

ISSUES

The issues are: (1) whether appellant has more than seven percent permanent impairment of his right testicle, for which he received a schedule award; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 16, 2014 appellant, then a 23-year-old mail handler assistant, filed a traumatic injury claim (Form CA-1) for a right groin strain that allegedly occurred earlier that same day while pulling an all-purpose container at work. On August 16, 2014 he was diagnosed with testicular torsion and he underwent a right simple orchiectomy and left orchiopexy. On January 22, 2015 OWCP accepted appellant's traumatic injury claim for right testicular torsion. It also retroactively authorized his August 16, 2014 surgery.

Appellant submitted medical reports relating to his August 16, 2014 surgery and on April 29, 2015 he filed a claim for compensation (Form CA-7) claiming a schedule award due to his accepted employment injury.

In a March 10, 2016 decision, OWCP denied appellant's schedule award claim because he had not submitted sufficient medical evidence to establish permanent impairment under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*).

Appellant requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review. Prior to the hearing, OWCP's hearing representative set aside OWCP's March 10, 2016 decision and remanded the case to OWCP for further development, to be followed by issuance of an appropriate decision. He indicated that, despite the acceptance of appellant's claim, further development was needed regarding whether the right testicular torsion and the need for the August 16, 2014 orchiectomy were related to the August 16, 2014 employment incident. The hearing representative noted that the case should be referred to an appropriate medical specialist to consider whether appellant's testicle condition and surgery were work related and, if so, to provide an impairment rating under the sixth edition of the A.M.A., *Guides*.³

In November 2016 OWCP referred appellant to Dr. Mark Ehrenpreis, a Board-certified urologist, for a second opinion examination and opinion on appellant's work-related conditions and permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*.

³ The hearing representative indicated that, if the referral physician finds that the testicle condition and surgery were not work related, OWCP should issue a proposed notice of rescission for the accepted condition of right testicular torsion. He further noted that, if the physician finds a work-related connection and produces an impairment rating calculation, the case should be referred to an OWCP medical adviser for review of the impairment rating calculation.

In a November 30, 2016 report, Dr. Ehrenpreis indicated that his physical examination showed an absent right testicle and a palpably normal left testicle. There was no hernia and the abdomen was soft with no palpable hepatosplenomegaly or masses. Dr. Ehrenpreis found that appellant's right testicular torsion and the need for the August 16, 2014 orchiectomy were related to the August 16, 2014 employment incident. He noted that appellant was back to baseline status without any disability from work and advised that he did not require treatment. Dr. Ehrenpreis opined that, due to the absence of the right testicle, appellant had 15 percent whole person impairment (class 3) based on Table 7-8 (Criteria for Rating Impairment due to Testicular, Epididymal, and Spermatic Cord Disease) on page 147 of the sixth edition of the A.M.A., *Guides*.

In January 2017 OWCP referred the case to Dr. David I. Krohn, a Board-certified internist serving as an OWCP medical adviser, and requested that he review the evidence of record and provide an opinion regarding appellant's permanent impairment under the sixth edition of the A.M.A., *Guides*.

In an undated report received on February 7, 2017, Dr. Krohn determined that appellant had seven percent whole person permanent impairment with regard to his accepted right testicle injury. He indicated that, under Table 7-8, appellant's absent right testicle fell under a class 2 impairment for "[p]ersistent anatomic alteration or physical signs referable to testes...." which correlated with the default value of nine percent whole person impairment. Dr. Krohn noted that, given the absence of symptoms relative to the testes, the grade modifier for history under Table 7-8 fell was class 1, and that this finding required movement one space to the left of the class 2 default value, *i.e.*, to seven percent whole person impairment. He advised that Dr. Ehrenpreis assigned a class 3 or 15 percent whole person impairment "due to the absence of the right testicle," but noted that he felt that a class 3 impairment required bilateral anatomic loss of the testes. However, appellant had only one absent testicle and, therefore, class 2 impairment was indicated. Dr. Krohn advised that appellant reached maximum medical improvement on November 30, 2016.

In a March 21, 2017 decision, OWCP granted appellant a schedule award for seven percent permanent impairment of his right testicle. The award ran for 3.64 weeks (7 percent of 52 weeks) and was based on the opinion of Dr. Krohn who reviewed the findings of Dr. Ehrenpreis.

On March 30, 2017 counsel, on behalf of appellant, requested reconsideration of OWCP's March 21, 2017 decision. He argued that Dr. Ehrenpreis properly applied the A.M.A., *Guides* to find that appellant had 15 percent permanent impairment of his whole person, but that Dr. Krohn improperly lowered the rating to 7 percent permanent impairment of his whole person. He asserted the correct decision would be to give appellant a schedule award for 100 percent permanent impairment of his right testicle, which would provide for payment of 52 weeks of compensation.

With respect to the pay rate of the schedule award, counsel generally noted that appellant was making \$566.87 per week as a mail handler assistant, but he asserted that OWCP should set a pay rate of \$1,000.00 per week since he would have received that amount when he became a

mail handler.⁴ He argued his belief that such a young person as appellant should not be punished after suffering a catastrophic accident.

In an April 5, 2017 decision, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). It found that he failed to submit any new and relevant evidence or legal argument.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of the FECA⁵ and its implementing regulation⁶ 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. The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁷

Section 10.404(b) of OWCP's regulations provides that, for the complete loss of one testicle, a claimant is entitled to 52 weeks of compensation.⁸

OWCP's procedures note that, in addition to the loss of use, the statute compensates for loss of an organ.⁹ The procedures provide that, if there is total loss of a single paired organ (such as a kidney, breast, testicle, or ovary), the schedule award is generally based on the loss of the organ. In this situation, it is immaterial whether the remaining organ compensates functionally for the loss.¹⁰

⁴ Counsel provided no citation to support his claim for a pay rate of \$1,000.00 per week. The Board finds the assertion fully without merit.

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

⁸ 20 C.F.R. § 10.404(b). See also *S.G.*, Docket No. 15-1531 (issued August 10, 2016). In *S.G.*, OWCP initially granted the claimant a schedule award for 60 percent permanent impairment of his right testicle due to an accepted work-related condition, but it did not grant him additional compensation after his right testicle was surgically removed due to the same condition. The Board found that, due to the claimant's complete and total surgical loss of his right testicle, he was entitled to schedule award compensation for 100 percent loss of his right testicle.

⁹ See *supra* note 7, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4d(2)(c) (January 2010).

¹⁰ *Id.*

ANALYSIS -- ISSUE 1

The Board finds that appellant has 100 percent permanent impairment of his right testicle. He is entitled to 48.36 weeks of additional schedule award compensation.

OWCP accepted appellant's claim for right testicular torsion. On August 16, 2014 appellant underwent a right simple orchiectomy and left orchiopexy, a procedure which included a complete and total removal of the right testicle.¹¹ By decision dated March 21, 2017, OWCP granted him a schedule award for seven percent permanent impairment of his right testicle based on the opinion of Dr. Krohn, an OWCP medical adviser. The award ran for 3.64 weeks (7 percent of 52 weeks).

Dr. Krohn had reviewed the November 30, 2016 report of Dr. Ehrenpreis, an OWCP referral physician. Applying the findings from Dr. Ehrenpreis' November 30, 2016 report to the standards of Table 7-8, page 147 of the A.M.A., *Guides*, he determined that appellant had seven percent permanent impairment of the whole person with regard to his accepted right testicle injury.¹²

The Board notes that appellant's right testicle was surgically removed due to a work-related condition and it cannot be argued that he retains any use of that organ. As noted above, OWCP's regulations provide that, for the complete loss of one testicle, a claimant is entitled to 100 percent loss of 52 weeks of compensation.¹³ In addition, OWCP's procedures provide that, if there is total loss of a single paired organ (such as a testicle), the schedule award is generally based on the loss of the organ and, in this situation, it is immaterial whether the remaining organ compensates functionally for the loss.¹⁴ Therefore, it was inappropriate to apply a provision of the A.M.A., *Guides*, Table 7-8 in the present case,¹⁵ which evaluates partial loss of function of the testicles.¹⁶

For these reasons, appellant's complete loss of his right testicle due to a work-related condition entitles him to receive 52 weeks of compensation. Accordingly, the Board finds that appellant is entitled to 48.36 weeks of additional schedule award compensation (52 weeks

¹¹ The procedure was later approved by OWCP as necessitated by the accepted condition.

¹² Dr. Ehrenpreis had calculated 15 percent whole person impairment under Table 7-8. OWCP medical adviser's lower impairment rating was attributable to his finding that appellant's testicular condition fell under class 2 on Table 7-8, rather than class 3 as determined by Dr. Ehrenpreis. See A.M.A., *Guides* 147, Table 7-8.

¹³ See *supra* note 8.

¹⁴ See *supra* notes 9 and 10.

¹⁵ A.M.A., *Guides* 147, Table 7-8. When there is partial loss of testicular, epididymal, or spermatic cord function and it is appropriate to apply Table 7-8, the whole person impairment derived from this table is converted to a rating for permanent impairment of the testicle under a formula found in OWCP's procedures. See *supra* note 7, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4d(2)(a), (b) (January 2010). See also *A.H.*, Docket No. 16-1537 (issued February 7, 2017).

¹⁶ See generally *S.G.*, *supra* note 8.

maximum compensation minus 3.64 weeks previously awarded). The Board will set aside OWCP's March 21, 2017 decision and remand the case for an additional schedule award of 93 percent permanent impairment of the right testicle.¹⁷

CONCLUSION

The Board finds that appellant has 100 percent permanent impairment of his right testicle. Appellant is entitled to 48.36 weeks of additional schedule award compensation.

ORDER

IT IS HEREBY ORDERED THAT the March 21, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: September 12, 2017
Washington, DC

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

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

¹⁷ Given the Board's finding regarding the merit issue of the present case, it is not necessary to consider the nonmerit issue of the case.