

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

D.P., Appellant

and

PEACE CORPS, Thailand, Employer

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**Docket No. 11-369
Issued: October 24, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 3, 2010 appellant filed a timely appeal from a July 27, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding entitlement to a schedule award. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

ISSUES

The issues are: (1) whether appellant has more than a 13 percent permanent impairment of the penis; and (2) whether he is entitled to a schedule award for the bladder.

FACTUAL HISTORY

On October 16, 2002 appellant, then a 24-year-old Peace Corps volunteer, filed a traumatic injury claim for injuries sustained in a July 24, 2002 motor vehicle accident. OWCP accepted the claim for an anterior wedge compression fracture at L3, a fractured proximal

¹ 5 U.S.C. § 8101 *et seq.*

sacrum with displacement and angulation at S1-2, a fractured right tibia, a Schmorl node and a nerve root injury at S2-4.

On January 22, 2007 Dr. Peter Moskovitz, a Board-certified orthopedic surgeon, opined that appellant had a 24 percent permanent impairment to the whole person due to his back problems and cauda equina syndrome. On June 5, 2007 appellant filed a claim for a schedule award. In a report dated May 11, 2007, Dr. Edward F. Aulisi, a Board-certified neurosurgeon, opined that appellant had a 50 percent permanent impairment due to his spine and cauda equina syndrome pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001) (A.M.A., *Guides*). OWCP's medical adviser reviewed the evidence on November 25, 2008 and found that it was insufficient to determine the extent of any impairment.

By decision dated February 25, 2009, OWCP denied appellant's claim for a schedule award. On March 20, 2009 appellant requested a review of the written record. He submitted a report dated March 18, 2008 from Dr. Kenneth J. Hammerman, a Board-certified internist, who diagnosed cauda equina syndrome "with neurogenic bladder, sexual dysfunction and a neurogenic bowel." Dr. Hammerman opined that appellant had a 37 percent whole person impairment after rating his back, bladder, bowel and loss of sexual function under the fifth edition of the A.M.A., *Guides*.

Following a preliminary review of the record, on December 15, 2009 a hearing representative vacated the February 25, 2009 decision. He instructed OWCP to refer appellant for a second opinion examination to determine the extent of any permanent impairment of the penis and lower extremities.

On February 11, 2010 OWCP referred appellant to Dr. Leonard A. Brant, a Board-certified urologist, for a second opinion examination.² In a March 5, 2010 evaluation, Dr. Brant discussed his complaints of an inability to empty his bladder and his loss of the sensation of bladder fullness. He also found that appellant had erectile dysfunction usually successfully treated with Cialis. Dr. Brant diagnosed cauda equina syndrome, erectile dysfunction and bowel dysfunction due to the accepted employment injury. He performed diagnostic studies which revealed no bladder sensation and a significantly abnormal voiding pattern. Dr. Brant stated:

"The noninvasive urodynamic studies were markedly abnormal indicating the presence of a loss of bladder sensation and an inability to empty the bladder. The applicant is able to occasionally achieve an erection without the use of Cialis, however, the Cialis enables him to function better. He has a loss of sensation in the ventral portion of the shaft and the penis."

Dr. Brant advised, "[Appellant] should have an ultrasound of his abdomen to evaluate his kidneys and be certain that he does not have hydronephrosis. As the bladder becomes

² OWCP also referred appellant to Dr. Alan B. Kimelman, a Board-certified physiatrist, for a second opinion examination regarding the extent of any lower extremity impairment. On February 8, 2010 Dr. Kimelman found that appellant had a 61 percent lower extremity impairment. OWCP is separately developing the issue of the extent of his lower extremity impairment.

decompensated [he] may develop reflex and renal dysfunction.” He determined that appellant had a 29 percent impairment of the bladder under the sixth edition of the A.M.A., *Guides*. Dr. Brant further found that he had a class 1, or five percent whole person impairment due to penile disease, categorized as “sexual function possible with varying degrees of difficulty with erection or sensation that are responsive to medical treatment [and] mild physical or testing abnormalities. I believe that [appellant] qualifies for class 1 so long [as] he has access to Cialis or equivalent medication....”

On March 24, 2010 OWCP’s medical adviser concurred with Dr. Brant’s finding that appellant had a 29 percent impairment due to a bladder impairment and a 5 percent impairment due to loss of sexual function. He stated:

“Noting the Federal (FECA) Procedure Manual for Special Determination a rating for sexual dysfunction may be calculated as a loss of the penis. For organs such as the penis the FECA Manual dictates that both sexual function whole-person impairment and loss of urethral function [are] considered in calculating the impairment of the penis. In this particular case there is zero percent whole-person impairment with regard to urethral dysfunction with the maximum rating of the whole person for urethral disease a [c]lass IV -- 28 percent. The maximal loss of function of the penis for [c]lass III impairment for sexual function would be 15 percent. The 15 combined with 28 would be a total of a 39 percent whole-person impairment. The [p]hysician indicates a 5 percent impairment for sexual dysfunction and this would represent a 13 percent impairment of the penis for loss of sexual function as described.”

By decision dated April 14, 2010, OWCP granted appellant a schedule award for a 13 percent permanent impairment of the penis. The period of the award ran for 26.65 weeks from March 5 to September 7, 2010.

In a letter dated April 23, 2010, appellant questioned why OWCP did not provide him with a schedule award for his bladder. On May 6, 2010 he requested a review of the written record. Appellant argued that the schedule award did not address his severe bladder impairment and did not include his loss of urethral function in determining his penile impairment. He additionally maintained that Dr. Brant found an impairment in urethral function.

In a decision dated July 27, 2010, the hearing representative affirmed the April 14, 2010 decision. He further found that FECA did not provide for a loss of function of the bladder.

On appeal appellant argues that the schedule award should include his bladder impairment. He also maintains that OWCP erred in failing to include a loss of urethral function in determining his penile impairment. Appellant questions why he did not also receive a schedule award for the lower extremities.

LEGAL PRECEDENT -- ISSUE 1 & 2

The schedule award provision of FECA,³ and its implementing federal regulations,⁴ 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. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁵ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁶

The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).⁷ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

OWCP procedures provide a formula to measure the percentage of impairment of an organ when the whole person impairment is provided. The whole person impairment of the claimant, identified as A, is divided by B, the maximum impairment of the organ, which equals X, the impairment rating, divided by 100. For organs such as the penis, which have more than one physiologic function, the A.M.A., *Guides* provide whole person impairment levels for each function. When calculating the impairment of these organs, OWCP's medical adviser must consider all functions as instructed in the A.M.A., *Guides*. The maximum whole person impairment ascribed to the particular organ (B) is obtained by combining the maximum levels for all functions using the Combined Values Chart in the current edition of the A.M.A., *Guides*. The actual whole person impairment (A) is obtained by combining all functional impairments found using the Combined Values Chart in the A.M.A., *Guides*.⁸

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.⁹ FECA identifies members such as the arm, leg, hand, foot, thumb and finger, organs to include the eye and functions as loss of hearing and loss of vision.¹⁰ Section 8107(c)(22) of FECA provides for the payment of compensation for

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Id.* at § 10.404(a).

⁶ 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).

⁷ A.M.A., *Guides* 494-531.

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(c)(2)(a) (August 2002).

⁹ *See Leroy M. Terska*, 53 ECAB 247 (2001).

¹⁰ 5 U.S.C. § 8107(c).

permanent loss of “any other important external or internal organ of the body as determined by the Secretary of Labor.”¹¹ 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, ovary, uterus and tongue to the schedule.¹² FECA does not provide for OWCP to add organs or functions to the compensation scheduled on a case-by-case basis and the Board does not have the power to enlarge the provisions of either statute or regulation.¹³

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.¹⁴ While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹⁵ Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.¹⁶

ANALYSIS -- ISSUES 1 & 2

OWCP accepted that appellant sustained an anterior wedge compression fracture at L3, a fractured proximal sacrum with displacement and angulation at S1-2, a fractured right tibia, a Schmorl node at and a nerve root injury at S2-4 due to a July 24, 2002 motor vehicle accident.

On June 5, 2007 appellant requested a schedule award. In a report dated January 22, 2007, Dr. Moskovitz opined that he had a 24 percent whole person impairment due to cauda equina syndrome and his back condition. On May 11, 2007 Dr. Aulisi found that he had a 50 percent permanent impairment due to his spinal problems and cauda equina syndrome. In a report dated March 18, 2008, Dr. Hammerman advised that appellant had a 37 percent whole person impairment due to impairments of his back, bladder, bowel and loss of sexual function. FECA, however, does not provide for impairment of the whole person.¹⁷ It also specifically excludes the back as an organ and, therefore, the back does not come under the provisions for payment of a schedule award.¹⁸ Consequently, the opinions of Dr. Moskovitz, Dr. Aulisi and Dr. Hammerman are insufficient to support payment of a schedule award.

OWCP referred appellant to Dr. Brant for an impairment evaluation. On March 5, 2010 Dr. Brant diagnosed cauda equina syndrome with bladder, bowel and erectile dysfunction. He found that appellant was unable to adequately empty his bladder and had an absence of the sensation of bladder fullness. Dr. Brant further diagnosed erectile dysfunction treated largely

¹¹ *Id.* at § 8122(c)(22).

¹² 20 C.F.R. § 10.404; *Henry B. Ford, III*, 52 ECAB 220 (2001).

¹³ *See Janet C. Anderson*, 54 ECAB 394 (2003).

¹⁴ *Vanessa Young*, 55 ECAB 575 (2004).

¹⁵ *Richard E. Simpson*, 55 ECAB 490 (2004).

¹⁶ *Melvin James*, 55 ECAB 406 (2004).

¹⁷ *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

¹⁸ *Francesco C. Veneziani*, 48 ECAB 572 (1997).

successfully with Cialis. He recommended that appellant have an ultrasound to evaluate his kidney function. Utilizing the sixth edition of the A.M.A., *Guides*, Dr. Brant found a 29 percent impairment of the bladder. He next determined that appellant had a class 1 impairment of the penis due to loss of sexual function under Table 7-6 on page 144 of the A.M.A., *Guides*. Dr. Brant graded the severity of the class 1 penile impairment as five percent of the whole person.

On appeal appellant argues that OWCP should have awarded him a schedule award for his bladder impairment. Neither FECA nor the regulations, however, provide a schedule award for the bladder.¹⁹ As discussed, no schedule award is payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.²⁰ FECA does not allow OWCP to add organs or functions to the compensation scheduled on a case-by-case basis nor does the Board have the power to enlarge the provisions of either statute or regulation.²¹ Consequently, appellant is not entitled to a schedule award for his bladder impairment.

Appellant would, however, be entitled to any impairment of the urethra as part of his penile impairment. The sixth edition of the A.M.A., *Guides* notes that the penis has both sexual and urinary functions and states, “When evaluating penis impairment, consider both sexual and urinary function impairment.”²² Dr. Brant discussed his difficulty voiding urine and his loss of sensation but did not directly address whether he had any impairment in urethral function. As OWCP referred appellant to him for a second opinion, it has the obligation to secure a report that will resolve the relevant issues in the case.²³ Accordingly, the Board finds that the case must be remanded to OWCP. On remand, OWCP should request that Dr. Brant clarify whether appellant has an additional penile impairment due to loss of urinary function as set forth in the sixth edition of the A.M.A., *Guides*. Following this and any other development deemed necessary, OWCP shall issue an appropriate decision.²⁴

CONCLUSION

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

¹⁹ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404.

²⁰ See *J.W.*, 59 ECAB 308 (2008); *Paul A. Zoltek*, 56 ECAB 325 (2005).

²¹ See *Janet C. Anderson*, *supra* note 13.

²² A.M.A., *Guides* 143.

²³ On appeal appellant argues that OWCP failed to issue him a schedule award for his lower extremities. OWCP is separately adjudicating the issue of his lower extremity impairment. The Board’s jurisdiction is limited to reviewing final decisions of OWCP. See 20 C.F.R. § 501.2(c).

²⁴ The Board notes that Dr. Brant also recommended an ultrasound of appellant’s kidneys. The kidney is a scheduled member under FECA and thus any employment-related kidney impairment would be compensable. See 5 U.S.C. § 8122(c)(22).

ORDER

IT IS HEREBY ORDERED THAT the July 27, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: October 24, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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