

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

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C.R., Appellant )

and )

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

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**Docket No. 13-1258  
Issued: December 3, 2013**

*Appearances:*

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 29, 2013 appellant, through his attorney, filed a timely appeal of an April 25, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

**ISSUE**

The issue is whether appellant has met his burden of proof to establish permanent impairment of a scheduled member.

**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 employing establishment's front lobby floor. OWCP accepted his claim for aggravation of a

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

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 his July 21, 2009 report. Dr. Eichberg stated that appellant's sexual dysfunction was neurogenic and based on the same nerve roots causing his sciatic dysfunction. He opined that appellant had class 3 sexual dysfunction based on Table 13-15 at page 388 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.<sup>2</sup> OWCP denied this claim on September 3, 2009 and appellant appealed this decision of the Board. In an August 13, 2010 decision,<sup>3</sup> the Board found that appellant had no more than eight percent impairment of his left leg. The Board also found that 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 for penile impairment and refer the case to the medical adviser for an opinion as to whether the medical evidence establishes that appellant's sexual dysfunction was related to his accepted lumbar spine condition and if so to determine an appropriate impairment percentage based on the A.M.A., *Guides* and OWCP's procedures.

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 finding the weight of the medical evidence was with the medical adviser. Appellant appealed this decision to the Board. In a decision dated July 12, 2011, the Board found that there was an unresolved conflict of medical opinion evidence between appellant's physician, Dr. Eichberg, and OWCP's medical adviser on the issue of whether appellant's sexual dysfunction was causally related to his accepted employment injury.<sup>4</sup> The facts of the case as set forth in the Board's prior decisions are adopted herein by reference.

On November 28, 2011 OWCP referred appellant for an impartial medical examination with Dr. Stephen F. Dobkin, a Board-certified urologist. In a letter dated July 9, 2012, it stated that Dr. Dobkin had not submitted a report because he had begun a doctor-patient relationship with appellant. OWCP stated that appellant would be referred to a new impartial medical examiner.

Appellant underwent a magnetic resonance imaging (MRI) scan of his lumbar spine on July 26, 2011 which demonstrated degenerative disc disease from L1-2 through L4-5 as mild spinal stenosis at L1-2, moderate-to-severe spinal stenosis at L2-3 with facet arthropathy as well as L3-4 and L4-5 bulging discs with severe spinal stenosis and foraminal encroachment. On April 2, 2012 appellant's physician, Dr. Saqib Khan, Board-certified in anesthesiology, critical

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

<sup>3</sup> Docket No. 09-2301 (issued August 13, 2010).

<sup>4</sup> Docket No. 10-2375 (issued July 12, 2011).

care and pain medicine, noted that appellant had severe back pain and wanted to have back surgery. In a report dated July 6, 2012, Dr. Khan stated that appellant had increased pain levels.

Dr. Eberto Pineiro, a Board-certified neurologist, completed a report on July 18, 2012 and found that appellant's genitourinary system was positive for back pain, decreased stream, frequent urination, infertility and polyuria. He noted that appellant demonstrated facet sacroiliac pinpoint tenderness with the sciatic notch being tender. Dr. Pineiro diagnosed chronic facet arthropathy of the sacroiliac bilaterally worse on the left.

On July 18, 2012 OWCP referred appellant for an impartial medical examination with Dr. Kevin Lee, a Board-certified urologist. In a letter dated August 30, 2012, counsel informed OWCP that appellant had appeared for his directed medical examination but that Dr. Lee did not have the records needed from OWCP and thus sent appellant away without conducting an examination.

In a report dated December 12, 2011, Dr. Dobkin stated that appellant experienced work-related back injuries in 1998 and 2004. He stated that as a result of the May 6, 2004 injury appellant had left leg numbness, bilateral calf pain and pain radiating into his groin bilaterally. Dr. Dobkin noted that appellant lost the ability to have erections over time. On December 20, 2011 he examined appellant for a neurogenic bladder. Dr. Dobkin performed a Doppler study on January 12, 2012 which was consistent with a vasculogenic erectile dysfunction. On January 23, 2012 he stated that it was possible that appellant's low testosterone was secondary to his medications of Tramadol and Lyrica. In a note dated May 20, 2012, Dr. Dobkin stated that he was treating appellant for erectile dysfunction and neurogenic bladder from a workers' compensation injury in 2004. On November 19, 2012 appellant underwent an MRI scan of his lumbar spine which found that compared to appellant's July 26, 2011 MRI scan his spondylotic changes were still visible, that there was a slight S-shaped curvature of the lumbar spine and that the degree of canal and foraminal stenosis was similar. The MRI scan revealed appellant's L3-4 disc herniation.

After receiving the medical records and providing a physical examination in a report dated September 14, 2012, Dr. Lee provided appellant's history of work injury in 2004 and described appellant's gradual onset of erectile dysfunction. He performed a physical examination and stated that innervation of the penis is from T10-L2 and the cranial nerves. Dr. Lee noted that appellant's original injury was L2-3 and L3-4 level. He stated, "I do not think his problem is neurological. His problem is multifactorial and certainly his chronic back pain would contribute to his ability to perform." Dr. Lee requested the treatment records from Dr. Dobkin prior to a final report. On December 13, 2012 he reviewed Dr. Dobkin's notes and stated that appellant's back injury would not cause vasculogenic impotence, but that the chronic use of pain medication could lower his testosterone level and the chronic pain could cause some psychological problems with sex. Dr. Lee stated, "I think that he should have back surgery so he can get off pain medication if possible and reevaluate at that time. Certainly his vasculogenic problem is not going to go away."

On January 4, 2013 OWCP requested a supplemental report from Dr. Lee clarifying whether appellant's sexual dysfunction was causally related to his accepted conditions or to the

medications authorized for these conditions. It further asked that Dr. Lee evaluate any work-related sexual dysfunction using the A.M.A., *Guides*.<sup>5</sup>

Dr. Lee submitted a report dated January 18, 2013 and diagnosed impotence of organic origin. He stated that appellant had vasculogenic erectile dysfunction with low testosterone level. Dr. Lee stated that appellant's pain medication may interfere with his condition, but that his herniated discs were not contributing to his condition. He reviewed Table 13-15 of the A.M.A., *Guides*<sup>6</sup> and stated that appellant had one to two percent whole person impairment as a result of dysfunction due to pain medication. Dr. Lee noted that, if appellant underwent back surgery and pain medication was no longer required, then there was no impairment from his back injury at all.

OWCP's medical adviser reviewed appellant's claim on March 14, 2013 and agreed that appellant's lumbar condition was not contributing to appellant's erectile dysfunction. He stated, "FECA does not provide a schedule award for chronic impairment or pain of the spine and does not consider whole person impairment."

OWCP accepted the additional condition of impotence of organic origin on April 23, 2013.

By decision dated April 25, 2013, OWCP denied appellant's claim for a schedule award on the grounds that he had not established permanent impairment of a scheduled member due to his accepted work injury. It noted that Dr. Lee opined that appellant's impotence was due to an organic origin as appellant's pain medication contributed to his erectile dysfunction. OWCP further stated that Dr. Lee opined that appellant's accepted herniated discs were not directly contributing to appellant's erectile dysfunction. Dr. Lee found one to two percent impairment due to pain medication. OWCP's medical adviser found that Dr. Lee applied inappropriate tables in reaching his impairment rating and that appellant did not have a permanent impairment under the A.M.A., *Guides*.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>7</sup> and its implementing regulations<sup>8</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment for loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of

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<sup>5</sup> 20 C.F.R. § 10.404. For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

<sup>6</sup> A.M.A., *Guides*, 338, Table 13-15.

<sup>7</sup> 5 U.S.C. §§ 8101-8193, 8107.

<sup>8</sup> 20 C.F.R. § 10.404.

tables so that there may be uniform standards applicable to all claimants. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.<sup>9</sup>

It is the claimant's burden to establish that he or she has sustained a permanent impairment of the scheduled member or function as a result of any employment injury.<sup>10</sup> OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of maximum medical improvement), describes the impairment in sufficient detail so that it can be visualized on review and computes the percentage of impairment in accordance with the A.M.A., *Guides*.<sup>11</sup>

The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).<sup>12</sup> The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

OWCP procedures provide a formula to measure the percentage of impairment of an organ when the whole person impairment is provided. The whole person impairment of the claimant, identified as A, is divided by B, the maximum impairment of the organ, which equals X, the impairment rating, divided by 100. For organs such as the penis, which have more than one physiologic function, the A.M.A., *Guides* provide whole person impairment levels for each function. When calculating the impairment of these organs, OWCP's medical adviser must consider all functions as instructed in the A.M.A., *Guides*. The maximum whole person impairment ascribed to the particular organ (B) is obtained by combining the maximum levels for all functions using the Combined Values Chart in the current edition of the A.M.A., *Guides*. The actual whole person impairment (A) is obtained by combining all functional impairments found using the Combined Values Chart in the A.M.A., *Guides*.<sup>13</sup>

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.<sup>14</sup> FECA identifies members such as the arm, leg, hand, foot, thumb and finger, organs to include the eye and functions as loss of hearing and loss of vision.<sup>15</sup> Section 8107(c)(22) of FECA provides for the payment of compensation for

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<sup>9</sup> *Supra* note 2.

<sup>10</sup> *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(b) (August 2002).

<sup>12</sup> A.M.A., *Guides*, 494-531.

<sup>13</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700(4)(d)(2)(b) (January 2010).

<sup>14</sup> *See Leroy M. Terska*, 53 ECAB 247 (2001).

<sup>15</sup> 5 U.S.C. § 8107(c).

permanent loss of any other important external or internal organ of the body as determined by the Secretary of Labor.<sup>16</sup> The Secretary of Labor has made such a determination and pursuant to the authority granted in section 8107(c)(22), added the breast, kidney, larynx, lung, penis, testicle, ovary, uterus and tongue to the schedule.<sup>17</sup>

### ANALYSIS

OWCP accepted that appellant sustained lumbar sprain, aggravation of a herniated disc at L2-3 and L3-4 as well as impotence of organic origin.

Appellant requested a schedule award for his impotence. On remand from the Board, OWCP referred appellant for an impartial medical examination with Dr. Lee who determined that appellant's impotence was due in part to his pain medications. Dr. Lee opined that appellant had one to two percent impairment of the whole person due to neurogenic sexual dysfunction, a class 1 impairment in accordance with Table 13-15 of the A.M.A., *Guides*. FECA does not provide for impairment of the whole person.<sup>18</sup> OWCP's medical adviser noted this fact and found that appellant was not entitled to a schedule award under the provisions discussed by Dr. Lee. The sixth edition of the A.M.A., *Guides* notes that the penis has both sexual and urinary functions and states that when evaluating penis impairment, an examiner must consider both sexual and urinary function impairment.<sup>19</sup> On remand, OWCP should secure a supplemental report from Dr. Lee to determine appellant's impairment to his penis for schedule award purposes. Following this and such other development as deemed necessary, OWCP shall issue a *de novo* decision.<sup>20</sup>

### CONCLUSION

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

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<sup>16</sup> *Id.* at § 8122(c)(22)

<sup>17</sup> 20 C.F.R. § 10.404; *Henry B. Ford, III*, 52 ECAB 220 (2001).

<sup>18</sup> *D.P.*, Docket No. 11-369 (issued October 24, 2011); *N.D.*, 59 ECAB 344 (2008).

<sup>19</sup> A.M.A., *Guides* 143-144, Table 7-6.

<sup>20</sup> *See. D.P.*, *supra* note 18.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 25, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: December 3, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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