U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MIKE E. REID and DEPARTMENT OF THE NAVY, WEAPONS SUPPORT FACILITY, Seal Beach, CA

Docket No. 98-2593; Submitted on the Record;
Issued June 9, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had no greater than a 10 percent permanent impairment of his left eye, for which he received a schedule award.

On January 18, 1996 appellant, a 40-year-old carpenter, was struck in his left eye by a tie wire. He filed a claim for benefits, which the Office accepted for corneal abrasion and scarring. Appellant attempted to return to work in a light-duty capacity, but stopped working after one week. He has not worked for the employing establishment since that time.

On April 4, 1996 appellant filed a Form CA-7 claim for a schedule award based on permanent impairment of his left eye.

In a report dated May 7, 1996, Dr. Michael B. Woolf, a Board-certified ophthalmologist and appellant's treating physician, explained that appellant's employment injury had caused a central superficial corneal laceration. He explained that, while the surface layer had healed, there was a subsurface scar extending from the 10 o'clock to the 4 o'clock position, clearly crossing the center of the visual papillary access. Dr. Woolf noted that, while appellant could score reasonably well on an objective Snellen eye chart, he still had manifestations, which involved light striking the scarred portion of the ocular media from an unusual angle causing symptoms including glare, unusual appearances of light and other symptoms. In a supplemental report dated August 27, 1996, Dr. Woolf found that appellant's uncorrected visual acuity in his left eye following the January 18, 1996 employment injury was 20/200.

In a report dated October 2, 1996, Dr. Dean R. Hirabayashi, a Board-certified ophthalmologist, acting as an Office medical consultant, based on Dr. Woolf's finding of a 20/200 visual acuity in the left eye, found that appellant had an 80 percent permanent impairment of the left eye pursuant to the American Medical Association (A.M.A.), *Guides to the Evaluation of Permanent Impairment* (fourth edition 1993).

On December 5, 1996 the Office granted appellant a schedule award for a 100 percent total impairment of the left eye for the period April 3, 1996 to April 27, 1999 for a total of 160 weeks of compensation.

By telephone call dated February 11, 1997 and follow-up letter dated February 13, 1997, the Office advised appellant that it had received new evidence from the employing establishment regarding his left eye condition. Dr. Hirabayashi stated in a supplemental report dated March 14, 1997 that this evidence indicated appellant had uncorrected visual acuities prior to the January 18, 1996 employment injury. He reviewed these records and stated:

> "Although there is (probably) documentation that [appellant] had an uncorrected visual acuity of 20/200 in the left eye on September 21, 1995, the [Office] has accepted the conditions of a corneal abrasion and scar of the left eye as being related to the January 18, 1996 work injury. My understanding of the calculation of schedule awards for eye injuries is that regardless of the preinjury visual acuities, the schedule awards are calculated on the basis of the uncorrected visual acuity after the injury, when the condition is permanent and stationary. Since the uncorrected visual acuity in the injured left eye is 20/200, the schedule award remains at 80 percent impairment of vision in the left eye."

Appellant's case file was forwarded to an Office medical adviser, Dr. Ellen L. Pichey, a Board-certified family practitioner. In an April 7, 1997 report, she reviewed appellant's medical records and the reports from Dr. Woolf dated May 7 and August 27, 1996 and reports from Dr. Hirabayashi dated March 14, 1997 and October 2, 1996. Dr. Pichey stated that, "although Dr. Hirabayashi had rated appellant at an 80 percent impairment for the left eye based on visual acuity, he did not take into consideration whether the injury had changed the visual acuity for that eye." She stated that, according to Office procedures, the impairment should be based on the change in uncorrected acuity due to the injury. Dr. Pichey further stated:

> "Records of optometrical screening at the employment site indicate that [appellant] had an uncorrected visual acuity of 20/200 in the left eye on September 21, 1995, prior to the January 18, 1996 injury and an uncorrected visual acuity of 20/100 on September 5, 1996. Dr. Woolf, the treating ophthalmologist, gave an uncorrected visual acuity of 20/200 on August 27, 1996. This information would indicate that there was no change of uncorrected visual acuity from the injury.
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> "However, Dr. Woolf does note that the permanent corneal scar, although not affecting his tests of visual acuity, may cause symptoms of glare, unusual appearance of light, etc. According to the A.M.A., *Guides*, page 209, third paragraph, 'if an ocular ... deformity interferes with visual function and [is] not reflected in diminished visual acuity, decreased visual fields, or ocular motility with diplopia ... the physician may combine an additional 5 percent to 10 percent impairment with the impaired visual function of the involved eye."

Based on the factors cited above, Dr. Pichey determined that appellant had a 10 percent impairment of the left eye.

On April 18, 1997 the Office modified appellant's schedule award based on Dr. Pichey's report granting him a 10 percent permanent impairment of the left lower eye for the period April 3 to July 23, 1996, for a total of 16 weeks of compensation. The Office indicated that this award superseded the previous award for a 100 percent permanent impairment.

By letter dated June 22, 1997, appellant requested reconsideration.[1] By decision dated August 8, 1997, the Office denied modification of the April 18, 1997 decision. By letter dated September 15, 1997, appellant requested reconsideration. By decision dated February 26, 1998, the Office denied appellant's request for reconsideration, finding that he failed to submit evidence sufficient to warrant review of its August 8, 1997 decision.

By letter dated May 4, 1998, appellant requested reconsideration. In support of his claim, appellant submitted a May 31, 1998 report from Dr. Lee K. Schwartz, a Board-certified ophthalmologist, who stated that appellant did receive an injury to the left cornea and that he did have an organic change in that cornea with a corneal scar going through the visual axis. He also stated that appellant's uncorrected vision on December 18, 1991 and his uncorrected vision currently were the same.

By decision dated July 8, 1998, the Office denied modification of the previous decision.

The Board finds that the Office did not meet its burden of proof to modify appellant's schedule award.

It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[2] In the present case, on December 5, 1996 the Office granted appellant a schedule award for 100 percent impairment of the left eye. This award was premised upon Dr. Hirabayashi's evaluation and opinion that appellant had a 80 percent permanent impairment of the left eye due to loss of visual acuity. As section 8107(c)(14) of the Federal Employees' Compensation Act[3] provides that loss of 80 percent or more of the vision of an eye is the same as loss of the eye, the Office granted appellant an award for 100 percent loss of use of the left eye. On April 18, 1997, however, the Office reduced appellant's schedule award to a 10 percent impairment of the left eye. In other schedule award cases, the Board has reiterated that the Office bears the burden of proof to modify an award of compensation benefits.[4] The Office, therefore, bears the burden of proof to modify appellant's schedule award benefits in this case.

[1] Appellant initially appealed to the Board by letter received May 1, 1997. Appellant, however, subsequently informed the Board by letter dated June 22, 1997 that he wished to request reconsideration before the Office. The Board issued an order dismissing appeal dated July 17, 1997. Docket No. 97-1796 (issued July 17, 1997).

[2] *Edwin L. Lester*, 34 ECAB 1807 (1983).

[3] 5 U.S.C. § 8107(c)(14).

[4] *See Leonard J. Khajet*, 41 ECAB 283 (1989).

The schedule award provision of the Act[5] and its implementing regulation[6] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. However, neither the Act nor its regulations specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants seeking schedule awards. The A.M.A., *Guides* have been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.[7]

The A.M.A., *Guides* indicate that the evaluation of visual impairment is based on deviations from normal of three functions: corrected visual acuity for distance and near vision, visual fields and ocular motility with absence of diplopia.[8] The A.M.A., *Guides* note that, although not all of the functions are equally important, vision is imperfect without coordination of all three. Also, other ocular functions and disturbances are to be considered to the extent that they affect one or more of the three functions.[9] The medical evidence of record indicates that the accepted injury caused corneal abrasion and scarring and that when light strikes the scarred portion of appellant's left ocular media he experiences glare and unusual appearance of light.

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 he finds him."[11] The Office's own 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.

[5] 5 U.S.C. §§ 8101-8193*; see* 5 U.S.C. § 8107(c).

[6] 20 C.F.R. § 10.304.

[7] *Thomas D. Gunthier,* 34 ECAB 1060 (1983).

[8] A.M.A., *Guides*, Chapter 8, *The Visual System* (4th ed. 1993).

[9] *Id.*

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

[11] *Id.*

> "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 the same member was, therefore, applicable in this case. Appellant's visual acuity had not changed following the employment injury. Appellant, therefore, essentially had a preexisting 100 percent loss of the left eye prior to the injury. As noted by the program memorandum, in such a case 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 a factually similar case, *Franklin E. Larsen*,[13] claimant 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 an 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 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 which would constitute a 100 percent permanent

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

[13] 17 ECAB 391 (1966).

impairment of the left eye, appellant had useful vision in the left eye prior to the employment injury, which was diminished by the employment injury.

In the instant case, the Office determined that appellant had a 10 percent permanent impairment of his left eye based on the opinion of Dr. Pichey, the Office medical adviser. She determined the impairment rating by taking into consideration whether appellant's December 18, 1996 employment injury had changed the visual acuity for his left eye in accordance with the relevant standards of the A.M.A., *Guides* (fourth edition). Dr. Pichey noted that appellant had an uncorrected visual acuity of 20/200 in the left eye as of September 21, 1995, prior to the December 18, 1996 employment injury, an uncorrected visual acuity of 20/100 on September 5, 1996 and an uncorrected visual acuity of 20/200 based on Dr. Woolf's August 27, 1996 report. Although Dr. Pichey stated that this evidence indicated no change of uncorrected visual acuity attributable to the December 18, 1996 employment injury, she found that Dr. Woolf did state that the injury resulted in a permanent corneal scar, which could cause additional symptoms, including glare and unusual appearance. Based on this ocular deformity, which Dr. Pichey found had impaired the visual function of the left eye, Dr. Pichey found that the employment injury had caused interference with appellant's visual function. She concluded that appellant had a 10 percent impairment of the left eye due to the December 18, 1996 employment injury.

The Office improperly found that appellant had a 10 percent impairment of the left eye based on Dr. Pichey's report in its April 18, 1997 decision, which modified and amended the previous schedule award granting a 100 percent impairment of the left eye.

The Board concludes that the Office medical adviser improperly applied the A.M.A., *Guides* in determining that appellant has no more than a 10 percent permanent impairment for loss of use of his left eye. Dr. Pichey's 10 percent permanent impairment rating was premised on the A.M.A., *Guides* instructions which provide as follows:

> "If an ocular or adnexal disturbance or deformity interferes with visual function and is not reflected in diminished visual acuity, decreased visual fields, or ocular motility with diplopia, the significance of the disturbance or deformity should be evaluated by the examining physician. In that situation, the physician may *combine* an additional 5 percent to 10 percent impairment with the impaired visual function of the involved eye."[14] (Emphasis in the original.)

In conformance with the A.M.A., *Guides*, the FECA Program Memorandum and prior case law, the additional 10 percent impairment of visual function caused by the employment injury was to be combined with appellant's preexisting 80 percent impairment of visual acuity to determine the total percentage of loss of function of the eye. Instead of combining appellant's preexisting impairment with his employment-related impairment, the Office ruled out appellant's preexisting impairment. The Office did not meet its burden of proof to establish that appellant had less than a 100 percent permanent loss of use of the left eye.

[14] A.M.A., *Guides supra* note 8, at p. 209.

The decisions of the Office of Workers' Compensation Programs dated July 8 and February 26, 1998 and August 8, 1997 are hereby reversed.

Dated, Washington, D.C.
June 9, 2000

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member