

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

PAUL A. ZOLTEK, Appellant

and

**NATIONAL SECURITY AGENCY,
Fort Meade, MD, Employer**

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**Docket No. 04-2185
Issued: February 9, 2005**

Appearances:
Paul A. Zoltek, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 7, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit schedule award decision dated August 25, 2004, finding that he had no more than 10 percent impairment to his left 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 has more than 10 percent permanent impairment of his left kidney.

FACTUAL HISTORY

On December 27, 2001 appellant, then a 42-year-old intelligence analyst, filed a notice of occupational disease alleging that, while on temporary duty in Kosovo, he developed an infection in his left leg.

The Office accepted appellant's claim for cellulitis and abscess of the left leg, excluding the foot, on April 8, 2002. On July 30, 2002 the Office accepted that appellant's cystoscopy and

removal of a urethral stent as causally related to his employment injury. The Office medical adviser stated that hydronephrosis was due to the injury and surgery by complication.

Appellant requested a schedule award for his left kidney on June 6, 2003.

In a report dated July 8, 2003, Dr. Joseph B. Murphy, a Board-certified urologist, noted that appellant had received treatment for left renal impairment and pain related to this impairment. He reviewed a May 30, 2003 renogram and noted that appellant had minimal function in his left kidney with his right kidney performing 94 percent of the function and the left kidney providing 6 percent of function. Dr. Murphy stated, "This is permanent loss of function and the patient should be considered as basically having a single functioning kidney on the right side." He noted that appellant continued to experience pain in his left kidney area and might require a nephrectomy in the future as the pain was sufficient to prevent him from working normally.

On September 12, 2003 Dr. James E. Mouldsdaile, a Board-certified urologist, performed a laproscopic left nephrectomy converted to open left nephrectomy. In a report dated May 3, 2004, Dr. Mouldsdaile noted that appellant underwent a left nephrectomy on September 12, 2003 for a nonfunctioning left kidney and left flank pain.

The Office referred appellant for a second opinion evaluation on June 15, 2004 with Dr. Gerald P. Batipps, a Board-certified urologist. In a report dated July 22, 2004, he noted that appellant had lost his left kidney due to an infection that spread from a leg operated on for a tendon repair which had developed cellulitis. Dr. Batipps noted that the infection spread to an ileofemoral bypass and involved the ureter causing stricture and subsequent hydronephrosis. He stated that irreversible renal damage occurred in spite of the urethral stent placement. Dr. Batipps found that the date of maximum medical improvement was November 29, 2003. He noted that appellant had residual impairment in terms of renal function, but had lost renal reserve and would be at risk for renal failure if his remaining kidney was damaged. He noted that the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,¹ provided that an individual with only one functioning kidney had a 10 percent impairment to the whole person.²

By decision dated August 25, 2004, the Office granted appellant a schedule award for 10 percent loss of use of his left kidney and awarded him 15.60 weeks of compensation.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act³ and its implementing regulation⁴ sets forth the number of weeks of compensation payable to employees

¹ A.M.A., *Guides* (5th ed. 2001).

² *Id.* at 145, 7.3 Upper Urinary Tract.

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

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.⁵ 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.]”⁶ 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.⁷ The schedule provides that total loss of a kidney entitles a claimant to 156 weeks of compensation.⁸

However, neither the Act nor the applicable regulation specifies the manner in which the percentage of loss shall be determined. Where the percentage of impairment is less than 100 percent of a member, function or organ listed in the schedule,⁹ 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.¹⁰ Effective February 1, 2001 the Office adopted the fifth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.¹¹

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.¹² While the A.M.A., *Guides* provide for impairment to the individual member as well as impairment to the whole person, the Act does not provide for permanent impairment of the whole person. As stated above, the schedule award provisions of the Act provide for loss of use of a member, function of organ of the body listed.¹³

⁵ See *Gary M. Goul*, 54 ECAB ____ (Docket No. 03-1235, issued July 14, 2003); *Donald A. Larson*, 41 ECAB 947 (1990).

⁶ 5 U.S.C. § 8107(c)(22).

⁷ 20 C.F.R. § 10.404(a).

⁸ *Id.*

⁹ *Barbara A. Alfred* (Docket No. 03-1062, issued September 16, 2003).

¹⁰ *Id.*

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (August 2002).

¹² A.M.A., *Guides* 145, 7.3 Upper Urinary Tract.

¹³ *Barbara A. Alfred*, *supra* note 9.

ANALYSIS

The Office accepted that appellant sustained impairment of his left kidney as a consequence of his accepted employment injury of cellulitis and abscess of the left leg. Appellant subsequently underwent removal of his left kidney due to loss of function and pain. The provision of the A.M.A., *Guides*, relied upon by Dr. Batipps, a Board-certified urologist, and Office second opinion physician, granting appellant 10 percent impairment of the whole person is not applicable to cases under the Act as it relates to impairment of the whole person and not the kidney, which is a scheduled member under the Office's regulations. As appellant has lost a scheduled member, the left kidney, he is entitled to the 156 weeks of compensation allotted by the Secretary for this member rather than the 15.6 weeks of compensation awarded by the Office. On remand the Office should amend the schedule award determination to reflect the total loss of the left 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.

ORDER

IT IS HEREBY ORDERED THAT the August 25, 2004 decision of the Office of Workers' Compensation Programs is hereby set aside and remanded for further development and an appropriate decision consistent with this decision of the Board.

Issued: February 9, 2005
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member