

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

N.D., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Napa Valley, CA, Employer)

**Docket No. 07-1981
Issued: February 1, 2008**

Appearances:
Mark Coby, 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 July 24, 2007 appellant filed a timely appeal from a June 11, 2007 merit decision by a hearing representative of the Office of Workers' Compensation Programs that affirmed a schedule award for 15 percent permanent impairment of the left kidney. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award issue.

ISSUE

The issue is whether appellant has more than 15 percent permanent impairment of his left kidney, for which he received a schedule award.

FACTUAL HISTORY

On January 5, 2005 appellant, then a 56-year-old rural route carrier, sustained abdominal injuries in a motor vehicle accident while delivering mail on January 4, 2005. He stated that his spleen and left kidney were removed after his accident. Appellant was treated at Queen of the Valley Hospital on the date of his injury and stopped work effective January 5, 2005. He returned to modified-duty work for four hours per day on April 25, 2005 and gradually increased

his work load until he returned to full-time, full-duty work as of January 4, 2006. By correspondence dated January 7, 2005, the employing establishment confirmed that appellant's spleen and one kidney were removed secondary to the injuries he sustained in the motor vehicle accident. On January 12, 2005 the Office accepted appellant's claim for complete disruption of kidney parenchyma and massive disruption of the spleen.

In a January 4, 2005 emergency room report, Dr. Faramarz Mottalei, a Board-certified emergency medicine specialist, noted the history of injury. He explained that appellant was thrown against his steering wheel and sustained left flank injuries. Dr. Mottalei noted that appellant's left flank and abdomen were tender to palpation and diagnosed high speed motor vehicle accident, acute surgical abdomen, hemoperitoneum, ruptured left kidney with retroperitoneal hematoma and splenic laceration or fracture. Also on January 4, 2005 Dr. Thomas A. Hildreth, a Board-certified urologist, noted that a computerized tomography (CT) scan revealed evidence of a large left retroperitoneal hematoma with a large left kidney injury and that appellant also had significant injury to his spleen. He stated that appellant's left kidney was fragmented in three or four pieces. Dr. Hildreth recommended that appellant's left kidney be removed after his splenectomy. He diagnosed motor vehicle accident with apparent left-sided abdominal or flank trauma and lacerated ruptured left kidney. In a January 4, 2005 CT scan report, Dr. Daniel H. Bunnell, a Board-certified radiologist, noted finding splenic lacerations with hemoperitoneum, complex severe left renal lacerations and a large retroperitoneal hematoma.

On January 4, 2005 Dr. John P. Loftus, a general and vascular surgeon and anesthesiologist, performed a splenectomy and left nephrectomy, diagnosing traumatic injury to the spleen and left kidney.¹ In a report dated the same day, he noted that appellant was traveling at a slow speed but was struck by a motor vehicle traveling at a high speed. Dr. Loftus diagnosed left kidney injury with significant parenchymal changes as well as possible disruption of the left renal artery and large retroperitoneal hematoma and splenic injury.

In a March 28, 2005 progress note, Dr. Loftus reported that appellant was recovering well from his splenectomy and nephrectomy. On June 20, 2005 he noted that appellant complained of numb sensations from his left shoulder and thorax to his left leg. Appellant sustained multiple left-sided rib fractures in the January 4, 2005 motor vehicle accident and did have a "nicely healing abdominal incision." Dr. Loftus stated: "I am unable to correlate his symptoms to any physiologic or anatomic abnormalities." In a July 25, 2005 note, he stated that appellant could increase his work activity as tolerated. In an October 17, 2005 report, Dr. Loftus advised that appellant had developed chronic back pain and left flank pain. He stated that appellant needed a primary care physician to direct his care for his nontrauma conditions.

On January 9, 2006 appellant filed a claim for a schedule award.

On March 30, 2006 the Office referred appellant to Dr. Sergio Court, a nephrologist and Board-certified internist, for a second opinion examination regarding permanent impairment of the left kidney. In a May 2, 2005 report, he noted appellant's history of injury and subsequent splenectomy and left nephrectomy, as well as his chief complaint of residual back pain.

¹ The Office subsequently authorized the removal of the spleen and kidney.

Dr. Court noted that appellant reported that he was asymptomatic at work and experienced back pain in the evenings. He diagnosed post-traumatic injuries after a motor vehicle accident, status post splenectomy and left nephrectomy, as well as unrelated history of sciatica. Dr. Court concluded: "It is considerably possible that [appellant's] backaches could be related to, or at least aggravated by, his work injury." In a work capacity evaluation prepared the same day, he advised that appellant could work eight hours per day with lifting restrictions.

In a June 13, 2006 follow-up report, Dr. Court advised that appellant experienced the complete and permanent loss of his left kidney on January 4, 2005. He stated that the "global degree of impairment due to this loss is 10 percent." Dr. Court did not indicate whether he applied the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, fifth edition (A.M.A., *Guides*). He also noted that appellant reached maximum medical improvement on January 4, 2006.

On August 11, 2006 the Office requested that its medical adviser provide an opinion concerning appellant's degree of permanent impairment due to functional loss of use of the left kidney.

In a September 20, 2006 report, the Office medical adviser noted that appellant underwent a splenectomy and left nephrectomy secondary to injuries sustained in a work-related motor vehicle accident. She determined that appellant had 15 percent permanent impairment due to loss of kidney function. The medical adviser explained that, pursuant to the A.M.A., *Guides*, page 146, Table 7-1, Class 1, loss of kidney function warranted a 14 percent whole person impairment rating. She applied an Office formula for converting whole person impairment to impairment of a schedule member to arrive at a total of 15 percent permanent impairment due to loss of kidney function. The medical adviser noted: "This impairment is based on function. There is actual 100 percent loss of one kidney, but the remaining kidney can compensate for the functional loss of the other."

On November 13, 2006 the Office granted appellant a schedule award for 15 percent permanent impairment for functional loss of use of the left kidney, equivalent to 23 weeks of compensation.

On December 12, 2006 appellant requested an oral hearing which was held on March 21, 2007. At the hearing, he contended that the Office should expand the list of compensable schedule members to include the spleen. Appellant also asserted that the Office erred in granting a schedule award for 15 percent impairment due to loss of kidney function. He argued that the Office should have granted him a schedule award for 100 percent loss of one kidney, or 156 weeks of compensation.

By decision dated June 11, 2007, the hearing representative affirmed the Office's schedule award determination. The hearing representative found that the Office properly applied the formulas in the A.M.A., *Guides* to determine that appellant was entitled to a schedule award for 15 percent permanent impairment due to loss of use of the left kidney. The hearing representative also found that appellant was not entitled to a schedule award for impairment of the spleen.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulations³ 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. 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.⁴ 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]." ⁵ 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.⁶ The schedule provides that total loss of a kidney entitles a claimant to 156 weeks of compensation.⁷

However, the Act does not specify the manner in which the percentage of loss for a schedule member shall be determined. 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 regulations as the appropriate standard for evaluating schedule losses.⁸

ANALYSIS

The Board finds that appellant has established that he has 100 percent impairment of his left kidney. The Office accepted that he sustained complete disruption of kidney parenchyma as well as massive disruption of the spleen. The Office authorized, and appellant underwent, a left nephrectomy, or complete removal of the left kidney as a consequence of the injuries he sustained due to his accepted employment-related motor vehicle accident.

The Office referred appellant to Dr. Court for a second opinion regarding permanent impairment. In a report dated June 13, 2006, he opined that appellant's "global degree of impairment due to this loss is 10 percent" but never explained how he arrived at that figure. Dr. Court did not specify whether he used the A.M.A., *Guides* in determining appellant's degree of permanent impairment and did not explain what method he used to rate appellant's

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

⁴ *Paul A. Zoltek*, 56 ECAB 325 (2005).

⁵ 5 U.S.C. § 8107(c)(22).

⁶ 20 C.F.R. § 10.404(a).

⁷ *Id.*

⁸ *See id.*

impairment.⁹ Thereafter, the Office requested an opinion from its medical adviser concerning appellant's degree of permanent impairment secondary to his left nephrectomy and related to his employment injury. She found that appellant had 15 percent permanent impairment due to loss of kidney function. Applying the A.M.A., *Guides*, page 146, Table 7-1, the medical adviser concluded that appellant had 100 percent loss of the function of his left kidney but that "the remaining kidney can compensate for the functional loss of the other." She recommended that the Office grant appellant a schedule award for 15 percent loss of kidney function, noting the Office's formula for converting whole person impairment to an impairment rating for a lost organ.¹⁰

The Board notes that the compensation schedule provides 156 weeks of compensation for total loss of a kidney.¹¹ The record clearly establishes that appellant lost his left kidney due to his employment injury when it was removed during surgery. In *Paul A. Zoltek*,¹² the employee had a kidney surgically removed due to an employment injury. The Board found that he sustained total loss of his kidney for which he was entitled to the 156 weeks of compensation. Although the Office applied a formula in its procedures to convert the whole person impairment listed in the A.M.A., *Guides* to impairment of a schedule member, the Board has held that the formula does not apply when there is a total loss of the member.¹³ In this case, appellant underwent a complete removal of his left kidney and is entitled to the maximum 156 weeks of compensation for complete loss of the kidney. 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.¹⁴

CONCLUSION

The Board finds that as appellant has a total loss of his left kidney he is entitled to 156 weeks of compensation for total loss of function of that kidney.

⁹ The Board notes that, while section 7.3 on page 145 of the A.M.A., *Guides* provides that an individual with only one functioning kidney has a 10 percent impairment of the whole person, the Act does not authorize schedule awards for permanent impairment of "the whole person." *D.H.*, 58 ECAB ____ (Docket No. 06-2160, issued February 12, 2007).

¹⁰ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(c)(2) (March 2005).

¹¹ 20 C.F.R. § 10.404(a).

¹² *Zoltek*, *supra* note 4.

¹³ See *Marilyn S. Freeland*, 57 ECAB ____ (Docket No. 06-563, issued June 7, 2006).

¹⁴ Appellant, before the hearing representative, asserted entitlement to a schedule award for impairment of the spleen. On appeal, his counsel acknowledges that Board precedent supports the hearing representative's finding with regard to the spleen. See *Thomas E. Stubbs*, 40 ECAB 647 (1989) (as the spleen is not a bodily organ specified in the Act or the regulations, appellant is not entitled to a schedule award for any permanent impairment of the spleen).

ORDER

IT IS HEREBY ORDERED THAT the June 11, 2007 and November 13, 2006 decisions of the Office of Workers' Compensation Programs are hereby set aside and remanded for further development and an appropriate disposition consistent with this decision of the Board.

Issued: February 1, 2008
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
Employees' Compensation Appeals Board