United States Department of Labor
Employees' Compensation Appeals Board

D.F., Appellant	)	
and	)	**Docket No. 07-1607**
	)	**Issued: December 21, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Indianapolis, IN, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 30, 2007 appellant filed a timely appeal of a May 4, 2007 merit decision of the Office of Workers' Compensation Programs, which affirmed a schedule award for a 15 percent permanent impairment of the left eye. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

ISSUE

The issue is whether appellant has met her burden of proof to establish that she has more than a 15 percent impairment of her left eye.

FACTUAL HISTORY

On June 13, 1991 appellant, then a 38-year-old temporary officer in charge, sustained injury to her left eye in the performance of duty when she was involved in a motor vehicle accident. Her claim was accepted for chronic cervical/thoracic strain, fractured teeth and facial injuries. On January 25, 1994 appellant sustained a recurrence. On May 31, 1994 her claim was

accepted for subretinal hemorrhage of the left eye related to the January 25, 1994 employment injury.

On May 23, 2001 appellant filed for a schedule award. In a report dated February 20, 2003, her treating physician, Dr. John Latona, a Board-certified ophthalmologist, indicated that her best corrected visual acuity was 20/40. Using the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, Dr. Latona opined that appellant had a visual impairment rating of 24 percent. In a second opinion report dated December 12, 2003, Dr. David Eriksen, a Board-certified ophthalmologist, reviewed appellant's medical records and found a 15 percent visual acuity impairment rating based on the A.M.A., *Guides* and a maximum medical improvement date of June 17, 1994.

On March 10, 2004 the Office granted appellant a schedule award for a 15 percent impairment of her left eye. On March 18, 2004 appellant requested an oral hearing.

By decision dated October 31, 2005, the Office hearing representative set aside the March 10, 2004 schedule award on the grounds that appellant's loss of vision should have been determined without regard to correction, as required under the Federal Employees' Compensation Act, section 8107(c)(19).

By letter dated February 22, 2006, the Office asked Dr. Eriksen to review appellant's record and rate appellant without regard to correction based on the statement of accepted facts.

In a report dated March 2, 2006, Dr. Eriksen stated that assessing uncorrected vision measurements for appellant was meaningless as she had extremely strong glasses prior to the injury with uncorrected vision in the 20/800 to 20/1000 range and was still in the same range postinjury. He also opined that the impairment rating should be based on the best corrected visual acuity.

On June 12, 2006 the Office issued a decision denying an increase in excess of 15 percent impairment for appellant's left eye on the grounds that the medical evidence was insufficient.

On June 27, 2006 appellant requested an oral hearing. The hearing was held on March 8, 2007. She submitted additional medical information.

On May 4, 2007 the Office hearing representative affirmed the June 12, 2006 decision, finding that the medical evidence did not establish that appellant's uncorrected vision loss in the left eye was work related.

LEGAL PRECEDENT

The schedule award provision of the Act[1] and its implementing regulation[2] 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. The Act, however, does not

[1] 5 U.S.C. §§ 8101-8193.

[2] 20 C.F.R. § 10.404.

specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of the Office.[3] 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. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[4]

Section 8107(c)(19) of the Act provides that the degree of loss of vision or hearing under this schedule is determined without regard to correction.[5] Permanent visual impairment is defined by the A.M.A., *Guides* as a permanent loss of vision that remains after maximal medical improvement of the underlying medical condition has been reached.[6] The A.M.A., *Guides* indicate that the evaluation of visual impairment is based on the functional vision score (FVS), which is the combination of an assessment of visual acuity, the ability of the eye to perceive details necessary for activities such as reading and; an assessment of visual field, and the ability of the eye to detect objects in the periphery of the visual environment, which relates to orientation and mobility.[7] The A.M.A., *Guides* also allow for individual adjustments for other functional deficits, such as contrast and glare sensitivity, color vision defects and binocularity, stereopsis, suppression and diplopia, only if these deficits are not reflected in a visual acuity or visual field loss.[8] However, the A.M.A., *Guides* specifically limit adjustment of the impairment rating for these deficits to cases which are well documented and state that the adjustment should be limited to an increase in the impairment rating of the visual system (reduction of the FVS) by, at most, 15 points.[9]

ANALYSIS

The Board finds that the Office was incorrect in its June 12, 2006 decision finding that appellant's eye condition was not work related. The Office previously accepted appellant's claim for subretinal hemorrhage of the left eye on May 31, 1994 and granted appellant a schedule award based on this injury.

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[3] *Linda R. Sherman*, 56 ECAB ___ (Docket No. 04-1510, issued October 14, 2004); *Danniel C. Goings*, 37 ECAB 781, 783-84 (1986).

[4] *Ronald R. Kraynak*, 53 ECAB 130 (2001).

[5] 5 U.S.C. § 8107(c)(19).

[6] A.M.A., *Guides* 278 (5th ed. 2001).

[7] *Id*. at 278, 280, 296. This represents a change from the visual efficiency scale that was used up to the fourth edition of the A.M.A., *Guides*, as the extra scale and losses for diplopia and aphakia have been removed. The current edition of the A.M.A., *Guides*, the fifth edition, also utilizes a different formula for calculating visual impairment ratings to better account for situations where the binocular function is not identical to the function of the better eye.

[8] A.M.A., *Guides* 297.

[9] *Id*.

The Board also notes that it is well established that, in determining the degree of impairment for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body member are to be included in the evaluation of the permanent impairment.[10] The Board has noted Larson's explanation that this principle "is sometimes expressed by saying that the employer takes the employee as it finds that employee."[11] The Office's procedures also require that, in evaluating loss of use of a scheduled member due to employment injury, the total amount of the permanent impairment of the scheduled member be determined.

In this regard, the FECA Program Memorandum No. 69, entitled "Payment of a Scheduled Award Where Prior, Permanent Disability of the Same Member or Function Exists" provides in pertinent part as follows:

> "Recent inquiries indicate that it is necessary to reiterate the Bureau's general policy concerning reduction of compensation for subsequent injury to the same member or function or for disfigurement.
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> "It has been and continues to be the Bureau's policy to include in the payment of a scheduled award, any preexisting permanent disability of the same member or function. There are, however, two exceptions: (1) where the Bureau has paid or will pay a scheduled award under 5 U.S.C. [§] 8107 on account of an earlier injury; and (2) where the Veterans Administration (VA) has paid or is paying an award for a preexisting disability. These are the only exceptions believed to be authorized by the provisions of 5 U.S.C. § 8108."
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> "It is also necessary to comment on those injury cases involving a preexisting 100 percent loss or loss of use of a member or function of the body. In such cases, a scheduled award is not necessarily ruled out. Cases of this type should be developed to determine: (1) the prior usefulness of the member or function; and (2) whether the injury in federal employment has diminished any such usefulness in whole or in part.
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> "When the question of scheduled award entitlement arises in cases involving what appears to be a prior 100 percent loss or loss of use, the case should be referred to the central Office for review and decision after all necessary factual and medical evidence has been obtained."[12]

Appellant had not previously been paid a schedule award for an earlier injury for the same eye and had not received any VA award for preexisting disability. The Office's general policy to include in the payment of a schedule award any preexisting permanent impairment of

[10] *Kenneth E. Leone*, 46 ECAB 133 (1994).

[11] *Id*. *See* A. Larson, *The Law of Workers' Compensation*, § 9.02 (2002).

[12] FECA Program Memorandum No. 69 (issued May 6, 1968).

the same member was, therefore, applicable in this case. In *Mike E. Reid*,[13] the employee essentially had a preexisting 100 percent loss of the left eye prior to the injury. The Board found that, as noted in the program memorandum, a schedule award is not necessarily ruled out. A schedule award is still payable if the employment injury diminished any usefulness of the eye in whole or in part. In *Franklin E. Larsen*,[14] the employee was inspecting lumber when a hot cinder was blown into his left eye. The claim for a schedule award was denied by the Office on the grounds that he had 10/0 vision in the left eye prior to the employment injury and that he was, therefore, wholly blind prior to the employment injury. The Office determined that, as claimant had no useful vision in the left eye prior to the injury, he was not entitled to a schedule award under the Act. The Board found, however, that the medical evidence indicated that claimant had light perception in the left eye prior to the injury and that the ability to perceive light was useful vision. As the claimant lost useful vision as a result of the employment injury, even though appellant had 100 percent loss of the eye prior to the injury, the Board found that the claimant was entitled to a schedule award for 100 percent loss of use of the left eye.

In the present case, while appellant had a preexisting loss of visual acuity, the Office has not determined whether she had useful vision in the left eye prior to the employment injury, which was diminished by the employment injury.

Finally, the Board notes that Dr. Eriksen improperly applied the A.M.A., *Guides* in determining that appellant had no more than a 15 percent permanent impairment for loss of use of her left eye. When assessing the degree of vision loss under the Act, he must use appellant's uncorrected vision measurements.[15] As none of the medical reports contain an impairment rating based on appellant's uncorrected vision, the case will be remanded in order for the proper rating to be assessed.

CONCLUSION

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

[13] 51 ECAB 543 (2000).

[14] 17 ECAB 391 (1966).

[15] "[T]he degree of loss of vision or hearing under this schedule is determined without regard to correction" section 8107(c)(19).

ORDER

IT IS HEREBY ORDERED THAT the May 4, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for further development consistent with this decision of the Board.

Issued: December 21, 2007
Washington, DC

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

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

James A. Haynes, Alternate Judge
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