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MICHELE TOUSLEY, Appellant)	
)	
and)	Docket No. 05-1156
)	Issued: October 12, 2005
DEPARTMENT OF THE INTERIOR, BUREAU)	
OF LAND MANAGEMENT, Salt Lake City, UT,)	
Employer)	
)	

Case Submitted on the Record

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

On April 28, 2005 appellant filed a timely appeal of a July 22, 2004 merit decision of the Office of Workers' Compensation Programs, which granted a schedule award for a 65 percent permanent impairment of the left eye and a January 27, 2005 nonmerit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this decision and the nonmerit issue.

The issues are: (1) whether appellant has met her burden of proof to establish that she has more than a 65 percent impairment of her left eye; and (2) whether the Branch of Hearings and Review properly denied appellant's request for an oral hearing.

On September 24, 2001 appellant, then a 20-year-old firefighter, sustained injuries in the performance of duty when she was punctured in her left eye by a stick. Her claim was accepted

for ocular laceration and traumatic cataract of the left eye. Appellant underwent surgeries pursuant to her injury in July, September and November 2001.

On June 14, 2002 the Office asked an Office medical adviser to provide an impairment rating of appellant's left eye for purposes of a schedule award. On June 18, 2002 the medical adviser stated that eye impairments should be rated on best corrected visual acuity and opined that appellant had a zero percent impairment of her left eye.

In a report dated August 16, 2002, appellant's treating physician, Dr. Mark D. Mifflin, a Board-certified ophthalmologist, indicated that appellant's best corrected visual acuity was 20/40; that she had a relatively dense corneal scar and a decentered pupil; and that her visual field was mildly depressed but full in the left eye. He related that appellant suffered from "moderately severe" glare disability, as documented by the brightness acuity meter. Dr. Mifflin explained that the acuity reading in the left eye with the meter set at low adjustment was 20/70 with best correction. Based on the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,¹ Dr. Mifflin opined that appellant's 20/40 best-corrected vision and monocular pseudophakia corresponded to a 57 percent loss of central vision in the left eye. He added a 10 percent disability for the corneal scar and glare disability, for a total of 67 percent impairment in the left eye. Dr. Mifflin translated his findings into a 21 percent whole person impairment. Upon review of Dr. Mifflin's report, the Office medical adviser asked Dr. Mifflin to reevaluate appellant's impairment under the fifth edition of the A.M.A., *Guides*.²

In a report dated February 13, 2003, based upon the fifth edition of the A.M.A., *Guides*, Dr. Mifflin opined that appellant had an 18 percent impairment of her visual system, corresponding to an eight percent whole person impairment. He explained that she had a functional acuity score of 97 percent, resulting in a three percent whole person acuity-related impairment rating. Dr. Mifflin found that she had no visual field deficits. He found, however, that appellant had significant disability due to her monocular pseudophakia and glare disability and that she had cosmetic deformity "which may certainly, in [his] opinion, contribute to her impairment." Referring to section 12.4(b) of the A.M.A., *Guides*, Dr. Mifflin opined that a 15 percent reduction should be allowed for the above-referenced individual adjustments.

On May 6, 2003 the Office granted appellant a schedule award for an 18 percent impairment of her left eye. On May 20, 2003 appellant requested an oral hearing.

By decision dated April 14, 2004, an Office hearing representative set aside the May 6, 2003 schedule award on the grounds that loss of vision should have been determined without regard to correction under the Federal Employees' Compensation Act; that the schedule award should have been issued for the individual eye; and that the office gave no consideration to appellant's cosmetic abnormality caused by scarring to the eye.

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993).

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

By letter dated May 11, 2004, the Office asked Dr. Mifflin to again rate appellant without regard to correction and based solely on impairment to the left eye. The Office also requested an impairment rating for facial disfigurement.

In a report dated June 23, 2004, Dr. Mifflin indicated that his June 15, 2004 examination of appellant revealed that she had visual acuity in the left eye of 20/400. He found her visual field testing to be normal and reported that her glare disability in the left eye had worsened from 20/60 to 20/200 on the medium setting. Without regard to best corrected visual acuity, he concluded that appellant had a visual acuity score of 35, corresponding to a 65 percent visual acuity impairment rating in the left eye. He opined that she had an additional 15 percent impairment rating pursuant to section 12.4(b) of the A.M.A., *Guides* due to glare disability, decreased contrast sensitivity and cosmetic deformity of her cornea and pupil. In a supplemental note dated July 2, 2004, Dr. Mifflin indicated that appellant had 20 percent function of the left eye.

By memorandum dated July 6, 2004, the Office asked the Office medical adviser to review Dr. Mifflin's report for purposes of a schedule award. The memorandum stated that a schedule award for disfigurement could not be awarded at that time, due to the fact that it had not been determined whether or not appellant was employable. The memorandum specifically directed the medical adviser not to address disfigurement.

On July 14, 2004 the Office medical adviser found the date of maximum medical improvement to be August 8, 2002. Referring to Table 12-11 at page 302 of the A.M.A., *Guides*, the medical adviser opined that appellant's uncorrected visual acuity in her left eye was 20/400, resulting in a 65 percent impairment of the left eye.

On July 22, 2004 the Office granted appellant an additional 47 percent, or a total of 65 percent, schedule award for permanent loss of use to the left eye, finding the date of maximum medical improvement to be February 13, 2003.

The record contains an envelope addressed to appellant, which was postmarked July 24, 2004, received by the Office on August 3, 2004, and stamped "forward time expired/return to sender." The record also contains an envelope addressed to appellant, which was returned to the Office by the post office and received by the Office on August 24, 2004. On August 24, 2004 the Office informed appellant that it had received notification of her address change on that date.

On December 15, 2004 appellant requested an oral hearing. She alleged that her request was untimely because she did not receive the schedule award decision "because [she] moved." Appellant claimed that, although she sent a "change of address" letter to the Office, the Office received it after the award letter had been mailed. She stated that she was required to contact the Office for a copy of the July 22, 2004 schedule award.

On January 27, 2005 an Office hearing representative denied appellant's request for an oral hearing as untimely and for the reason that the issue could be equally well addressed by a request for reconsideration.³

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁴ and its implementing regulation⁵ sets 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 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.⁶ 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.⁷

Section 8107(c)(19) of the Act provides that "[t]he degree of loss of vision or hearing under this schedule is determined without regard to correction."⁸ A 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.⁹ The A.M.A., *Guides* indicate that the evaluation of visual impairment is based on the functional vision score, 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.¹⁰ The A.M.A., *Guides* also allow for individual adjustments for other

³ The Board notes that the record on appeal contains additional evidence which was not before the Office at the time it issued its December 24, 1998 decision. The Board has no jurisdiction to review this evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 20 C.F.R. § 10.404.

⁶ *Linda R. Sherman*, 56 ECAB ____ (Docket No. 04-1510, issued October 14, 2004); *Daniel C. Goings*, 37 ECAB 781, 783-84 (1986).

⁷ *Ronald R. Kraynak*, 53 ECAB 130 (2001).

⁸ 5 U.S.C. § 8107(c)(19).

⁹ A.M.A., *Guides* 278 (5th ed. 2001).

¹⁰ *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.

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.¹¹ However, the A.M.A., *Guides* specifically limit adjustment of the impairment rating for these deficits to cases which are well documented and state, “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.”¹²

Section 8107(c)(14) of the Act¹³ provides that loss of 80 percent or more of the vision of an eye is the same as loss of the eye.

ANALYSIS

The Board concludes that the Office medical adviser improperly applied the A.M.A., *Guides* in determining that appellant had no more than a 65 percent permanent impairment for loss of use of her left eye.

On May 6, 2003 the Office granted appellant a schedule award for an 18 percent impairment of her left eye, based upon a February 13, 2003 report by appellant’s ophthalmologist, Dr. Mifflin, who had rated appellant’s impairment on the best corrected visual acuity, opining that appellant had an 18 percent impairment of her visual system; significant disability due to her monocular pseudophakia and glare disability; and cosmetic deformity. By decision dated April 14, 2004, an Office hearing representative set aside the May 6, 2003 schedule award, correctly finding that loss of vision should have been determined without regard to correction under the Act¹⁴ and that the schedule award should have been issued for the individual eye. In his June 23, 2004 report, based upon the fifth edition of the A.M.A., *Guides*, Dr. Mifflin found that appellant’s uncorrected visual acuity was 20/400 in the left eye resulting in a 65 percent visual acuity impairment rating in the left eye. He further opined that she had an additional 15 percent impairment rating pursuant to section 12.4(b) of the A.M.A., *Guides* due to glare disability, decreased contrast sensitivity and cosmetic deformity of her cornea and pupil. After reviewing Dr. Mifflin’s report, the Office medical adviser, opined that appellant had a 65 percent impairment of the left eye pursuant to Table 12-11 at page 302 of the A.M.A., *Guides*. Based upon the medical adviser’s recommendation, on July 22, 2004 the Office granted appellant a schedule award for an additional 47 percent impairment of the left eye.

¹¹ A.M.A., *Guides* 297.

¹² *Id.*

¹³ 5 U.S.C. § 8107(c)(14).

¹⁴ 5 U.S.C. § 8107(c)(19).

The Office medical adviser and appellant's ophthalmologist agreed that appellant had a 65 percent impairment of the left eye, based on an uncorrected visual acuity of 20/400.¹⁵ Pursuant to Table 12-2 at page 284 of the A.M.A., *Guides*, appellant's visual acuity score of 35 corresponds to a 65 percent visual acuity impairment rating in the left eye. Accordingly, the Board finds that the Office correctly determined that appellant had a 65 percent impairment of the left eye. However, the Office failed to address Dr. Mifflin's recommendations for individual adjustments pursuant to section 12.4(b).¹⁶ Section 12.4(b) allows for individual adjustments, up to a maximum of 15 points, for other functional deficits, such as contrast and glare sensitivity, color vision defects and binocularity, stereopsis, suppression and diplopia, if these deficits are not reflected in a visual acuity or visual field loss and if they are well documented."¹⁷

The Board finds that in addition to appellant's 20/400 uncorrected visual acuity in the left eye resulting in a 65 percent visual acuity impairment rating, significant well-documented factors remain that affect appellant's functional vision and that are not accounted for through visual acuity or visual field loss. In his August 16, 2002 report, Dr. Mifflin indicated that appellant suffered from "moderately severe" glare disability, as documented by the brightness acuity meter. He explained that the acuity reading in the left eye with the meter set at low adjustment was 20/70 with best correction. In his February 13, 2003 report, Dr. Mifflin found that, although appellant had no visual field deficits, she had significant disability due to her monocular pseudophakia and glare disability. Referring to section 12.4(b) of the A.M.A., *Guides*, Dr. Mifflin opined that a 15 percent reduction should be allowed for the above-referenced individual adjustments. In a report dated June 23, 2004, Dr. Mifflin indicated that her glare disability in the left eye had worsened from 20/60 to 20/200 on the medium setting. He again opined that she had an additional 15 percent impairment rating due to glare disability, decreased contrast sensitivity and cosmetic deformity of her cornea and pupil. Dr. Mifflin's findings are well documented by testing on the brightness acuity meter and examinations over a two-year period. Moreover, appellant's glare disability and decreased contrast sensitivity are not accounted for through visual acuity or visual field loss. Accordingly, the Board finds that the visual impairment rating of appellant's left eye should be increased by 15 percent for individual adjustments,¹⁸ resulting in an 80 percent impairment to the left eye. Section 8107(c)(14) of the Act¹⁹ provides that loss of 80 percent or more of the vision of an eye is the same as loss of the eye.²⁰ Therefore, the Board finds that appellant should be granted a schedule award for a 100

¹⁵ Dr. Mifflin found that appellant had a visual acuity score of 35, corresponding to a 65 percent visual acuity impairment rating in the left eye. See Table 12-2, page 284, "Impairment of Visual Acuity." The Office medical adviser referred to Table 12-11 at page 302 in making his determination. The Board notes that Dr. Mifflin properly used Table 12-2 in making his impairment rating. See section 12.2(c) at page 282.

¹⁶ A.M.A., *Guides* 297, section 12.4(b).

¹⁷ *Id.*

¹⁸ The Board notes that section 12.4(b) provides for a maximum increase in the impairment rating of the visual system of 15 percent. An increase of 15 percent in the impairment rating of appellant's left eye is, thus, less than the maximum increase permitted by the A.M.A., *Guides*.

¹⁹ 5 U.S.C. § 8107(c)(14).

²⁰ *Id.*

percent loss of use of the left eye and is entitled to 160 weeks of compensation under section 8107(c)(5) of the Act.²¹

The Board notes that the issue of appellant's request for an oral hearing is moot, in that she has been granted a schedule award for a 100 percent impairment of her left eye.

CONCLUSION

The Board finds that appellant is entitled to a schedule award for a 100 percent loss of use of the left eye. The Board will modify the Office's July 22, 2004 decision to reflect that she is entitled to a schedule award for a 100 percent permanent impairment of her left eye and to 160 weeks of compensation for loss of use of her left eye.

ORDER

IT IS HEREBY ORDERED THAT the July 22, 2004 schedule award is affirmed as modified.

Issued: October 12, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

²¹ 5 U.S.C. § 8107(c)(5). Section 8107(c)(5) provides that the compensation schedule award for total loss of an eye equals 160 weeks of compensation.