United States Department of Labor
Employees' Compensation Appeals Board

W.H., Appellant	)	
and	)	**Docket No. 15-1434**
	)	**Issued: December 3, 2015**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, OFC-Los Angeles, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 19, 2015 appellant filed a timely appeal from a June 3, 2015 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 the case.

ISSUE

The issue is whether appellant has established that his accepted condition has reached maximum medical improvement thereby entitling him to payment of a schedule award.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated February 3, 2015, the Board affirmed OWCP's April 29, 2014 decision finding that OWCP had not abused its

[1] 5 U.S.C. § 8101 *et seq.*

discretion in denying appellant's request for reimbursement of travel expenses.[2] On August 14, 2015 the Board issued an order dismissing appeal as there was no final adverse decision of OWCP over which it had jurisdiction.[3] The facts as presented in the previous Board decisions are incorporated herein by reference.

On March 27, 2000 appellant, then a 50-year-old senior customs inspector, filed a (Form CA-2) occupational disease claim for exposure to different irritants during his assignments in Ismail, Ukraine; Los Angeles International Airport; and Ontario International Airport. He first became aware of his condition in October 1992 and realized that it was caused or aggravated by his employment on August 21, 1999. OWCP accepted appellant's claim for precipitation of extrinsic asthma and restrictive airways disease, aggravation of diabetes mellitus without complication, Type 2, aggravation of hypertension, obstructive sleep apnea, bilateral carpal tunnel syndrome, bilateral polyneuropathy secondary to diabetes, and left ulnar mononeuritis.[4]

On October 22, 2014 appellant filed claim for an increased schedule award (Form CA-7).[5] He advised, in an October 22, 2014 letter, that the schedule award claim was for his erectile dysfunction, a natural consequence of his accepted claim for bilateral polyneuropathy secondary to diabetes.

Regarding this condition, OWCP received a July 30, 2013 report from Dr. Edmund Ko, an urologist, who noted that appellant was seen for a history of erectile difficulty. Dr. Ko noted that appellant was not interested in treatment of erectile dysfunction, but was looking for diagnostic proof of the condition. He concluded that the type of diagnostic testing appellant was seeking was not offered by his office.

OWCP also received a September 6, 2013 report from Dr. Gautam Ganguly, a Board certified neurologist, who related that appellant sought advice as to where he could undergo electromyography and nerve conduction testing for erectile dysfunction. Dr. Ganguly noted a number of diagnoses, including erectile dysfunction.

In a January 14, 2014 report, Dr. Irwin Goldstein, a Board-certified urologist, noted appellant's multiple medical conditions and noted that he was seen that day to establish a diagnosis for the nature of his erectile dysfunction. He noted various options available for appellant to use to achieve an erection and addressed several medical concerns. Dr. Goldstein related various treatment strategies, but noted that appellant was not interested in treatment for his suspected medical conditions of hypogonadism or hypothyroidism or in seeking treatment of his erectile dysfunction. He reported that appellant's sexual function was zero percent of previous capabilities. Dr. Goldstein opined that appellant's erectile dysfunction was causally related to his federal employment as diabetic complications of neuropathy and microvascular

[2] Docket No. 14-1662 (issued February 3, 2015).

[3] Docket No. 15-0692 (issued August 14, 2015).

[4] Appellant also has an accepted hearing loss claim under master file number xxxxxx532.

[5] By decision dated October 30, 2012, appellant received a schedule award for six percent right upper extremity impairment and nine percent left upper extremity impairment.

disease. He noted results of quantitative sensory testing and duplex Doppler ultrasonography performed during pharmacologic erection. Dr. Goldstein further opined that, according to the criteria for rating permanent impairment due to penile disease, appellant was class 3 grade B rating.

On March 12, 2014 OWCP referred the case file to its medical adviser for an opinion on whether the medical evidence was sufficient to establish that appellant developed erectile dysfunction as a consequence of his work-related diabetes. In a May 30, 2014 report, Dr. Anthony Cerone, an osteopath and an urologist, noted the history of injury and reviewed the medical reports of record pertinent to appellant's erectile dysfunction. He opined that appellant's erectile dysfunction, as evidenced by neurologic and vascular erectile function testing abnormalities, appeared to be related to the diabetic complications of neuropathy and microvascular disease. While other risk factors were contributory, Dr. Goldstein indicated that it was not possible to determine what percentage of appellant's erectile dysfunction was caused by each of those risk factors.

On February 11, 2015 OWCP expanded appellant's claim to include acceptance of erectile dysfunction as work related. On February 11, 2015 it referred his case file to an OWCP medical adviser for an opinion regarding permanent functional loss of use of the penis and date of maximum medical improvement.

In a May 21, 2015 report, Dr. Isaac Koziol, an urologist and OWCP medical adviser, reviewed appellant's medical records. Dr. Koziol reported that appellant's erectile dysfunction was complete and that he takes oral medications for it. He noted that on appellant's last visit with Dr. Goldstein on January 15, 2014 penile revascularization surgery was offered. Dr. Koziol reported that erectile dysfunction from diabetes was not a static disease process. He opined that appellant had not reached maximum medical improvement at the time of his visit and that he was focused on a diagnosis and noted that options such as therapy, surgery, continued trials of injection therapy, or even a possible penile prosthesis were suggested. Dr. Koziol noted that maximum medical improvement would be obtained if and when appellant could achieve adequate erections for sexual function with whatever method of treatment that he pursued.

By decision dated June 3, 2015, OWCP denied appellant's schedule award claim. It found that he had not established that his accepted erectile dysfunction condition had reached maximum medical improvement.

LEGAL PRECEDENT

Section 8107(c)(22) of FECA[6] provides for the payment of compensation for permanent loss of any important external or internal organ of the body as determined by the Secretary of Labor, and pursuant to this authority the Secretary of Labor has added the breast, kidney, larynx, lung, penis, testicle, ovary, uterus, and tongue to the schedule.[7]

[6] 5 U.S.C. 8107(c)(22).

[7] *See Henry B. Floyd, III,* 52 ECAB 220 (2001).

The schedule award provision of FECA[8] and its implementing regulations 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. 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 sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) has been adopted by OWCP for evaluating schedule losses and the Board has concurred in such adoption.[9] The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.[10]

The A.M.A., *Guides*[11] explain that impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized. The Board has further stated that it is understood that an individual's condition is dynamic. Maximum medical improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once an impairment has reached maximum medical improvement, a permanent impairment rating may be performed.[12]

ANALYSIS

OWCP has accepted that appellant has sustained a number of medical conditions in the course of his federal employment, including erectile dysfunction. By decision dated June 3, 2015, it denied his claim for a schedule award for this condition because the medical evidence did not establish that his accepted erectile dysfunction condition had reached maximum medical improvement. The Board finds that appellant has not reached maximum medical improvement, and thus, he is not entitled to a schedule award.

Before a schedule award can be awarded, it must be medically determined that no further improvement can be anticipated and the impairment had reached a fixed and permanent state, which is known as maximum medical improvement.[13] The determination of the date of maximum medical improvement is factual in nature and depends primarily on the medical evidence.[14] The date of maximum medical improvement is usually considered to be the date of

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[8] 5 U.S.C. § 8107.

[9] *See* 20 C.F.R. § 10.404; *Bernard A. Babcock, Jr.,* 52 ECAB 143 (2000).

[10] *Veronica Williams*, 56 ECAB 367, 370 (2005).

[11] A.M.A., *Guides* (6th ed. 2009).

[12] A.M.A., *Guides*, Table 2-1 at page 20 (6th ed. 2009); *see also Orlando Vivens*, 42 ECAB 303 (1991) (a schedule award is not payable until maximum medical improvement -- meaning that the physical condition of the injured member of the body has stabilized and will not improve further -- has been reached).

[13] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3a(1) (January 2010); *see also P.L.*, Docket No. 13-1340 (issued October 28, 2013).

[14] *J.B.*, Docket No. 11-1469 (issued February 14, 2012); *Franklin L. Armfield*, 28 ECAB 445 (1977).

the evaluation accepted as definitive by OWCP.[15] While additional medical treatment such as surgery may be recommended in order to improve the claimant's condition, the claimant is not required to undergo such treatment.[16] OWCP must calculate the percentage of a schedule award as if no further improvement were possible if the claimant declined such intervention.[17]

The reports from Dr. Ko dated July 30, 2013 and Dr. Ganguly dated September 6, 2013 noted that appellant was seeking a medical opinion regarding the cause of his erectile dysfunction condition, but was not seeking medical treatment at that time. These reports offered no discussion regarding the degree of permanent impairment or whether appellant had reached maximum medical improvement.

Similarly, the report from Dr. Cerone, dated May 30, 2014, diagnosed erectile dysfunction causally related to appellant's employment, but offered no opinion regarding the degree of impairment or whether appellant had reached maximum medical improvement.

In his January 14, 2015 report, Dr. Goldstein noted various treatment options available for appellant. While he opined that, according to the criteria for rating permanent impairment due to penile disease, appellant was class 3 grade B, he did not provide discussion as to how appellant's impairment was rated, and he did not provide an opinion as to whether appellant was at maximum medical improvement.[18]

Dr. Koziol, OWCP's medical adviser, reported on May 21, 2015 that appellant's erectile dysfunction was currently complete, but that it was not a static disease process. He opined that appellant had not reached maximum medical improvement. While appellant may be granted a schedule award for an untreated condition, the evidence of record must establish a permanent impairment rating pursuant to the A.M.A., *Guides*, and the evidence must establish that appellant had reached maximum medical improvement.[19] He had not met his burden of proof to establish entitlement to a schedule award because he has established neither.

On appeal appellant contends that since OWCP's medical adviser noted that his erectile dysfunction was complete, maximum medical improvement was obtained. He argued that case law supports his positon that his erectile dysfunction had reached maximum medical improvement as the condition has continued for a lengthy period and appeared to be of lasting or indefinite duration. Appellant also contends that OWCP's reliance on its medical adviser's opinion was misplaced and that he should be sent for a second opinion evaluation. However, the issue of whether his erectile dysfunction has stabilized is a medical determination and the current

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[15] *Supra* note 13.

[16] *O.N.*, Docket No. 14-1744 (issued July 13, 2015).

[17] *Id*.

[18] *Renee M. Straubinger*, 51 ECAB 667, 669 (2000) (the Board found that, when providing an impairment rating, a physician must provide a description of a claimant's impairment in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment and its resulting restrictions and limitations).

[19] *Supra* note 16.

medical evidence of record is devoid of such an opinion. As such, appellant has not met his burden of proof in this case.

CONCLUSION

The Board finds that appellant has not established that his accepted condition has reached maximum medical improvement, thereby entitling him to payment of a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the June 3, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 3, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board