

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

_____)	
T.L., Appellant)	
)	
and)	Docket No. 17-1854
)	Issued: March 20, 2018
SOCIAL SECURITY ADMINISTRATION,)	
Glendale, AZ, Employer)	
_____)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 31, 2017 appellant, through counsel, filed a timely appeal from an August 1, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has established that she has more than seven percent permanent impairment of her right eye, for which she previously received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances of the case as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

OWCP accepted that on or before February 13, 2001 appellant, then a 39-year-old social insurance specialist claims representative, performed repetitive keypunching, typing, and writing, which caused bilateral carpal tunnel syndrome, bilateral lateral epicondylitis, bilateral median nerve neuritis, right wrist tenosynovitis, and a right shoulder condition.⁴ Appellant underwent a series of eight corticosteroid injections to treat accepted bilateral carpal tunnel syndrome.

Following multiple authorized upper extremity surgeries, appellant returned to full-time limited duty in July 2008 and to full duty on September 2008. She retired from federal employment effective November 30, 2010. Appellant was then employed in the private sector.

On March 27, 2013 Dr. Timothy Cavanaugh, an attending Board-certified ophthalmologist, performed phacoemulsification with posterior chamber intraocular lens implantation in the right eye on March 27, 2013, and in the left eye on April 10, 2013.

In a May 8, 2013 report, Dr. Cynthia Burlingame, an attending optometrist, opined that appellant's posterior subpolar cataracts were likely due to steroid use related to the accepted upper extremity injuries.

In an August 15, 2013 report, Dr. Burlingame opined that appellant's right cataract was believed to have resulted from corticosteroid injections administered for the accepted bilateral carpal tunnel syndrome. She opined that appellant's left cataract was due to normal aging.

On August 21, 2013 Dr. Cavanaugh performed an yttrium aluminum garnet (YAG) laser capsulotomy for the left eye.

On December 18, 2014 OWCP expanded acceptance of the claim to include a right ocular cataract.⁵

³ Docket No. 11-0527 (issued April 9, 2012).

⁴ As the issue on appeal pertains only to appellant's right eye, the Board will limit its discussion of the evidence to the relevant medical evidence of record.

⁵ OWCP initially denied the claim by April 4, 2014 decision as causal relationship was not established. Pursuant to counsel's April 8, 2014 request for a telephonic hearing before an OWCP hearing representative, OWCP's hearing representative issued a September 25, 2014 decision which remanded the claim for additional development. Following additional development, OWCP expanded the claim to accept a right cataract on December 18, 2014.

On March 20, 2015 appellant claimed a schedule award (Form CA-7) for permanent visual impairment caused by the accepted right cataract.

In support of her claim, appellant submitted an August 8, 2015 report from Dr. Neal Eylar, an attending optometrist. On examination, Dr. Eylar found unaided distance acuities of 20/30 in both eyes, and binocular unaided distance acuity of 20/25. He found near unaided acuities of 20/100 in both eyes and with both eyes at a 16 centimeter (cm) viewing distance. With corrective lenses, appellant attained 20/20 vision in each eye. He opined that according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*),⁶ Table 12-2,⁷ appellant had a visual acuity score (VAS) of 90 for the left eye, 90 for the right eye, and 95 binocularly. Dr. Eylar referred to Table 12-3⁸ to calculate the functional acuity score (FAS). He multiplied the right eye VAS, or 90, by one, to equal 90. Dr. Eylar then multiplied the left eye VAS, also 90, by one to equal 90. The binocular VAS was multiplied by 3 to equal 285. Dr. Eylar then added the sum of each VAS (90 + 90 + 285) to equal 465, which was divided by 5 to attain the final FAS of 93. The FAS of 93 was then subtracted from 100 to result in seven percent permanent impairment of the right eye. Utilizing Table 12-11,⁹ Dr. Eylar found a reading impairment score of 35 based on the right eye, left eye, and binocular measurements at 16 cm. He explained that the discrepancy between appellant's distance impairment of 7 and near impairment of 35 was attributable to a loss of near-focus ability that occurred after cataract surgery. Based on these calculations, Dr. Eylar found 7 percent permanent impairment rating of the right eye at a distance and a near impairment rating of 35 percent due to the posterior subcapsular polar cataract. He noted that these ratings were considered permanent.

In an April 21, 2016 report, an OWCP medical adviser reviewed the medical record. He opined that appellant had a zero percent loss of vision as she had no measurable visual impairment. The medical adviser noted that vision testing confirmed that appellant had 20/20 corrected near vision in both eyes. He explained that, according to the A.M.A., *Guides*, all acuity measurements must be based on the best corrected vision values. Instead, Dr. Eylar had incorrectly based his impairment rating on appellant's uncorrected vision.

By decision dated April 25, 2016, OWCP denied appellant's schedule award claim as the measurements obtained by Dr. Eylar, as reviewed by OWCP's medical adviser, demonstrated that appellant had no loss of vision. Therefore, appellant had no ratable impairment of the right eye due to the accepted right cataract.

Pursuant to counsel's request for a telephonic hearing before an OWCP hearing representative, by decision dated November 30, 2016, an OWCP hearing representative found that the case was not in posture for decision. The hearing representative found that although the

⁶ A.M.A., *Guides* (6th ed. 2009).

⁷ Table 12-2, page 288 of the sixth edition of the A.M.A., *Guides* is titled "Impairment of Visual Acuity."

⁸ Table 12-3, page 289 of the sixth edition of the A.M.A., *Guides* is titled "Calculation of the Acuity-Related Impairment Rating."

⁹ Table 12-11, page 310 of the sixth edition of the A.M.A., *Guides* is titled "Determination of Reading Acuity and Impairment Rating, Using Letter Size and Viewing Distance."

A.M.A., *Guides* provided that impairment ratings were to be based on best corrected visual acuity, section 8107(c)(19) of FECA¹⁰ provided that the degree of vision loss was to be determined without regard to correction. The hearing representative remanded the claim for referral to OWCP's medical adviser to obtain the appropriate percentage of permanent impairment based on appellant's uncorrected vision. OWCP was then to issue a *de novo* decision.

On remand of the case, an OWCP medical adviser submitted a December 23, 2016 report assessing seven percent permanent impairment of the right eye. He affirmed Dr. Eylar's methodology and calculations. The medical adviser also noted that appellant had attained maximum medical improvement.

By decision dated December 28, 2016, OWCP granted appellant a schedule award for seven percent permanent impairment of the right eye. The period of the award ran from October 28, 2013 to January 14, 2014. Although the decision acknowledged that appellant had a reading impairment score of 35, it noted erroneously that the impairment rating was based on a "best" corrected vision score.

In a January 6, 2017 letter, appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, held June 22, 2017. At the hearing, counsel argued that appellant sustained 100 percent permanent impairment of the right eye, as the posterior chamber intraocular lens Dr. Cavanaugh implanted during the March 27, 2013 surgery constituted a corrective device. Counsel contended that in the absence of the artificial lens implant, appellant would have 100 percent permanent impairment of the right eye. Following the hearing, he submitted medical literature indicating that cataract removal surgery entailed replacing the natural lens with an artificial lens implant.

By decision dated August 1, 2017, an OWCP hearing representative affirmed the December 28, 2016 decision, finding that OWCP's medical adviser properly applied the appropriate portions of the A.M.A., *Guides* to the visual acuity measurements obtained by Dr. Eylar.

LEGAL PRECEDENT

It is the claimant's burden of proof to establish that he or she sustained permanent impairment of a scheduled member or function as a result of any employment injury.¹¹

The schedule award provision of FECA¹² and its implementing federal regulations¹³ 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

¹⁰ 5 U.S.C. § 8107(19).

¹¹ See *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹² 5 U.S.C. § 8107.

¹³ 20 C.F.R. § 10.404.

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.¹⁴ For decisions issued after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹⁵

Section 8107(c)(19) of FECA provides that “[t]he degree of loss of vision or hearing under this schedule is determined without regard to correction.”¹⁶ The sixth edition of the A.M.A., *Guides* indicates that the evaluation of visual impairment is based on the functional vision score (FVS), which is the combination of an assessment of visual acuity, the ability of the eye to perceive details, necessary for activities such as reading and an assessment of visual field, the ability of the eye to detect objects in the periphery of the visual environment, which relates to orientation and mobility.¹⁷ The A.M.A., *Guides* also allows for individual adjustments for other functional deficits, such as contrast and glare sensitivity, color vision defects and binocularity, stereopsis, suppression and diplopia, only if these deficits are not reflected in a visual acuity or visual field loss.¹⁸ The A.M.A., *Guides*, however, specifically limits adjustment of the impairment rating for these deficits to cases which are well documented and provides, “The adjustment should be limited to an increase in the impairment rating of the visual system (reduction of the FVS) by, at most, 15 points.”¹⁹

ANALYSIS

OWCP accepted that appellant sustained a right cataract caused by corticosteroid injections used to treat accepted bilateral carpal tunnel syndrome. Appellant claimed a schedule award on March 20, 2015.

The Board finds that appellant has not established more than seven percent permanent impairment of the right eye.

In support of her claim, appellant provided an August 8, 2015 report from Dr. Eylar, an attending optometrist, who found seven percent permanent impairment of the right eye, based upon her uncorrected vision. Dr. Eylar provided detailed measurements from his clinical examination, and applied Table 12-2, Table 12-3, and Table 12-11 of the A.M.A., *Guides* to find a VAS of 90 for the left eye, 90 for the right eye, and 95 binocularly. To obtain the FAS, he multiplied the right eye VAS of 90, by one, to equal 90, multiplied the left eye VAS of 90 by one to equal 90. Dr. Eylar multiplied the binocular VAS by 3 to equal 285. He then added the sum of each VAS (90 + 90 +

¹⁴ *Id.* at § 10.404(a).

¹⁵ 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).

¹⁶ 5 U.S.C. § 8107(c)(19).

¹⁷ *Supra* note 6 at 282, 285.

¹⁸ *Id.* at 305.

¹⁹ *Id.*

285) to equal 465, which was divided by 5 to attain the final FAS of 93. Subtracting the FAS of 93 from 100 resulted in 7 percent permanent impairment of the right eye.

An OWCP medical adviser affirmed Dr. Eylar's calculations on December 23, 2016. OWCP then issued a December 28, 2016 schedule award for seven percent permanent impairment of the right eye, based on OWCP's medical adviser's review of Dr. Eylar's findings and calculations. Following a June 22, 2017 telephonic hearing, an OWCP hearing representative affirmed the schedule award by decision issued August 1, 2017.

The Board finds that Dr. Eylar applied the proper tables and grading schemes to his detailed clinical findings in his calculation of the schedule award. OWCP's medical adviser affirmed Dr. Eylar's methodology and mathematical calculations. The December 28, 2016 schedule award for seven percent permanent impairment of the right eye is therefore appropriate under the circumstances of this case.

On appeal counsel asserts that appellant had a complete loss of vision in the affected eye, based on "AG." As counsel did not provide a more detailed citation of authority, the Board cannot ascertain the matter to which he refers, nor the argument he intended to make.

Appellant may request a schedule award or increased schedule award at any time 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 established more than seven percent permanent impairment of the right eye, for which she previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 1, 2017 is affirmed.

Issued: March 20, 2018
Washington, DC

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

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

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