

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

M.E., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
AVIATION DEPOT, Cherry Point, NC,
Employer**

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**Docket No. 08-52
Issued: March 24, 2008**

Appearances:

*Stephen D. Scavuzzo, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 5, 2007 appellant filed a timely appeal from a July 12, 2007 merit decision by a hearing representative of the Office of Workers' Compensation Programs that affirmed a schedule award for 11 percent impairment of the right kidney. Pursuant to 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 met his burden of proof in establishing that he had greater than 11 percent permanent impairment of the right kidney for which he received a schedule award.

FACTUAL HISTORY

On October 5, 2004 appellant, then a 46-year-old tool maker, filed an occupational disease claim alleging that he sustained kidney cancer as a result of working with heavy metals, specifically grinding tools. After finding stage III renal cell carcinoma appellant underwent a right radical nephrectomy on March 11, 2004. On March 24, 2005 the Office denied appellant's

claim finding that the medical evidence did not demonstrate that his kidney condition was related to his employment.

On April 28, 2005 appellant requested an oral hearing. The hearing was held on October 18, 2005.

Additional evidence was submitted, including an October 12, 2005 letter from Dr. Peter F. Keurs and a November 14, 2005 letter from Dr. Marcelo R. Perez-Montes, a general practitioner. Dr. Keurs reported that appellant's right kidney was full of toxic metals of the kind found at the facility where he worked and that appellant was relocated to a different work environment. Dr. Perez-Montes opined that it was more likely than not that the work exposure incurred by appellant aggravated or contributed to the development of his renal dysfunction.

In a December 21, 2005 decision, the Office found a conflict in the medical evidence requiring further development of the medical evidence. The March 24, 2005 decision was set aside and the case remanded for further development.

On February 9, 2006 Dr. Wendy Rathmell, an oncologist, evaluated appellant. She opined that it was impossible to completely prove or disprove the etiologic impact of his work exposures on his renal cell carcinoma. In a May 11, 2006 note, Dr. Rathmell opined that it was possible if not probable that appellant's renal cell carcinoma was associated with his workplace exposure.

On May 16, 2006 the Office accepted appellant for malignant neoplasm of the right kidney.

On June 7, 2006 the district medical adviser reviewed appellant's case and used the American Medical Association, *Guides to the Evaluation of Permanent Impairment* to find that one functioning kidney equaled 10 percent whole person impairment. He concluded that appellant had an impairment of 11 percent of the right kidney.

On June 9, 2006 the Office informed appellant that he was eligible for a schedule award rating of 11 percent. On July 7, 2006 he filed a claim for schedule award.

On July 17, 2006 the Office granted appellant a schedule award for 11 percent impairment of the kidney and 17.16 weeks of compensation.

On July 25, 2006 appellant requested an oral hearing. The hearing was held on April 5, 2007. A December 13, 2006 computerized tomography (CT) scan of the abdomen and pelvis performed by Dr. Catherine J. Everett, a Board-certified radiologist, diagnosed restaging renal cell carcinoma. On August 17, 2004 a basic metabolic panel was performed. A urinalysis was performed on April 17, 2007.

In a May 17, 2007 decision, the hearing representative vacated the July 17, 2006 schedule award and remanded the case to the Office to obtain further review of the new medical evidence by an Office medical adviser.

In a May 18, 2007 memorandum, the medical adviser reviewed the new evidence, noting that the urinalysis did not have the creatinine clearance value required to determine impairment due to upper urinary tract disease. He concluded that the impairment rating of 11 percent for the right kidney was correct.

On July 12, 2007 the Office denied appellant's request for an increase in his schedule award impairment rating. The Office found that the medical adviser properly assessed the medical documents.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulations² 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. No schedule award is payable for a member, function or organ of the body that is not specified in the Act or the implementing regulation.³ The Act identifies members as the arm, leg, hand, foot, thumb and finger, functions as loss of hearing and loss of vision and organs to include the eye. Section 8107(c)(22) of the Act provides for payment of compensation for permanent loss of "any other important external or internal organ of the body as determined by the Secretary [of Labor.]"⁴ The Secretary of Labor has made such a determination and, pursuant to the authority granted in section 8107(c)(22), added the breast, kidney, larynx, lung, penis, testicle, tongue, ovary, uterus/cervix and vulva/vagina to the schedule.⁵ The schedule provides that total loss of a kidney entitles a claimant to 156 weeks of compensation.⁶

However, neither the Act nor the applicable regulation specifies the manner in which the percentage of loss shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office. 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 the Office as a standard for evaluating schedule losses and the Board has concurred in such

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404 (1999).

³ See *Gary M. Goul*, 54 ECAB 702 (2003); *Donald A. Larson*, 41 ECAB 947 (1990).

⁴ 5 U.S.C. § 8107(c)(22).

⁵ 20 C.F.R. § 10.404(a).

⁶ *Id.*

adoption.⁷ As of February 1, 2001, schedule awards are calculated according to the fifth edition of the A.M.A., *Guides*, published in 2000.⁸

The A.M.A., *Guides* provide that an individual with only one functioning kidney has 10 percent whole person impairment because of such an essential organ loss.⁹ While the A.M.A., *Guides* provide for impairment ratings to the individual member as well as impairment to the whole person, the Act does not provide for assessing permanent impairment of the whole person. As noted the schedule award provisions of the Act provide for loss of use of a member, function of organ of the body listed.

ANALYSIS

The Board finds that appellant met his burden of proof in establishing that he was entitled to a schedule award for 100 percent impairment of his right kidney. The Office accepted that appellant sustained a malignant neoplasm kidney. Appellant underwent a right nephrectomy, or complete removal of the right kidney, as a consequence of his accepted injury. The provision of the A.M.A., *Guides*, relied upon by the medical adviser rating appellant with a 10 percent impairment of the whole person is not applicable as the Act does not provide for permanent impairment of the whole person. Appellant has lost a scheduled member, the right kidney, he is therefore entitled to the 156 weeks of compensation allotted by the Secretary for this member rather than the 17.16 weeks of compensation awarded by the Office.¹⁰ On remand the Office should amend the schedule award determination to reflect the total loss of the right kidney and award the appropriate schedule award benefit.

CONCLUSION

The Board finds that as appellant has a total loss of his left kidney he is entitled to 156 weeks of compensation in accordance with the Act and implementing federal regulation.

⁷ *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

⁸ See FECA Bulletin No. 01-05 (issued January 29, 2001) (schedule awards calculated as of February 21, 2001 should be evaluated according to the fifth edition of the A.M.A., *Guides*. Any recalculations of previous awards which result from hearings, reconsideration or appeals should, however, be based on the fifth edition of the A.M.A., *Guides* effective February 1, 2001).

⁹ A.M.A., *Guides* 145, 7.3 Upper Urinary Tract.

¹⁰ *N.D.*, 59 ECAB ____ (Docket No. 07-1981, issued February 1, 2008); *Marilyn S. Freeland*, 57 ECAB ____ (Docket No. 06-563, issued June 7, 2006).

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: March 24, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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