

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

C.R., Appellant)

and)

U.S. POSTAL SERVICE, MAIN POST OFFICE,)
Winter Haven, FL, Employer)

**Docket No. 10-2375
Issued: July 12, 2011**

Appearances:

*Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 26, 2010 appellant, through his attorney, filed a timely appeal of a September 20, 2010 Office of Workers' Compensation Programs' (OWCP) merit decision. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether OWCP properly denied appellant's claim for sexual dysfunction as a result of his accepted back injury; and (2) whether OWCP properly denied appellant's request for a schedule award for penile impairment.

On appeal, counsel argues that OWCP's medical adviser failed to review all the medical evidence in reaching his determination.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board on appeal. On May 6, 2004 appellant, then a 57-year-old group leader/custodian, sustained a lumbar sprain while mopping the front lobby floor. OWCP accepted his claim for aggravation of a herniated disc at L2-3 and L3-4. Appellant requested a schedule award on June 10, 2009. By decision dated August 18, 2009, OWCP granted him a schedule award for eight percent left leg impairment. Appellant requested reconsideration noting that, his physician, Dr. Rodolfo D. Eichberg, a Board-certified physiatrist, had supported sexual dysfunction as a result of the employment injury in a July 21, 2009 report. Dr. Eichberg stated that appellant's sexual dysfunction was neurogenic and based on the same nerve roots causing appellant's sciatic dysfunction. He opined that appellant had class 3 sexual dysfunction under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*² (A.M.A., *Guides*).

In a September 3, 2009 decision, OWCP denied appellant's claim for a schedule award. Appellant appealed this decision to the Board. In an August 13, 2010 decision,³ the Board found that he had no more than eight percent impairment of his left leg. The Board found OWCP erroneously rejected the rating regarding penile impairment on the basis that a sexual dysfunction condition had not been accepted. The Board remanded the case for OWCP to undertake further development of appellant's claim and refer the case to OWCP's medical adviser for an opinion as to whether the medical evidence established that appellant's sexual dysfunction was related to his accepted lumbar spine conditions and, if so, a decision on impairment based on the A.M.A., *Guides*.

OWCP's medical adviser reviewed appellant's claim on August 20, 2010 and stated that appellant's sexual dysfunction was not due to his lumbar spine conditions. He stated that there was no basis for an association between appellant's degenerative disc disease which resulted in neurological changes to the left lower extremity along the L-4 dermatome and appellant's impotence. The medical adviser recommended that sexual dysfunction not be accepted as a condition related to the accepted back injury.

By decision dated September 20, 2010, OWCP denied appellant's claim for sexual dysfunction as causally related to his accepted back condition and for a schedule award for penile impairment.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence,

² For new decisions issued after May 1, 2009, OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

³ Docket No. 09-2301 (issued August 13, 2010).

⁴ 5 U.S.C. §§ 8101-8193.

including the fact that the individual is an “employee of the United States” within the meaning of FECA and that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁵

Proceedings before OWCP are not adversarial in nature and OWCP is not a disinterested arbiter; in a case where OWCP “proceeds to develop the evidence and to procure medical evidence, it must do so in a fair and impartial manner.”⁶

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination and resolve the conflict of medical evidence.⁷ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁸

ANALYSIS

In the prior appeal, the Board remanded the case to OWCP for further development of the medical evidence as to whether appellant’s diagnosed sexual dysfunction was related to his back injury and, if so, any permanent impairment. OWCP properly referred the medical records to the medical adviser who, on August 20, 2010, opined that appellant’s sexual dysfunction was not related to his accepted back condition. He opined that a schedule award was not appropriate. The Board finds that there is an unresolved conflict of medical opinion between appellant’s physician, Dr. Eichberg, and the medical adviser on the issue of whether appellant’s sexual dysfunction is causally related to his accepted back injury. The physicians expressed contrary views of whether appellant’s accepted aggravation of herniated discs at L2-3 and L3-4 resulted in sexual dysfunction. Dr. Eichberg opined that the same dermatomes which resulted in appellant’s accepted left leg impairment also caused his sexual dysfunction. OWCP’s medical adviser opined that there was no relationship between appellant’s degenerative disc disease in the L-4 dermatome and his impotence. Due to this disagreement in the medical evidence, a conflict of medical opinion exists. The case will be remanded for referral of appellant, a statement of accepted facts and a list of specific questions to an appropriate Board-certified physician for an impartial medical examination pursuant to 5 U.S.C. § 8123(a).

The Board notes that counsel argued that OWCP’s medical adviser did not appropriately review all the evidence in the record. As noted, the Board finds that the medical evidence of record creates a conflict and require additional development of the medical evidence.

⁵ *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

⁶ *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985).

⁷ 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

⁸ *R.C.*, 58 ECAB 238 (2006).

CONCLUSION

The Board finds that there is an unresolved conflict of medical opinion evidence pertaining to appellant's sexual dysfunction and entitlement to a schedule award for such condition.

ORDER

IT IS HEREBY ORDERED THAT the September 20, 2010 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision of the Board.

Issued: July 12, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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