened since then." He recommended a left hip arthroplasty.

On August 9, 2011 OWCP requested that an OWCP medical adviser review Dr. Hartunian's report to determine the date of maximum medical improvement and the appropriate percentage of impairment. An OWCP medical adviser submitted an August 22, 2011 report concurring with Dr. Hartunian's determination of 51 percent impairment of the left lower extremity. The medical adviser stated that it was "probable that the date of maximum medical improvement [was] May 2007, the date of the evaluation by Dr. Hartunian."

Appellant declined to undergo the recommended hip arthroplasty and requested that OWCP issue a schedule award. In an October 26, 2011 letter, OWCP asked Dr. Hartunian to explain whether appellant had reached maximum medical improvement in lieu of surgery. In an October 28, 2011 letter, Dr. Hartunian reiterated that appellant's condition "progressively worsened" since the May 2007 diagnosis.

In a November 22, 2011 memorandum, OWCP listed that, as of February 8, 2011, appellant's annual base pay rate was \$55,530.00, or \$1,067.88 a week. It noted that he "continued to be exposed to injurious work factors" through February 8, 2011.

By decision dated November 30, 2011, OWCP granted appellant a schedule award for a 51 percent impairment of the left lower extremity. The decision found the date of maximum medical improvement as May 30, 2007. The period of the award ran from February 8 to November 19, 2011. OWCP based the schedule award compensation on appellant's weekly pay rate of \$1,067.88 as of February 8, 2011.

Oral argument was held on June 25, 2013. At oral argument, counsel submitted a supplemental memorandum asserting that OWCP erred by failing to begin the November 30, 2011 schedule award on May 30, 2007, the date of diagnosis.

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<sup>2</sup> Table 16-4 of the sixth edition of the A.M.A., *Guides* is the Hip Regional Grid.

The Board issued an Order Allowing Supplemental Pleading on July 5, 2013. On July 19, 2013 the Director of OWCP submitted a Motion to Remand, contending that the case required further development on the issue of maximum medical improvement. He asserted that OWCP's medical adviser incorrectly referred to the date of diagnosis as the date of maximum medical improvement. In response, counsel submitted a supplemental pleading on August 22, 2013, asserting that the proper date of maximum medical improvement was July 13, 2007.<sup>3</sup>

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>4</sup> provide for compensation to employees sustaining impairment from loss or loss of use of specified members 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 determination is a matter which rests in the sound 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. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.<sup>5</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2008.<sup>6</sup>

The period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the residuals of the employment injury. Maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further.<sup>7</sup> The determination of the date of maximum medical improvement is factual in nature and depends primarily on the medical evidence.<sup>8</sup> The date of maximum medical improvement is usually considered to be the date of the evaluation accepted as definitive by OWCP.<sup>9</sup> The Board has also noted a reluctance to find a date of maximum medical improvement which is retroactive to the award, as retroactive awards often

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<sup>3</sup> In his August 22, 2013 pleading, counsel requested a second oral argument on the present case. The Board, in its discretion, has considered counsel's request for oral argument. The request is denied on the grounds that it would serve no useful purpose and only serve to delay the issuance of a decision in the case.

<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>7</sup> *Adela Hernandez-Piris*, 35 ECAB 839 (1984).

<sup>8</sup> *J.B.*, Docket No. 11-1469 (issued February 14, 2012); *Franklin L. Armfield*, 28 ECAB 445 (1977).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 3 -- *supra* note 6 at Chapter 3.700.3.a (January 2010); *see Richard Larry Enders*, 48 ECAB 184 (1996) (the date of maximum medical improvement was the date of the audiologic examination used as the basis of the schedule award).

result in payment of less compensation benefits. The Board, therefore, requires persuasive proof of maximum medical improvement if OWCP selects a retroactive date.<sup>10</sup>

### ANALYSIS

OWCP accepted that, on or before February 8, 2011, appellant sustained an aggravation of degenerative arthritis of the left hip. Appellant claimed a schedule award and submitted a May 3, 2011 impairment rating from Dr. Hartunian, an attending Board-certified orthopedic surgeon, who rated 51 percent impairment of the left leg due to the accepted condition. Dr. Hartunian found that appellant attained maximum medical improvement when diagnosed in May 2007 and that the condition had worsened since that time. He appears to have misinterpreted the meaning of maximum medical improvement, a permanent stabilization of the condition, as he stated appellant's condition continued to worsen. Therefore, May 2007 is not established by the medical evidence to be the correct date of maximum medical improvement.

An OWCP medical adviser stated that appellant reached maximum medical improvement in "May 2007, the date of the evaluation by Dr. Hartunian." However, Dr. Hartunian evaluated appellant on May 3, 2011, not in May 2007. The medical adviser concurred with Dr. Hartunian's assessment of a 51 percent impairment of the left lower extremity.

On November 30, 2011 OWCP granted appellant a schedule award for a 51 percent impairment of the left leg, based on Dr. Hartunian's rating. The percentage of impairment and the method of its calculation are not at issue. OWCP listed May 30, 2007 as the date of maximum medical improvement; yet, it commenced the award on February 8, 2011, the date that appellant first related his condition to work factors.<sup>11</sup> It also based the amount of the schedule award on appellant's pay rate as of February 8, 2011.

The Board finds that the November 30, 2011 schedule award decision sets forth an incorrect date of maximum medical improvement. The case will be remanded to OWCP for further development to ascertain the correct date of maximum medical improvement. Following any development as deemed necessary, OWCP will issue a *de novo* decision in the case.

On appeal, counsel asserts that OWCP erred by starting the period of the schedule award on the date of injury rather than on any of the offered dates of maximum medical improvement. As noted, the case is returned to OWCP for additional development regarding the date of maximum medical improvement.

### CONCLUSION

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

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<sup>10</sup> *James E. Earle*, 51 ECAB 567 (2000).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.a (January 2010), *supra* note 8.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 30, 2011 is set aside, and the case remanded for further development consistent with this decision and order.

Issued: September 16, 2013  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board