

ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment to her senses of smell and taste, sufficient to warrant a schedule award.

FACTUAL HISTORY

On March 12, 2013 appellant, then a 53-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on that date she struck the back of her head when she slipped on an icy walkway at her work location. OWCP accepted the claim for disturbances of the sensation of smell and taste and a concussion that resolved by April 30, 2013.

In an impairment evaluation dated October 6, 2014, Dr. Matthew T. Lister, a Board-certified otolaryngologist, advised that appellant had “a permanent impairment of her sense of smell which is complete and bilateral with associated taste impairment as a result of a fall at work on March 12, 2013.” He opined that striking her head during her fall probably damaged “olfactory fibers at the skull base, which is a known mechanism of smell loss during trauma.” Dr. Lister noted that diagnostic testing had eliminated alternative causes. Citing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), he found that appellant had five percent permanent impairment of bilateral olfactory loss.

On October 21, 2014 appellant filed a claim for a schedule award (Form CA-7). OWCP requested that she submit an evaluation from her attending physician using the A.M.A., *Guides* supporting the alleged permanent impairment due to her accepted employment injury. No further response was received.

By decision dated December 29, 2014, OWCP denied appellant’s claim for a schedule award as the evidence of record failed to establish permanent impairment of a scheduled member or function.

On January 15, 2015 appellant requested a review of the written record by an OWCP hearing representative. In a decision dated June 16, 2015, the hearing representative affirmed the December 29, 2014 decision. She found that FECA did not provide a schedule award for an impairment of smell or taste.

On appeal appellant asserts that because of her loss of smell she cannot detect smoke, fumes, or tainted food. She requests that her case remain open for potential future medical treatment.

LEGAL PRECEDENT

The schedule award provision of FECA,⁴ and its implementing federal regulation,⁵ set forth the number of weeks of compensation payable to employees sustaining permanent

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

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 to be 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 FECA identifies members such as the arm, leg, hand, foot, thumb, finger, and toes. It also specifies loss of hearing and vision, the loss of an eye, and serious disfigurement of the face, head, or neck.⁹ Section 8107(c)(22) of FECA provides for the payment of compensation for permanent loss of any other important external or internal organ of the body as determined by the Secretary of Labor.¹⁰ 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, tongue, ovary, uterus/cervix, vulva/vagina, and skin to the compensation schedule.¹¹ There is no statutory basis for payment of a schedule award for impairment to taste or smell under FECA or in the regulations.¹²

ANALYSIS

OWCP accepted that appellant sustained a concussion and a disturbance of the sensations of taste and smell due to a March 12, 2013 work injury. Appellant filed a claim for a schedule award. In support of her claim, she submitted an impairment evaluation dated October 6, 2014 from Dr. Lister. The physician opined that she had a complete loss of smell and a related impairment of taste as a result of her March 12, 2013 employment injury. Dr. Lister determined that appellant had five percent impairment due to olfactory loss bilaterally.

As discussed, a schedule award is only payable for a member, function, or organ of the body not specified in FECA or in the implementing regulations.¹³ FECA identifies as specified members the arm, leg, hand, foot, thumb, and finger, organs to include the eye, and the functions of loss of hearing and loss of vision.¹⁴ Section 8107(c)(22) of FECA provides for the payment of

⁶ *Id.* at § 10.404(a).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁸ *See J.W.*, 59 ECAB 308 (2008); *Paul A. Zoltek*, 56 ECAB 325 (2005).

⁹ 5 U.S.C. § 8107.

¹⁰ *Id.* at § 8107(c)(22).

¹¹ 20 C.F.R. § 10.404; *Henry B. Ford, III*, 52 ECAB 220 (2001).

¹² *See Leroy M. Terska*, 53 ECAB 274 (2001).

¹³ *Id.*

¹⁴ 5 U.S.C. § 8107(c).

compensation for permanent loss of “any other important external or internal organ of the body as determined by the Secretary of Labor.”¹⁵ The Secretary of Labor, pursuant to the authority granted in section 8107(c)(22), added the breast, kidney, larynx, lung, penis, testicle, ovary, uterus, skin, and tongue to the schedule.¹⁶ While the tongue is listed as a scheduled member, there is no evidence that appellant has any loss of use of the tongue, only a loss of sensation.¹⁷ As the Secretary has not determined, pursuant to the discretionary authority granted in section 8107(c)(22) of FECA, that the sense of smell or taste constitutes another important external or internal organ of the body, there is no statutory basis for the payment of a schedule award for these impairments.¹⁸ FECA does not allow OWCP to add organs or functions to the compensation scheduled on a case-by-case basis, nor does the Board have the power to enlarge the provisions of either statute or regulation.¹⁹ OWCP consequently, properly denied appellant’s claim for a schedule award for the loss of taste and smell.²⁰

On appeal appellant argues that her loss of smell has impacted her safety as she cannot detect smoke, fumes, or spoiled food. As discussed, however, there is no authority under FECA or the implementing regulations for granting a schedule award for the loss of smell, and the Board has no power to enlarge the provisions of the statute or regulations.²¹

Appellant additionally requests that her case remain open for possible future medical care. The Board’s jurisdiction, however, is limited to reviewing final adverse decisions of OWCP.²²

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish permanent impairment of her senses of smell and taste sufficient to warrant a schedule award.

¹⁵ *Id.* at § 8107(c)(22).

¹⁶ *Supra* note 11.

¹⁷ *See W.B.*, Docket No. 08-14 (issued April 15, 2008).

¹⁸ *See Leroy M. Terska*, *supra* note 12.

¹⁹ *See Janet C. Anderson*, 54 ECAB 394 (2003).

²⁰ *See W.B.*, *supra* note 17; *Leroy M. Terska*, *supra* note 12.

²¹ *See B.C.*, Docket No. 13-1855 (issued July 22, 2014).

²² 20 C.F.R. §§ 501.2(c) and 501.3(a).

ORDER

IT IS HEREBY ORDERED THAT the June 16, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 8, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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