United States Department of Labor
Employees' Compensation Appeals Board

R.M., Appellant	)	
and	)	**Docket No. 10-755**
	)	**Issued: March 28, 2011**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Ayer, MA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 27, 2010 appellant filed a timely appeal from the January 14, 2010 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he has more than a 47 percent permanent impairment of his gonads for which he received a schedule award; and (2) whether appellant's schedule award compensation was paid at a proper pay rate.

FACTUAL HISTORY

The Office accepted that on July 25, 2005 appellant, then a 31-year-old correctional officer, sustained a kidney injury (open wound into cavity), back contusion and concussion without loss of consciousness due to falling 15 to 20 feet during a rope climb and landing on his back and the back of his head. He stopped work after the accident and returned to his regular full-time work on August 10, 2005.

In an October 24, 2007 report, Dr. Matthew Kamil, an attending Board-certified endocrinologist, stated that after his July 25, 2005 fall appellant developed fatigue and decreased libido. He noted that laboratory tests determined that appellant's pituitary axis was damaged and that he had needed testosterone replacement since the accident.[1] Dr. Kamil stated, "Based on the course of events, it is highly likely that the accident/head trauma caused his current diagnosis of hypogonadism." In November 2007 appellant's claim was expanded to include hypogonadism, testicular dysfunction, anterior pituitary disorder, impotence of organic origin, neck sprain and dislocation of multiple cervical vertebrae.[2]

In a September 23, 2008 report, Dr. Christopher R. Brigham, an attending Board-certified occupational medicine physician, indicated that under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* appellant has a three percent permanent impairment of the whole person when one considers that he has undergone testosterone replacement therapy and has normal sexual functioning with this therapy. He further noted that, absent appellant's medication regimen, his rating could be as high as 30 percent under the fifth edition of the A.M.A., *Guides*. Dr. Brigham stated:

> "The sixth edition of the A.M.A., *Guides* represents a paradigm shift in how specific conditions are rated. Gonadal disorders are specifically addressed in Table 10-12, Criteria for Rating Impairment due to Gonadal Disorders (6th ed., 239). Based on the history, required treatment and issues relating to infertility, [appellant's] condition results in an estimated 15 percent impairment."

On May 28, 2009 appellant filed a claim for a schedule award due to his accepted conditions.

In a September 24, 2009 report, Dr. George L. Cohen, a Board-certified internist serving as an Office medical adviser, stated that appellant's work-related hypogonadism was being treated with weekly testosterone injections. He indicated that on August 11, 2008 Dr. Kamil had reported that appellant's erectile dysfunction was resolved. Dr. Cohen noted that he was applying the sixth edition of the A.M.A., *Guides* to determine impairment and stated:

> "Using Table 10-12, page 239, the impairment rating for gonadal disorder established biochemically, moderate symptoms, treatment recommended is assigned to Class 2 with a default value of [eight] percent. There is no evidence of infertility requiring a higher class. Table 10-2B, page 217, assigns [two] points BOTC (burden of treatment compliance) for parenteral injection once weekly. BOTC of [two] points reduces the rating to Class 1 lowering the rating from [eight] percent to [seven] percent whole person impairment. Gonadal, pituitary and other endocrine impairments are only rated in the [sixth] edition for whole

[1] Testing from November 2006 showed suppressed levels of luteinzing hormone, a hormone which acts upon the cells responsible for the production of testosterone.

[2] Appellant received weekly injections of 200 milligrams of testosterone enanthate. On August 11, 2008 he reported to Dr. Kamil that his erectile condition was "back to normal." Dr. Kamil indicated that appellant had an impairment rating of five percent.

person impairment. The date of maximum medical improvement is August 11, [20]08, the date of the examination for impairment."

In an October 29, 2009 report, Dr. Cohen stated that on September 24, 2009 he had determined that appellant had a seven percent whole person impairment for gonadal disorder. He indicated that Office procedure required that in order to calculate impairment of an organ or organ system corresponding to whole person impairment, the following ratio should be used:

"*Claimant's whole person impairment* 7% = X

Maximum whole person impairments for organ system 15% 100

"This results in 47 percent [i]mpairment of the gonads or gonadal system."

In a November 12, 2009 decision, the Office awarded appellant a schedule award for a 47 percent permanent impairment of his gonads. The award ran for 24.44 weeks from August 11, 2008 to January 29, 2009 and was based on a weekly pay rate of $910.67. The decision explained that the percentage of permanent impairment was based on the September 23, 2008 medical findings of Dr. Brigham and the rating calculations contained in the September 24 and October 29, 2009 reports of Dr. Cohen.

Appellant, through counsel, requested reconsideration of his claim. In a December 1, 2009 report, Dr. Kamil noted that appellant had low sex drive and that Cialis medication was not working. He indicated that appellant's testosterone levels were normal. In a November 29, 2009 letter, counsel argued that the pay rate utilized in appellant's schedule award did not include night differential as well as other wage elements that should have been part of his pay rate. He asserted that Dr. Cohen did not adequately consider "the fertility issue" and did not provide adequate rationale for excluding the penis from his impairment rating.

The Office asked the employing establishment to submit information regarding the amount of night differential as well as Sunday premium pay appellant received for the year prior to his July 25, 2005 injury. In a response dated December 14, 2009, the employing establishment stated that appellant's annual salary at the date of injury on July 25, 2006 was $42,256.00, or $$812.62 per week. Appellant was a GS 7/Step 2 employee with a weekly night differential amount of $34.54 and weekly Sunday premium of $30.69 for one year prior to the injury and his total weekly pay rate was $877.85. Attached with the pay rate information was a copy of his quarterly shift assignment as a correctional officer for the year prior to July 28, 2005. In response to a telephone inquiry on January 12, 2010 to further clarify the pay rate matter, the employing establishment stated that the previously reported pay rate of $910.67 was an error and in fact was applicable to another injury file (concerning an August 3, 2007 injury to the neck and upper back). It confirmed that the correct weekly pay rate for the schedule award should be $877.85.

The Office referred the case record, including the September 23, 2008 report of Dr. Brighams, to Dr. David I. Krohn, a Board-certified internist serving as an Office medical adviser, in order to determine whether appellant was entitled to additional schedule award for

loss of function of his penis. In his December 26, 2009 report, Dr. Krohn concluded that no additional rating for impairment of the penis was warranted:

> "I am asked whether or not the claimant is entitled to additional impairment rating for loss of function of the penis.
>
> "In my opinion, the functional loss to this claimant is fully encompassed by determination of loss to the gonadal system using Table 10-12 and sufficiently encompasses the work[-]related loss of function the claimant has suffered. In my considered medical opinion, there is no practical rationale for assignment of an additional impairment rating for the same condition using a different methodology in the [A.M.A., *Guides*]. In fact, this is not allowed by the [A.M.A., *Guides*] unless there is some functional loss not covered by the original impairment rating. This is not the case."

In a January 14, 2010 decision, the Office affirmed its November 12, 2009 decision with respect to the finding that appellant had no more than a 47 percent permanent impairment of his gonads. It indicated that the December 26, 2009 report of Dr. Krohn showed that it was appropriate to exclude a rating for penis impairment as such a rating would be duplicative. The Office addressed the pay rate of the schedule award and stated:

> "Claimant's employer was invited to submit the amount of night differential as well as Sunday premium one year prior to claimant's injury on July 25, 2005 and provided 20 days to respond. In a response *via* fax dated December 14, 2009, claimant's employer stated claimant's annual salary at the date of injury on July 25, 2006 is $42,256, or $812.62 per week as a GS 7/Step 2 employee with weekly night differential amount of $34.54 and weekly Sunday premium of $30.69, for one year prior to the injury, total weekly pay rate of $877.85. Attached with the pay rate information is a copy of claimant's quarterly shift assignment, one year prior to July 28, 2005 as correctional officers work a quarterly rotation schedule. In response to telephone inquiry on January 12, 2010 to further clarify the pay rate, claimant's employer stated previously reported pay rate of $910.67 is an error and applicable to case [file number omitted] for which claimant sustained an injury to his neck and upper back on August 3, 2007 and confirmed that correct weekly pay rate for schedule award should be $877.85. Based on the new pay rate, it is determined that without fault overpayment to be created as a result of the schedule award previously paid in the amount of $17,828.98 less $17,187.43, the amount should have been paid for 47 percent permanent partial impairment of the gonads with new pay rate and overpayment in the amount of $641.55 will be declared under separate cover.[3]

[3] The record does not contain a final decision of the Office regarding an overpayment and therefore this matter is not currently before the Board. *See* 20 C.F.R. § 501.2(c).

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulations[5] 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. However, the Act 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.[6] The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[7]

Under the sixth edition of the A.M.A., *Guides*, impairment of the gonads is considered under Chapter 10. Table 10-12 (Criteria for Rating Impairment due to Gonadal Disorders) on page 239 provides for placing gonadal disorders into diagnostic-based classes. A claimant's history will fall under Class 2 under the following criteria: Gonadal disorder established biochemically; moderate symptoms or physical sequelae, treatment highly recommended. The maximum allowable impairment for gonadal disorders is 15 percent of the whole person.[8] Under Table 10-2B (Parenteral Medications), the rating derived from Table 10-12 is adjusted to account for the Burden of Treatment Compliance. Points are assigned according to the burdensomeness of a given parenteral treatment and, if appropriate, a default impairment rating obtained from Table 10-12 may be lowered or raised.[9]

Section 10.8 on page 238 of Chapter 10 discusses how the sections relating to endocrine problems interact with the sections relating to the anatomic functions of sexual organs:

> "Care must be taken when assigning the reproductive system of either the male of female to avoid duplicating impairment, or more importantly, misusing this portion of the endocrine chapter and sections of the renal chapter that deal with sex organs ([s]ections 7.7 and 7.8). As can be seen from a perusal of these sections in the Urinary and Reproductive Systems chapter, Chapter 7 deals primarily with the anatomic aspects of these organs. This chapter deals primarily with the hormonal aspects of the reproductive system."[10]

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[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *Id*.

[7] FECA Bulletin No. 09-03 (issued March 15, 2009).

[8] A.M.A., *Guides* 239, Table 10-12 (6th ed. 2009).

[9] *Id.* at 217, Table 10-2B.

[10] *See* A.M.A., *Guides* 238-39

Under Office procedure, a whole person impairment measurement can be directly translated into an organ rating in the case of a vital organ where the total impairment of the organ produces 100 percent impairment of the whole person. When the maximum whole person rating of the organ is less than 100 percent, direct translation of the whole person measurement into a percentage of impairment to the organ is not valid. In these cases, to obtain the percentage of impairment to an organ corresponding to a given whole person impairment, the following mathematical ratio should be used: A divided by B = X divided by 100. In this equation, A is the actual whole person impairment of the claimant, B is the maximum whole person impairment for the organ, and X is the organ rating to be determined.[11]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a kidney injury (open wound into cavity), back contusion, concussion without loss of consciousness, neck sprain, dislocation of multiple cervical vertebrae, hypogonadism, testicular dysfunction, anterior pituitary disorder and impotence of organic origin due to falling 15 to 20 feet during a rope climb and landing on his back and the back of his head. In a November 12, 2009 decision, the Office awarded appellant a schedule award for a 47 percent permanent impairment of his gonads. The percentage of permanent impairment was based primarily on the September 23, 2008 medical findings of Dr. Brigham, an attending Board-certified occupational medicine physician, and the rating calculations contained in the September 24 and October 29, 2009 reports of Dr. Cohen, a Board-certified internist serving as an Office medical adviser.

The Board finds that Dr. Cohen properly evaluated the medical evidence of record and applied the relevant standards of the sixth edition of the A.M.A., *Guides* to determine that appellant had a 47 percent impairment of his gonads. Dr. Cohen properly found that, under Table 10-12 on page 239, appellant's condition (which included a biochemically established gonadal disorder, moderate symptoms and highly recommended treatment) fell under Class 2 with a default value of eight percent.[12] He correctly found that, under Table 10-28 on page 217, appellant was assigned two points for a Class 1 Burden of Treatment Compliance (due to injection of testosterone once a week) and indicated that therefore the default rating value under Table 10-12 was lowered from an eight percent whole person impairment to a seven percent whole person impairment.[13] Dr. Cohen then properly applied the formula found in Office procedure to convert this whole person impairment figure to a 47 percent impairment of the gonads.[14]

On appeal, counsel argued that the 15 percent whole person rating provided by Dr. Brigham in his September 23, 2008 report should have been adopted. However, Dr. Brigham

[11] *See* FECA Bulletin No. 09-03 (issued March 15, 2009). Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(c) (March 2005).

[12] *See supra* note 8.

[13] *See supra* note 9.

[14] *See supra* note 11. In applying the formula, Dr. Cohen took into account that the maximum allowable impairment for gonadal disorders under Table 10-12 is 15 percent of the whole person. *See supra* note 8.

did not explain how this rating was derived in accordance with the relevant standards. Counsel also argued that a rating for penis impairment should have been included, but Dr. Krohn, a Board-certified internist serving as an Office medical adviser, properly explained that the inclusion of such a rating would have been duplicative. Appellant's accepted gonadal condition was endocrinal in nature and Dr. Krohn provided an opinion that there was no functional loss which was not fully accounted for by applying the standards for evaluating endocrinal conditions (found in Chapter 10 of the A.M.A., *Guides*).[15]

LEGAL PRECEDENT -- ISSUE 2

Section 8105(a) of the Act provides: "If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability."[16] Section 8101(4) of the Act defines "monthly pay" for purposes of computing compensation benefits as follows: "[T]he monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...."[17]

The word "disability" is used in several sections of the Act. With the exception of certain sections where the statutory context or the legislative history clearly shows that a different meaning was intended, the word as used in the Act means "Incapacity because of injury in employment to earn wages which the employee was receiving at the time of such injury." This meaning, for brevity, is expressed as "disability for work."[18]

ANALYSIS -- ISSUE 2

The Board finds that the Office properly calculated appellant's pay rate for compensation purposes. The evidence of record reveals that the Office calculated the pay rate with reference to appellant's date-of-injury pay rate (*i.e.*, with reference to his pay as of July 25, 2005). There is no indication that he would be entitled to a recurrent pay rate as he did not sustain a recurrence of disability that began more than six months after he resumed regular full-time employment. The Office gained information from the employing establishment regarding appellant's weekly

[15] *See supra* note 10 discussing how the sections of the A.M.A., *Guides* relating to endocrine problems interact with the sections relating to the anatomic functions of sexual organs. On appeal, counsel also questioned the number of erectile dysfunction pills that appellant received each month. However, the record does not contain a final decision of the Office regarding this matter and it is not currently before the Board. *See* 20 C.F.R. § 501.2(c). Counsel argued that a December 1, 2009 report of Dr. Kamil, an attending Board-certified endocrinologist, showed that appellant's rating should reflect erectile dysfunction. However, a review of the medical record does not show that appellant's condition as delineated in that report was usual or that it was related to the accepted hypogonadism condition. Dr. Kamil had reported that appellant's testosterone level was normal at that time.

[16] 5 U.S.C. § 8105(a). Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

[17] 5 U.S.C. § 8101(4).

[18] *See Charles P. Mulholland, Jr.*, 48 ECAB 604, 606 (1997).

night differential pay and weekly Sunday premium pay and properly used the figures to calculate his pay rate. It discovered that an improper higher pay rate ($910.67 per week) had been applied for the November 12, 2009 schedule award but made a correcting calculation to apply the proper pay rate ($877.85). Appellant has not submitted any evidence showing that the Office's calculation of appellant's pay rate was improper and the evidence of record does not otherwise reveal that such an error was made.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a 47 percent permanent impairment of his gonads for which he received a schedule award. The Board further finds that appellant's schedule award compensation was paid at a proper pay rate.

ORDER

IT IS HEREBY ORDERED THAT the January 14, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 28, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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