United States Department of Labor
Employees' Compensation Appeals Board

L.P., Appellant	)	
and	)	**Docket No. 12-168**
	)	**Issued: August 22, 2012**
HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, Buffalo, NY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 26, 2011 appellant filed a timely appeal from a September 21, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether appellant sustained more than a 21 percent permanent impairment of the left eye for which he received a schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence after OWCP rendered its September 21, 2011 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision and therefore, this additional evidence cannot be considered on appeal. 20 C.F.R. § 510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

FACTUAL HISTORY

On April 28, 2006 appellant, then a 44-year-old customs and border protection officer, was injured when he was pepper sprayed in the eyes. OWCP accepted the claim for corneal abrasion of both eyes.

On August 22, 2007 appellant was status post deep anterior lamellar keratoplasty of the right eye due to a central corneal scar. In December 2007, he underwent a postpenetrating keratoplasty of the right eye.

In a July 28, 2009 medical report, Dr. Michael W. Belin, a Board-certified ophthalmologist, reported that there was a running suture in appellant's right eye and noted right eye visual acuity of 20/200, pinhole to 20/100 and 20/30 in the left eye. He opined that appellant's visual acuity was limited to spectacle correction due to his transplant but that he could reasonably improve should he desire rigid contact lens.

Appellant filed claim for compensation forms (Form CA-7) for leave without pay and received disability for the period June 22 to July 30, 2006. He also filed claim for compensation forms for leave buyback and received compensation for the period August 16, 2006 to November 16, 2010.

On November 3, 2009 appellant filed a schedule award claim.

On February 3, 2010 OWCP referred appellant and the case record to Dr. Duncan Winter, a Board-certified ophthalmologist, for a second opinion examination. In a February 23, 2010 report, Dr. Winter reported that appellant suffered a corneal abrasion that turned into a corneal ulcer after he was pepper sprayed in the eyes on April 28, 2006. Prior to the employment incident, appellant had a visual acuity of 20/20. Dr. Winter opined that the full account of appellant's vision could not be ascertained until a rigid, gas permeable (RGP) contact lens was placed in his right eye and the suture was removed to determine if it could restore him to 20/20 vision. He noted that leaving the suture in would cause appellant irritation when using a contact lens.

OWCP routed Dr. Winter's report, a statement of accepted facts and the case file to Dr. Morley Slutsky, a district medical adviser (DMA) and Board-certified in occupational medicine. In a March 24, 2010 report, Dr. Slutsky reported that appellant had not yet reached maximum medical improvement (MMI). He noted that appellant was unable to tolerate the use of contacts due to a running suture in his eye. Dr. Slutsky opined that, once the suture was removed, appellant's ability to fully use the contact lenses would place him at MMI.

By letter dated April 1, 2010, OWCP advised appellant to submit a report from his treating physician with an opinion regarding the degree of his permanent partial impairment (PPI) related to the accepted injury.

By letter dated April 26, 2010, Dr. Robert A. Eden, a Board-certified ophthalmologist, reported that appellant remained with an uncorrected visual acuity of counting fingers at three feet and a corrected visual acuity of 20/20 with an RGP. He disagreed with Dr. Winter's opinion

that contact lenses could not be placed due to irritation from the stitch and opined that appellant had essentially reached MMI though he had to wait for his contact lenses to be fitted.

On May 14, 2010 OWCP referred the case record to Dr. Slutsky for a follow-up report. In a May 17, 2010 report, Dr. Slutsky reported that, once appellant was fitted for contacts, his most recent vision measurements should be obtained and an opinion could be provided as to whether he could wear them without difficulty for most of the time. He further noted that there was disagreement between Dr. Eden and Dr. Winter's reports regarding whether appellant's astigmatism could worsen if his right eye suture was removed.

In a November 17, 2010 report, Dr. Eden stated that appellant had reached MMI of the right eye and had a best corrected visual acuity of 20/40 -2. He noted that, upon physical examination, appellant continued to have uncorrected visual acuity of counting fingers at 1 foot. Dr. Eden stated that removing the suture from appellant's right eye would not make a major difference in his corneal astigmatism because there was no tension on the running suture. He further stated that there remained 13.5 diopters of corneal astigmatism, which could be improved with a contact lens, appellant was unable to tolerate the contacts for more than an hour and half at a time with severe discomfort and irritation.

In a November 29, 2010 medical report, Dr. Eden reported that appellant's left eye was stable with an uncorrected visual acuity of 20/40 +2. He opined that appellant had reached MMI of the left eye.

On June 24, 2011 OWCP referred the case record to Dr. Gregory L. Cowan, another DMA and Board-certified ophthalmologist. In an August 23, 2011 report, Dr. Cowan stated that appellant suffered a central corneal abrasion in the right eye which resulted in corneal scarring despite numerous attempts to decrease the opacification. Appellant underwent a full thickness corneal transplant and was required to leave his running sutures in due to the nature of his job. Dr. Cowan noted that appellant had visual impairments in the right eye due to extreme astigmatism from his corneal transplant and was required to wear an RPG. Appellant was corrected to 20/20 with the rigid lens however. Dr. Cowan opined that appellant's left eye had reached MMI in 2009 and agreed with the 21 percent impairment rating in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), Table 12-2 and Table 12-3.

On August 25, 2011 OWCP requested Dr. Cowan provide clarification on his report to determine if the 21 percent impairment rating was for one or both eyes.

In a September 7, 2011 medical report, Dr. Cowan reported that the 21 percent permanent impairment was for the left eye only, noting the date of MMI as December 2009. He further stated that, because appellant's right eye could be improved by instilling an RGP contact lens, MMI had not yet been achieved until it could be determined whether appellant could tolerate this lens.

By decision dated September 21, 2011, OWCP granted appellant a schedule award claim for 21 percent permanent impairment of the left eye. The award covered a period of 33.6 weeks from November 17, 2010 to July 10, 2011.

LEGAL PRECEDENT

Section 8107 of FECA authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. For 100 percent loss of an eye, as with blindness, FECA provides a maximum 160 weeks of compensation.[3] Compensation for loss of binocular vision is the same as for loss of the eye.[4] Partial losses are compensated proportionately.[5]

Such loss or loss of use is known as permanent impairment. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[6] For impairment ratings calculated on and after May 1, 2009, it should advise any physician evaluating permanent impairment to use the sixth edition and to report findings in accordance with those guidelines.[7]

Although the A.M.A., *Guides* provides that impairment ratings should be based on the best-corrected visual acuity,[8] FECA mandates that the degree of loss of vision must be determined without regard to correction.[9] Following the May 1, 2009 implementation of the sixth edition of the A.M.A., *Guides*, OWCP's procedure manual noted with respect to loss of vision that the percentage of impairment continues to be based on best uncorrected vision.[10]

ANALYSIS

The Board finds that this case is not in posture for decision. OWCP accepted appellant's claim for corneal abrasion of both eyes. The issue is whether appellant sustained more than a 21 percent permanent impairment of the left eye for which he received a schedule award. The DMA's report, however, is insufficient to form the basis for a schedule award determination as he failed to adequately explain how his calculations were reached. Therefore, the September 21, 2011 decision will be set aside and the case remanded for further development.

[3] 5 U.S.C. § 8107(c)(5).

[4] *Id*. at § 8107(c)(14). *See Russell E. Wageneck*, 46 ECAB 653 (1995) (holding there is no provision under section 8107 of OWCP for the combination of each eye into a schedule award for both eyes together, as there is for loss of hearing in both ears; therefore, schedule awards are issued for each eye individually).

[5] *Id*. at § 8107(c)(19).

[6] 20 C.F.R. § 10.404.

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010).

[8] A.M.A., *Guides* 283, 284, Chapter 12.2b.

[9] 5 U.S.C. § 8107(c)(19).

[10] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4c (January 2010); *see also P.G.*, Docket No. 10-2209 (issued June 28, 2011).

OWCP referred the case record to Dr. Cowan. In medical reports dated August 23 and September 7, 2011, Dr. Cowan opined that appellant's left eye had reached MMI in December 2009 and stated that he also arrived at a 21 percent impairment rating in accordance with the sixth edition of the A.M.A., *Guides*, Table 12-2 and Table 12-3.[11] He noted that, according to the formula, "a visual acuity score of 255 OU corresponded to 20/40, best corrected acuity score of 395/5. Based on the formula, this equaled a functional acuity score of 79."

FECA notes that the degree of loss of vision must be determined without regard to correction.[12] Additionally, Dr. Cowan indicated that appellant had a functional acuity score of 79. However, he did not explain how this figure was derived pursuant to Table 12-3. Dr. Cowan also failed to discuss whether there was evidence of visual field impairment or whether individual adjustments for functional vision were appropriate pursuant to page 305 of the A.M.A., *Guides*.[13] He did not provide any explanation as to how these figures were derived and which physician's report he was referencing when stating that he agreed with the 21 percent impairment rating. Thus, Dr. Cowan's report is deficient as he failed to adequately explain how he arrived at the 21 percent impairment rating of the left eye according to the A.M.A., *Guides*.

Once OWCP undertakes development of the record it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[14] In this case, appellant submitted medical evidence in support of his schedule award claim. OWCP began to develop the evidence it failed, however, to obtain a rationalized report.[15] In view of the failure of the DMA to adequately explain how his determinations were reached in accordance with the relevant standards of the A.M.A., *Guides*, the claim requires further development to determine the extent of impairment of appellant's left eye.

On remand, OWCP should further develop the medical evidence of record by requesting that its medical adviser provide a reasoned opinion regarding appellant's left eye impairment, explaining the basis of impairment under the sixth edition of the A.M.A., *Guides.*

The Board also notes that on remand the medical adviser should also determine if the right eye has reached MMI and provide an impairment rating if appropriate. Again, as any impairment rating must be based upon uncorrected vision, a schedule award can be calculated if uncorrected vision has reached MMI. In his November 17, 2010 report, Dr. Eden stated that appellant had reached MMI of the right eye.

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[11] A.M.A., *Guides* 288, 289.

[12] *Wayne K. Dugimoto*, Docket No. 05-484 (issued June 3, 2005).

[13] Adjustments for such functions as contrast sensitivity, glare sensitivity, color vision defects and binocularity, stereopsis, suppression and diplopia are permitted, although they must be well documented and should be limited to an increase in impairment by, at most, 15 points. A.M.A., *Guides* 305.

[14] *Phillip L. Barnes*, 55 ECAB 426 (2004); *see also Virginia Richard, claiming as executrix of the estate of Lionel F. Richard*, 53 ECAB 430 (2002); *Dorothy L. Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1993).

[15] *C.B.*, Docket No. 11-1937 (issued April 6, 2012).

If the medical adviser is unable to render a reasoned opinion fully explaining the application of the A.M.A., *Guides,* OWCP shall refer appellant to an appropriate Board-certified specialist for a second opinion regarding the extent of his eye impairment. Following this and any other further development as deemed necessary, OWCP shall issue an appropriate merit decision on appellant's schedule award claim.

CONCLUSION

The Board finds that this case is not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the September 21, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further development consistent with this decision.

Issued: August 22, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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