

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

B.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Titusville, FL, Employer**

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**Docket No. 11-800
Issued: March 1, 2012**

Appearances:

*Ronald S. Webster, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 3, 2011¹ appellant, through her attorney, filed a timely appeal from an August 10, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her schedule award claim. Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP's decision. See 20 C.F.R. § 501.3(f)(2). As OWCP's merit decision was issued on August 10, 2010, the 180-day computation begins August 11, 2010. One hundred eighty days from August 11, 2010 was February 7, 2011. Since using February 11, 2011, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is February 3, 2011, which renders the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant sustained permanent impairment warranting a schedule award due to her accepted rectocele condition.

FACTUAL HISTORY

On April 20, 2007 appellant, then a 50-year-old postal clerk, filed an occupational disease claim alleging that she first realized that she sustained a pelvic prolapse on September 26, 2006, but that it was not until November 26, 2006 that she realized it was caused or aggravated by her employment duties of heavy lifting, excessive lifting and gravity. Appellant underwent a vaginal hysterectomy and rectocele repair on March 29, 2007. She initially returned to full-duty work on April 15, 2007 with restrictions and subsequently worked regular full-time duty with no restrictions.

In a report dated October 5, 2007 and signed on November 1, 2007, Dr. Vanessa Dance, a second-opinion Board-certified obstetrician and gynecologist, examined appellant at the request of OWCP to determine whether her rectocele had been caused or aggravated by her employment. Dr. Dance provided physical findings, reviewed a statement of accepted facts and found that appellant's work duties placed her at an increased risk for pelvic prolapse. She concluded that appellant's work duties exacerbated or caused her pelvic organ prolapse.

By decision dated November 9, 2007, OWCP accepted appellant's claim for rectocele based on Dr. Dance's report.

On September 24, 2009 appellant filed a claim for a schedule award and submitted a July 28, 2009 report from Dr. Donna G. Ivery, an attending Board-certified obstetrician and gynecologist, who treated appellant over several years and for a simple rectocele repair with a normal recovery and that this type of surgery had a failure rate within the range of 50 percent to 60 percent. Dr. Ivery stated that appellant had pain with intercourse which was not unusual since surgical scarring could result in changes in the flexibility and caliber of the vagina following the healing process. She noted that she was not trained or experienced in providing an impairment rating.

In an October 1, 2009 report, Dr. James W. Dyer, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed appellant's file, and a statement of accepted facts. He stated that the medical evidence of record was insufficient to support permanent impairment to a scheduled member due to the accepted condition. Dr. Dyer advised that the hernia or rectocele was not a ratable organ pursuant to 5 U.S.C. § 8107 and 20 C.F.R. § 10.304 and, thus, appellant was not entitled to a schedule award.

By decision dated October 5, 2009, OWCP denied appellant's claim for a schedule award based on the opinion of Dr. Dyer.

Appellant, through her counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on February 17, 2010.

By decision dated May 7, 2010, the hearing representative affirmed the denial of appellant's claim for a schedule award.

On June 2, 2010 appellant's counsel requested reconsideration and submitted a March 16, 2010 report from Dr. Dance, who had become appellant's treating physician, who concluded that appellant had a permanent impairment of the vagina due to her rectocele. Using Table 7-10, page 151 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009), she found that appellant had a 9 to 17 percent permanent impairment of the vagina. Dr. Dance stated that the impairment rating was based on the difficulty and/or possibility of sexual intercourse, the vaginal anatomy alteration, possibility of vaginal delivery and the amount of treatment necessary for signs or symptoms of vaginal deformity or disease. She noted that appellant reached maximum medical improvement in approximately June 2007.

In a June 17, 2010 report, Dr. Dyer, the medical adviser, reviewed Dr. Dance's March 16, 2010 report and concluded that appellant was not entitled to a schedule award. He reiterated that a rectocele was not a ratable organ pursuant to 5 U.S.C. § 8107 and 20 C.F.R. § 10.304. Dr. Dyer related that appellant had rectocele surgery on March 29, 2007 and, in 1981, had a vaginal delivery which could also cause a rectocele and pelvic prolapse.

By decision dated August 10, 2010, OWCP denied modification of its prior decisions.

LEGAL PRECEDENT

The schedule award provision of FECA³ and its implementing regulations⁴ 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, FECA 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.⁵ Effective May 1, 2009, OWCP adopted the sixth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.⁶

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.⁷ Amendments to FECA, however, modified the schedule award provisions to provide for an award for permanent impairment to a member of the

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Id.*

⁶ Federal (FECA) Procedure Manual, Part 3 -- Claims, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

⁷ *Thomas J. Engelhart*, 50 ECAB 319 (1999); *S.K.*, Docket No. 08-848 (issued January 26, 2009).

body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Pursuant to the authority provided by 5 U.S.C. § 8107(c)(22), the Secretary added as organs to the compensation schedule to include the breast, kidney, larynx, lung, tongue, penis, testicle, ovary, uterus/cervix and vulva/vagina.⁸

ANALYSIS

The Board finds that this case is not in posture for a decision on the issue of whether appellant has vaginal impairment causally related to her accepted rectocele.

The A.M.A., *Guides* provides for evaluation of the vagina/vulva under section 7.8, Female Reproductive Organs⁹ and Table 7-10, page 151. Sections 7.8a¹⁰ and 7.8c¹¹ address how a permanent impairment is calculated for the vulva and vagina and the cervix and uterus, respectively.

Dr. Dance found that appellant sustained a permanent impairment of her vagina as a result of the accepted rectocele. She noted the following criteria in determining appellant's impairment: difficulty and/or possibility of sexual intercourse, the vaginal anatomy alteration, possibility of vaginal delivery and the amount of treatment necessary for signs or symptoms of vaginal deformity or disease. Using Table 7-10, page 151 of the A.M.A., *Guides* (6th ed.), Dr. Dance found that appellant had a 9 to 17 percent permanent impairment of the vagina.

Dr. Dyer, OWCP's medical adviser, found that appellant had no ratable impairment of an accepted organ under FECA as the rectocele is not a covered organ. He also noted that appellant's rectocele could be attributable to a 1981 vaginal delivery. The Board notes that OWCP procedures indicate accepted conditions must be included in a statement of accepted facts and when an OWCP medical adviser renders a medical opinion based on a statement of accepted facts which is incomplete or inaccurate or when an OWCP medical adviser renders a medical opinion in which he does not use the statement of accepted facts as the framework in forming his or her opinion, the probative value of the opinion is diminished.¹² Dr. Dyer ignored that OWCP accepted appellant's rectocele was employment related when attributing it to her past vaginal delivery. Moreover he failed to address the A.M.A., *Guides* in considering appellant's impairment due to rectocele. Chapter 7.8 evaluates impairments for female reproductive organs.¹³ Sections 7.8a, 7.8b and 7.8c address how permanent impairments are determined for the vulva/vagina and uterus/cervix.¹⁴ The text cites examples in which rectocele contributes to

⁸ 5 U.S.C. § 8107; 20 C.F.R. § 10.404; *J.W.*, 59 ECAB 308 (2008); *Marilyn S. Freeland*, 57 ECAB 607 (2006).

⁹ A.M.A., *Guides* 149-50.

¹⁰ *Id.* at 149.

¹¹ *Id.* at 151.

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

¹³ A.M.A., *Guides* 149-55.

¹⁴ *Id.* at 149-51.

an impairment rating of these organs. Dr. Dyer failed to provide an impairment evaluation which conformed to the A.M.A., *Guides* and ignored that appellant's rectocele was an accepted condition. The case will be remanded for further development of the medical evidence. On remand, the case should be referred to an appropriate medical specialist or to a different OWCP medical adviser for an evaluation of appellant's permanent impairment consistent with the protocols of the A.M.A., *Guides*. Following any necessary further development, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 10, 2010 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: March 1, 2012
Washington, DC

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

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

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