United States Department of Labor
Employees' Compensation Appeals Board

D.H., Appellant **and** **DEPARTMENT OF DEFENSE, DEFENSE FINANCE & ACCOUNTING SERVICE, Indianapolis, IN, Employer**	)	**Docket No. 09-1804** **Issued: June 23, 2010**

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 7, 2009 appellant filed a timely appeal from a June 18, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying his request for reconsideration and a February 24, 2009 merit decision denying his claim for an increased schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant has established more than 50 percent permanent impairment of his right eye, for which he received a schedule award; and (2) whether the Office properly denied his request to reopen his case for further review of the merits under 5 U.S.C. § 8128.

FACTUAL HISTORY

On July 23, 1996 appellant, then a 43-year-old file clerk, filed a claim for a right eye condition. He indicated that, while using a defective drill press from October 1994 to

April 1995, his right eye was penetrated by a metal object. The Office accepted the claim for pseudophakia, old retinal detachment, removal of intraocular foreign body and deep vein thrombosis of the left lower leg. The claim was expanded to include precipitation of primary open angle glaucoma and precipitation of ocular hypertension. Appellant underwent right eye surgeries on January 12, 1996 and December 12, 1998. The Office paid compensation benefits.

On September 27, 2004 appellant filed a claim for a schedule award. By decision dated February 15, 2005 and amended on March 25, 2005, the Office granted appellant a schedule award for 15 percent permanent impairment of his right eye. Appellant requested a hearing. By decision dated March 7, 2006, an Office hearing representative found the schedule award decision premature as the schedule award was based on visual acuity with correction. The case was remanded for recalculation of the impairment rating of the right eye without regards to correction.

After receipt of a supplemental report from Dr. Robert L. Peets, an ophthalmologist and Office referral physician, the Office awarded appellant a schedule award for an additional 19 percent permanent impairment to the right eye, for a total impairment of 34 percent, in a May 16, 2006 decision. Appellant disagreed with the decision and requested a hearing. By decision dated January 12, 2007, an Office hearing representative set aside the May 16, 2006 decision and remanded the case to the Office for further medical development. The Office was directed to give appellant due process in providing the medical evidence necessary to establish impairment of the right eye based on uncorrected visual acuity. It was also directed to refer appellant for a second opinion evaluation.

In a January 25, 2007 letter, appellant and his physician were advised of the necessary evidence needed to establish impairment under the fifth edition of the American Medical Associations, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*). They were advised that loss of vision was based on uncorrected visual acuity.

In a February 26, 2007 report, Dr. Roger H.S. Langston, a Board-certified ophthalmologist, advised that appellant reached maximum medical improvement in his right eye in December 2002 after he had cataract surgery and a "YAG capsulotomy of capsulotomy of capsule opacity" that occurred after the cataract surgery. He advised the cataract surgery was necessitated by the injury. Dr. Langston indicated that currently appellant's injured eye was stable with glaucoma, adequately controlled by medication and intermittent mild iritis, probably related to the original injury. He indicated that he examined appellant on February 23, 2007 and appellant's uncorrected visual acuity was 20/80+2 in the right eye at distance. At near, reading distance, it was J5 on the right. Dr. Langston noted that, with corrective spectacle lenses, the visual acuity in the right eye was 20/20. He opined that appellant had no further disability although the glaucoma and occasional iritis in the injured right eye may require further treatment in the future.

In a March 22, 2007 report, Dr. James G. Ravin, a Board-certified ophthalmologist and Office medical adviser, indicated the history of the injury and his review of Dr. Langston's February 26, 2007 report. He indicated that the information provided did not include visual fields which are a part of the A.M.A., *Guides*. Under Tables 12-2 and 12-3, Dr. Ravin opined

that appellant had zero percent impairment. However, he noted recalculation may be necessary if he was provided with visual fields that indicate a defect.

On April 17, 2007 the Office wrote Dr. Langston and requested information pertaining to visual fields. On May 3, 2007 it received copies of appellant's single field analysis done September 22, 2006. On May 4, 2007 the Office denied appellant's claim for an increased award on the basis that the requested information pertaining to appellant's visual fields were not provided. On May 7, 2007 it requested that appellant disregard its May 4, 2007 decision as it had received the requested information and was sending it to its Office medical adviser for finalization of his impairment rating.

In a May 14, 2007 letter, Dr. Ravin, the Office medical adviser, indicated that the visual field analysis failed to provide any evidence that appellant had glaucoma and no defect was noted. He stated that his opinion remained that appellant had no impairment. In a June 20, 2007 report, Dr. Ravin advised that appellant's uncorrected visual acuity was 20/200 in the right eye and 20/80 in the left eye. He indicated that this gave appellant a visual acuity score of 50 for the right eye and 70 for the left eye, which corresponded to an overall functional acuity score of 66 and an impairment rating of 34 percent based on uncorrected visual acuity.

On July 9, 2007 the Office denied an additional schedule award for permanent impairment of the right eye based on the Office medical adviser's opinion. In a March 14, 2008 decision, an Office hearing representative vacated the July 9, 2007 decision. She requested that the Office medical adviser provide a fully-reasoned supplemental report, based on appellant's uncorrected vision measurements, for the visual acuity impairment rating for appellant's right eye only, that cited the page, table and figure numbers of the A.M.A., *Guides* which supported his calculations.[1]

The Office requested its medical adviser provide a supplemental report. In an April 22, 2008 supplemental report, Dr. Ravin indicated that his calculations were made based on Chapter 12, visual system, page 284 of the fifth edition of the A.M.A., *Guides*. He advised that appellant's visual acuity has been affected in his right eye by a retinal detachment. Dr. Ravin stated that previous calculations using the A.M.A., *Guides* relied on Tables 12-2 and 12-3. He stated that the computation was based on uncorrected visual acuities and when recalculated they came out the same. Dr. Ravin stated that appellant's right eye had an uncorrected visual acuity of 20/200 which was a visual acuity score of 50 and a visual acuity impairment rating of 50 percent for that eye alone.

In an August 12, 2008 decision, the Office awarded appellant 16 percent additional permanent impairment of the right eye, for a total impairment of 50 percent. Appellant requested a telephonic hearing that was held on December 10, 2008. He testified that he was blind in his right eye and that he regained sight in the eye through an artificial means. Appellant's attorney argued that appellant should be entitled to a schedule award for 100 percent impairment to the right eye. Dr. Ravin stated that appellant has no vision in his right eye without correction. In a January 15, 2009 letter, appellant's attorney reiterated that appellant should be entitled to a schedule award for 100 percent impairment to the right eye.

[1] A hearing was held on December 20, 2007.

By decision dated February 24, 2009, an Office hearing representative affirmed the Office's August 12, 2008 decision.

In an April 6, 2009 letter, appellant's attorney requested reconsideration of the February 24, 2009 decision. He quoted another case where a claimant was awarded 100 percent loss of vision of the right eye when the right eye was removed. Counsel argued that appellant's total loss of vision in the right eye was the same as the total removal of the eye.

By decision dated June 18, 2009, the Office denied appellant's request for reconsideration finding that as he did not raise any substantive legal questions or include any new and relevant evidence his request was insufficient to warrant a merit review.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulations[3] 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. The Act, however, 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 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.[4]

In determining the amount of a schedule award, preexisting permanent impairment of that scheduled member or function should also be included.[5] Section 8107(c)(19) of the Act provides that the degree of loss of vision or hearing under this schedule is determined without regard to correction.[6] 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.[7] The A.M.A., *Guides* indicate that the evaluation of visual impairment is based on the functional vision score (FVS), which is the combination of an

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[2] 5 U.S.C. §§ 8101-8193.

[3] 20 C.F.R. § 10.404.

[4] *Ronald R. Kraynak*, 53 ECAB 130 (2001).

[5] *See, e.g., Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.b (June 1993).

[6] 5 U.S.C. § 8107(c)(19).

[7] A.M.A., *Guides* 278 (5th ed. 2001).

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.[8] The A.M.A., *Guides* also allow for individual adjustments for other 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.[9] However, the A.M.A., *Guides* specifically limit adjustment of the impairment rating for these deficits to cases which are well documented and states that 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.[10]

ANALYSIS -- ISSUE 1

The Office medical adviser based his April 22, 2008 impairment rating on loss of visual acuity only. In previous reports, he indicated that his impairment rating was based on a review of Dr. Langston's February 26, 2007 report and visual field analysis. The Office medical adviser stated that, while appellant's visual acuity had been affected in his right eye by a retinal detachment, the visual field analysis failed to provide any evidence that appellant had any type of glaucoma and no defect was noted. Although the A.M.A., *Guides* provide that impairment ratings should be based on the best-corrected visual acuity,[11] the Act mandates that the degree of loss of vision under the schedule award provisions must be determined without regard to correction.[12] The Office medical adviser's April 22, 2008 visual acuity impairment rating was based on a reported uncorrected visual acuity result of 20/200 in the right eye. Application of Table 12-2, Impairment of Visual Acuity, to an uncorrected visual acuity result of 20/200 in the right eye reveals a visual acuity score of 50 and a visual acuity impairment rating of 50 percent.[13] As the postsurgical visual field results were negative, the Office medical adviser did not calculate impairment of the visual field.

The Board finds that the Office medical adviser's impairment rating conforms to the A.M.A., *Guides* and, thus, establishes that appellant has no more than 50 percent impairment of the right eye. Appellant has not submitted any credible medical evidence indicating he has greater than 50 percent impairment of the right eye. While appellant argued that he would be blind in his right eye but for surgical correction, the medical evidence reflects appellant's uncorrected visual acuity of 20/200 in the right eye was obtained after appellant reached

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[8] *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.

[9] A.M.A., *Guides* 297.

[10] *Id.*

[11] A.M.A., *Guides* 282, Section 12.2b.3.

[12] 5 U.S.C. § 8107(c)(19).

[13] A.M.A., *Guides* 284.

maximum medical improvement from his surgical procedures. Accordingly, the Office properly awarded appellant a total impairment of 50 percent for the right eye.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a), the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[14] Section 10.608(b) of Office regulations provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[15] The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[16]

ANALYSIS -- ISSUE 2

In support of his reconsideration request, appellant's attorney argued that appellant's total loss of vision in his right eye is the same as a total removal of an eye. In support of his argument, he quoted a case where a claimant was awarded a schedule award for 100 percent loss of use of an eye based on total removal of that eye. The issue of appellant's entitlement to schedule award compensation is medical in nature and can only be resolved by the submission of medical evidence. Appellant did not submit any medical evidence in support of his reconsideration request. Additionally, his argument pertaining to total removal of an eye is not persuasive as the medical evidence shows that appellant has 20/200 visual acuity in that eye and is not totally blind. Should appellant's impairment increase, a schedule award could be filed with the Office at that time.

Appellant has not established that the Office improperly denied his request for further review of the merits of its February 24, 2009 decision under section 8128(a) of the Act, because he did not submit evidence or argument showing that the Office erroneously applied or interpreted a specific point of law, advancing a relevant legal argument not previously considered by the Office, or constituting relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

Appellant has not established that he has greater than 50 percent impairment of the right eye. The Board further finds that the Office properly denied his request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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[14] 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB ___ (Docket No. 07-1441, issued October 22, 2007).

[15] *Id.* at § 10.608(b); *K.H.*, 59 ECAB ___ (Docket No. 07-2265, issued April 28, 2008).

[16] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

ORDER

IT IS HEREBY ORDERED THAT the June 18 and February 24, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 23, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board