

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

S.S., Appellant

and

**U.S. POSTAL SERVICE, OMAHA MAIL
PROCESSING PLANT, Omaha, NE, Employer**

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**Docket No. 14-272
Issued: July 8, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 20, 2013 appellant filed a timely appeal from an October 21, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than a 10 percent permanent impairment of the penis.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and the circumstances as set forth in the prior decision are hereby incorporated by reference. The facts relevant to the instant appeal will be set forth.

OWCP accepted that on October 3, 1997 appellant, then a 31-year-old clerk, sustained thoracic sprain, lumbar strain, limb pain, an unspecified colon injury, displacement of a lumbar interval, meningitis, neurogenic bladder and sexual dysfunction. On February 19, 1995 he underwent a discectomy at L5-S1 and on May 16, 1996 he underwent a discectomy at L4-5. Appellant returned to work as a modified distribution clerk on January 13, 2000.

In a decision dated February 25, 2000, OWCP granted appellant a schedule award for a 15 percent permanent impairment of the right lower extremity.³ By decision dated March 20, 2003, it granted him a schedule award for a 10 percent permanent impairment of the penis. OWCP specified that the award was for a five percent impairment of the bladder and a five percent impairment due to sexual dysfunction.

On January 15, 2013 appellant filed a claim for an increased schedule award. By letter dated January 25, 2013, OWCP requested that he submit an impairment evaluation from his attending physician in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*).

In a report dated June 24, 2013, an OWCP medical adviser noted that the record contained no current medical evidence that could be used to rate impairment under the sixth edition of the A.M.A., *Guides*. On August 13, 2013 OWCP referred appellant to Dr. Robert Michael Kroeger, a Board-certified urologist, for an impairment evaluation.

In a report dated August 28, 2013, Dr. Kroeger discussed appellant's history of an October 3, 1994 work injury and subsequent problems with urination, bowel movements and sexual function. He found that appellant had a class 1, grade C impairment of the bladder according to Table 7-4 on page 139 of the A.M.A., *Guides*, which yielded a five percent whole person impairment. Regarding erectile dysfunction, Dr. Kroeger found that appellant was "able to have intercourse, but the erections are of borderline quality and I think this has had a significant effect on the frequency and quality of sexual intercourse for he and his wife." He stated, "The guidelines talk about sexual function possible with varying degrees of difficulty

² Docket No. 11-1972 (issued September 18, 2012). In a decision dated September 18, 2012, the Board set aside a March 15, 2011 decision denying modification of an April 25, 2007 loss of wage-earning capacity determination. The Board remanded the case for OWCP to apply FECA Bulletin No. 09-05 in determining whether appellant had established modification of the April 25, 2007 loss of wage-earning capacity decision.

³ On October 8, 2000 an OWCP hearing representative set aside the February 25, 2000 decision and remanded the case for a determination of whether appellant had a permanent impairment of the penis. In a decision dated July 17, 2001, OWCP suspended appellant's compensation for failure to attend a medical appointment. By decision dated July 16, 2002, a hearing representative vacated the July 17, 2001 decision and instructed it to refer the record to an OWCP medical adviser. In a decision dated August 23, 2002, OWCP found that appellant was not entitled to a schedule award for the penis. Following a preliminary review, on November 22, 2002 a hearing representative vacated the August 23, 2002 decision after finding a conflict in medical opinion regarding whether he had an impairment of the bladder or penis.

with erection or sensation responsive to medical treatment as being class 1. Appellant indicated to Dr. Kroeger that he had not tried any medical treatment, so it is a little difficult to classify him.” Dr. Kroeger found that, if appellant responded well to medical treatment, he would have a class 1, grade B or three percent whole person impairment according to Table 7-6 on page 144 of the A.M.A., *Guides*. If appellant partially responded to treatment, he would have a class 1, grade C rating or a five percent impairment of the whole person and if he did not respond to treatment, he would have a class 2, grade A rating or a six percent impairment of the whole person.

On October 9, 2013 an OWCP medical adviser reviewed Dr. Kroeger’s report. He noted that Dr. Kroeger’s rating varied depending on whether appellant responded to future treatment and stated, “A rating that is speculatively offered is unacceptable for schedule award purposes.” The medical adviser noted that subtracting the five percent rating for the bladder and the five percent rating for sexual dysfunction from the prior schedule award yielded no additional impairment.

By decision dated October 21, 2013, OWCP denied appellant’s claim for an increased schedule award. It determined that its medical adviser found that the impairment rating by Dr. Kroeger was insufficient to establish more than the 10 percent previously awarded due to a combination of bladder and sexual dysfunction of the penis.

On appeal, appellant contends that OWCP failed to pay him compensation for disability from October 30, 2010 through May 1, 2011 and denied his claim for a schedule award for the bowel and left leg. He further argues that it failed to expand acceptance of his claim to include a L5-S1 disc protrusion and L5-S1 foraminal stenosis.

LEGAL PRECEDENT

The schedule award provision of FECA⁴ and its implementing federal regulations⁵ 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁶ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁷

No schedule award is payable for a member, function or organ of the body that is not specified in FECA or in the implementing regulations.⁸ The list of scheduled members includes

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.*

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁸ *See Anna V. Burke*, 57 ECAB 521 (2006).

the eye, arm, hand, fingers, leg, foot and toes.⁹ Additionally, FECA specifically provides for compensation for loss of hearing and loss of vision.¹⁰ By authority granted under FECA, the Secretary of Labor expanded the list of scheduled members to include the breast, kidney, larynx, lung, penis, testicle, tongue, ovary, uterus/cervix and vulva/vagina and skin.¹¹

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*.¹²

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.¹³ While the claimant has the responsibility to establish entitlement to compensation once OWCP undertakes to develop the medical evidence it has the responsibility to do so in the proper manner.¹⁴

ANALYSIS

OWCP accepted appellant's claim for thoracic sprain, lumbar strain, limb pain, an unspecified colon injury, displacement of a lumbar interval, meningitis, neurogenic bladder and sexual dysfunction. By decision dated February 25, 2000, it granted him a schedule award for a 15 percent right lower extremity impairment and, in a decision dated March 20, 2003, it granted him a schedule award for a 10 percent permanent impairment of the penis.

On January 15, 2013 appellant filed a claim for an increased schedule award. OWCP referred him to Dr. Kroeger to determine the extent of any permanent impairment of the penis due to his accepted work injury.¹⁵ On August 28, 2013 Dr. Kroeger determined that appellant had a five percent whole person impairment of the bladder using Table 7-4 on page 139 of the A.M.A., *Guides*, which provides the criterion for rating a permanent impairment due to bladder

⁹ 5 U.S.C. § 8107(c).

¹⁰ *Id.*

¹¹ *Id.*; 20 C.F.R § 10.404(b).

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(d)(2)(b) (January 2010).

¹³ *See Vanessa Young*, 55 ECAB 575 (2004).

¹⁴ *See Melvin James*, 55 ECAB 406 (2004).

¹⁵ OWCP separately developed the issue of whether appellant has an increased impairment of the right lower extremity impairment.

disease. Neither FECA nor the implementing federal regulations provide a schedule award for the bladder.¹⁶ The sixth edition of the A.M.A., *Guides*, however, provides that the penis has both sexual and urinary functions and states that, when evaluating penile impairments, an examiner must consider both sexual and urinary function.¹⁷

Regarding appellant's impairment due to loss of sexual function, Dr. Kroeger advised that his impairment had a significant effect on the quality of intercourse. He noted that appellant had not received treatment for his decreased sexual function. Using Table 7-6 on page 144, Dr. Kroeger found that, if appellant obtained treatment and responded satisfactorily, he would have a three percent whole person impairment, if he only partially responded to treatment he would have a five percent whole person impairment, and if he did not respond to treatment he would have a six percent whole person impairment due to his loss of sexual function.¹⁸ An OWCP medical adviser reviewed Dr. Kroeger's report on October 9, 2013 and found that it was not acceptable for rating a schedule award as it was speculative in nature. The Board has held that medical opinions which are speculative or equivocal in character have little probative value.¹⁹ As Dr. Kroeger's opinion is speculative in nature, it is insufficient to resolve the issue of the extent of appellant's permanent impairment of the penis.²⁰

Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do in a manner that will resolve the relevant issues in the case. Accordingly, the case must be remanded for OWCP to obtain a supplemental report from Dr. Kroeger rating appellant's permanent impairment of the penis based on his condition at the time of evaluation. After such further development as deemed necessary, it should issue a *de novo* decision.

On appeal, appellant contends that OWCP failed to pay him compensation for disability from October 30, 2010 through May 1, 2011 and denied his claim for a schedule award for the bowel and left leg.²¹ He further argues that it failed to expand acceptance of his claim to include an L5-S1 disc protrusion and L5-S1 foraminal stenosis.²² The Board's jurisdiction is limited to

¹⁶ *Supra* note 9; *supra* note 5.

¹⁷ A.M.A., *Guides*, Table 7-6 143-144.

¹⁸ As discussed, OWCP procedures provide a formula to measure the percentage impairment of an organ when the whole person impairment is provided. *See supra* note 12.

¹⁹ *L.R. (E.R.)*, 58 ECAB 369 (2007); *Kathy A. Kelley*, 55 ECAB 206 (2004).

²⁰ *See supra* note 15.

²¹ On appeal, appellant indicated that he was challenging a November 4, 2013 decision. The record contains correspondence from OWCP dated November 4, 2013 noting that appellant questioned the length of time it was taking to schedule him for a medical examination regarding his bowel and left leg. OWCP advised appellant to follow his appeal rights accompanying the October 21, 2013 letter. The letter did not identify itself as a final decision or provide findings of fact and a statement of reasons as required for a decision under OWCP regulations. *See* 20 C.F.R. § 10.126. As OWCP's letter dated November 4, 2013 is informational in nature rather than a final decision with appeal rights, it is not appealable to the Board. *See* 20 C.F.R. § 501.2(c).

²² Appellant asserted on appeal that he was appealing a November 15, 2012 decision. On November 15, 2012 OWCP advised him that it was expanding acceptance of his claim to include lumbar and thoracic sprain, limb pain, an unspecified colon injury, displacement of a lumbar intervertebral disc without myelopathy and meningitis. As this does not constitute a final adverse decision of OWCP, it is not appealable to the Board. *See* 20 C.F.R. §§ 501.2(c) and 501.3(a).

reviewing final decisions of OWCP.²³ OWCP has not issued a final decision on these issues. Consequently, they are not before the Board on this appeal.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 21, 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: July 8, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²³ 20 C.F.R. § 501.2(c).