

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

R.A., Appellant)	
)	
and)	Docket No. 19-0098
)	Issued: January 24, 2020
U.S. POSTAL SERVICE, WALTHAM)	
CARRIER ANNEX, Waltham, MA, Employer)	
)	

Appearances:
William Bothwell, for the appellant¹
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 16, 2018 appellant, through his representative, filed a timely appeal from an August 22, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).²

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 Appellant timely requested oral argument before the Board. By order dated September 5, 2019, the Board exercised its discretion and denied the request as the matter could be adequately addressed based on a review of the case record. *Order Denying Oral Argument*, Docket No. 19-0098 (issued September 5, 2019).

Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

ISSUE

The issue is whether appellant has met his burden of proof to establish more than 88 percent permanent impairment of his eyes, for which he previously received schedule award compensation.

FACTUAL HISTORY

On January 21, 2010 appellant, then a 59-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 31, 2009 he slipped in the snow when delivering mail while in the performance of duty, fracturing two ribs and injuring his back. On February 1, 2010 OWCP accepted this claim for systemic inflammatory response syndrome due to infection with organ dysfunction/septic shock, early pneumonia, and closed fracture of two ribs.

In a January 28, 2010 discharge summary, Dr. Michael S. Rosenblatt, a Board-certified endocrinologist, described appellant's history of injury and medical treatment beginning on December 31, 2009. He noted that during appellant's hospitalization for left-sided fractures of the fourth and fifth ribs with no pneumothorax, he experienced an episode of decreased consciousness with emesis which resulted in respiratory compromise. Appellant required intubation, developed sepsis, and became hypotensive requiring maximum doses of vasopressors to tighten blood vessels and raise his blood pressure. He also developed acute renal injury and multi-organ failure due to hospital-acquired pneumonia. On January 7, 2010 appellant was weaned from the vasopressor agents, but had evidence of ischemic changes in his feet bilaterally secondary to his profound sepsis and resultant vasoconstriction secondary to multiple high-dose vasopressor agents. On January 11, 2010 appellant was again weaned from the ventilator and reported a foreign-body sensation in his right eye as well as lack of sight in his right eye and blurry vision in his left eye. He underwent a magnetic resonance imaging (MRI) scan which demonstrated dilation of the right superior ophthalmic vein. Dr. Rosenblatt opined that appellant's loss of vision was secondary to retinal ischemia from his "massive" vasopressor requirements. He further noted that some of the toes on appellant's right foot would require amputation.⁵ Dr. Rosenblatt diagnosed aspiration pneumonia, sepsis, toxic shock, respiratory failure requiring mechanical ventilation for 10 days, multi-organ failure, acute kidney injury, ischemia to the lower extremities, acute vision loss, and profound sepsis treated with vasopressor therapy.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that following the August 22, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

⁵ On February 23, 2010 appellant underwent open partial amputation at the proximal interphalangeal (PIP) joints of the right second through fifth toes due to irreversible necrosis.

In a March 11, 2010 report, Dr. Scott H. Greenstein, a Board-certified ophthalmologist, examined appellant due to his vision loss. He noted that appellant had experienced septic shock and required extensive vasopressors for life support. When he awoke from his coma, appellant had foreign-body sensation in the eyes and was found to have decreased vision. Dr. Greenstein noted that appellant's vision loss was thought to be related to retinal ischemia from the vasopressors. He found that appellant's visual acuity in the right eye was no light perception (NLP) with optic nerve pallor due to either ischemic optic neuropathy or central retinal artery occlusion. Dr. Greenstein determined that appellant had 20/25 distance vision in the left eye as well as a superior field defect and mild pallor likely secondary to nonarteritic ischemic optic neuropathy (NAION). He also found mild cataracts in both eyes.

OWCP paid appellant compensation on the periodic rolls as of April 12, 2010.⁶

On May 3 and 20, 2010 Dr. Mary Lou Jackson, a Board-certified ophthalmologist, noted appellant's history of vision loss in the right eye at the time of septic shock. She found that he had a superior field defect in the left eye possibly due to NAION and found that his visual acuity in the right eye had NLP with optic nerve pallor due to either ischemic optic neuropathy or central retinal artery occlusion. Dr. Jackson further found that appellant's left eye had visual acuity of 20/20. She performed a Humphreys Vision Field (HVF) test which demonstrated left superior loss in vision field as well as depression in the inferior field.

On August 4, 2010 Dr. Lucy Qing Shen, a Board-certified ophthalmologist, found that appellant had no visual field in the right eye and significant loss of the superior visual field in the left eye. She reported that findings in the left eye were consistent with optic neuropathy.

On March 16, 2011 Dr. Greenstein performed a HVF test which continued to reveal NLP in the right eye and severe vision field loss in the left eye. Appellant continued to seek treatment from Dr. Greenstein through May 12, 2016.

On May 18, 2017 Dr. Greenstein examined appellant due to his eye conditions. He reported that appellant had a history of optic atrophy greater in the right eye as a result of septic shock, cataracts in both eyes, and a small choroidal nevus in the right eye.

On August 2, 2017 appellant filed a schedule award claim (Form CA-7).

On August 9, 2017 OWCP expanded the acceptance of his claim to include the additional conditions of crushing injury of ankle and foot, crushing injury of toes,⁷ generalized anxiety disorder, optic neuritis, disorders of the circulatory system on the right, and visual field defect.

In an August 9, 2017 development letter, OWCP requested additional medical evidence in support of appellant's schedule award claim including a detailed narrative medical report regarding

⁶ On June 12, 2017 appellant elected to receive federal retirement benefits, rather than FECA benefits, effective June 1, 2017.

⁷ While OWCP undertook development of appellant's claim for permanent impairment due to amputation of his right toes, it has not issued a final decision on this issue and the Board will not address this issue on appeal. 20 C.F.R. § 501.3(c).

permanent impairment from his treating physician based upon a recent examination. It afforded appellant 30 days to respond.

In an October 26, 2017 note, Dr. Greenstein opined that appellant had reached MMI and that his vision remained unchanged with NLP in the right eye and 20/20 in the left eye. He diagnosed optic pallor right eye greater than the left, likely ischemic.

On January 26, 2018 OWCP referred appellant for a second opinion evaluation with Dr. David Eisenberg, a Board-certified ophthalmologist. On April 2, 2018 Dr. Eisenberg noted that appellant's right eye had NLP and that his left eye was 20/50 correctable to 20/30 in the straight-ahead position. He found that appellant's left eye had a total superior field loss and partial inferior field loss. Dr. Eisenberg noted that appellant was totally blind in his right eye and that he was partially blind in his left eye as the vision field was severely compromised. He diagnosed optic atrophy in both eyes related to septic shock with hypotension. Dr. Eisenberg concluded that appellant's conditions were permanent and that he had reached MMI. He diagnosed completely blind right eye, and a permanently completely absent superior half of the vision field in the left eye with some central sparing of vision along with a small amount of inferior field scattered defects. Dr. Eisenberg opined that under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment (A.M.A., Guides)*⁸ the permanent impairment for appellant's right eye was 100 percent and that the permanent impairment for his left eye was approximately 50 percent.

On May 29, 2018 Dr. Kevin Yuhan, a Board-certified ophthalmologist serving as a district medical adviser (DMA), noted that appellant's vision was NLP in the right eye and 20/50 in the left eye, correctable to 20/30 or 20/20. He noted that the visual field in the right eye was nonfunctional, while appellant's left eye had complete superior field loss and partial inferior field loss including loss of the temporal quadrant, with vision only in the inferonasal quadrant. Dr. Yuhan evaluated the permanent impairment of appellant's eyes under Table 12-2 on page 288 of the sixth edition of the A.M.A., *Guides*. The DMA advised that appellant's right eye had 100 percent permanent impairment or a visual acuity score (VAS) of 0 while his left eye had 20/50 vision and a VAS of 80. Utilizing Table 12-3 on page 289, he determined that appellant's functional acuity score (FAS) was 64. The DMA noted that the acuity-related impairment rating was calculated by subtracting the FAS from 100. Subtracting the FAS of 64 from 100, he concluded that appellant had 37 percent permanent impairment for loss of vision based on loss of visual acuity.

The DMA also reviewed appellant's visual fields, noting that in the right eye he had a score of 0 and an impairment of 100 percent in accordance with Table 12-5, page 296. He then found that appellant's left eye visual field score was 30 as the superior field was completely lost and the inferotemporal quadrant was also lost. The DMA determined appellant's functional field score (FFS) based on the visual fields for each eye individually, and also for the binocular plot, and reached 19, in accordance with page 303, section 12. He found that appellant's impairment due to visual field test was equal to 100 minus 19 or 81 percent binocular loss. The DMA then determined appellant's functional vision score (FVS) in accordance with page 304 of the A.M.A., *Guides*,

⁸ A.M.A., *Guides* (6th ed. 2009).

which he opined was equal to 88 percent permanent impairment of his visual system. On June 26, 2018 OWCP referred the DMA's report to Dr. Eisenberg for review. On April 2, 2018 Dr. Eisenberg responded and again noted that appellant was totally blind in the right eye, while his left eye had severely compromised vision fields. He repeated his findings that appellant had 100 percent permanent impairment of his right eye and 50 percent permanent impairment of his left eye.

By decision dated August 22, 2018, OWCP granted appellant a schedule award for 88 percent permanent impairment of his total visual field. The award ran for 140.8 weeks for the period June 25, 2017 to March 6, 2020.

LEGAL PRECEDENT

It is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of an employment injury.⁹

The schedule award provisions of FECA¹⁰ and its implementing regulations¹¹ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use of scheduled members, organs, or functions of the body.¹² For 100 percent loss of an eye, as with blindness, FECA provides a maximum 160 weeks of compensation.¹³ A loss of 80 percent or more of the vision of an eye is considered the same as loss of the eye.¹⁴ Partial losses are compensated proportionately.¹⁵

Such loss or loss of use is known as permanent impairment. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*. For decisions issued after May 1, 2009, the sixth edition is used to calculate schedule awards.¹⁶

⁹ See *T.O.*, Docket No. 18-0659 (issued August 8, 2019); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹⁰ 5 U.S.C. § 8107.

¹¹ 20 C.F.R. § 10.404.

¹² *Supra* note 9.

¹³ *Id.* at § 8107(c)(5).

¹⁴ *Id.* at § 8107(c)(14).

¹⁵ *Id.* at § 8107(c)(19).

¹⁶ 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 2.808.5.a (March 2017).

Although the A.M.A., *Guides* provides that impairment ratings should be based on the best-corrected visual acuity,¹⁷ FECA mandates that the degree of loss of vision must be determined without regard to correction.¹⁸

The sixth edition of the A.M.A., *Guides* indicates that the evaluation of visual impairment is based on the FVS, which is the combination of an assessment of visual acuity and 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.¹⁹ 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, but only if these deficits are not reflected in a visual acuity or visual field loss.²⁰ The A.M.A., *Guides*, however, specifically limits adjustment of the impairment rating for these deficits to cases which are well documented and provides that 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.”²¹

OWCP’s procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.²²

ANALYSIS

The Board finds that appellant has 100 percent permanent impairment of his right eye entitling him to 160 weeks of schedule award compensation. The Board further finds that the case is not in posture for decision regarding the extent of permanent impairment of appellant’s left eye.

The FECA compensation schedule provides that total loss of an eye equals 160 weeks of compensation.²³ The medical evidence of record establishes that appellant has total loss of vision of the right eye, which entitles him to additional schedule award compensation beyond that already granted.

OWCP based its schedule award on the permanent impairment rating of its DMA, Dr. Yuhan. The DMA’s calculation of 88 percent permanent impairment of the entire visual

¹⁷ A.M.A., *Guides* 287, Chapter 12.2c.

¹⁸ 5 U.S.C. § 8107(c)(19).

¹⁹ A.M.A., *Guides* (6th ed. 2009) at 282, 285.

²⁰ *Id.* at 305.

²¹ *Id.*

²² *Supra* note 16 at Chapter 2.808.6(f) (March 2017).

²³ 20 C.F.R. § 8107(c)(5).

system utilized the formula for loss of functional acuity under Table 12-3, which combines the scores from each eye to reach a single functional acuity score.²⁴ The Board has recognized, however, that Table 12-2 is to be used to determine permanent impairment of a single eye.²⁵

The Board has previously considered what constitutes total loss of vision of an eye. In *Michael C. Knorr*,²⁶ the employee had no light perception and no visual function of his left eye. The Board found that he had sustained total loss of his left eye and was entitled to 160 weeks of compensation, rather than the 40 weeks granted by OWCP. The Board made similar findings in *J.C.*,²⁷ *A.G.*,²⁸ and *C.P.*,²⁹ wherein the medical evidence also established, in each case, that the employee had no light perception or vision function in an eye. In these cases, the Board found that appellant was entitled to compensation based upon permanent impairment of a single eye under Table 12-2, rather than permanent impairment of the entire visual system under Table 12-3. Appellant is totally blind in his right eye and he, therefore, has 100 percent permanent impairment of his right eye. The schedule award is, thus, modified to reflect that appellant is entitled to the full 160 weeks of compensation for total loss of his right eye, or an additional 19.2 weeks of compensation. This case shall be remanded to OWCP to amend the schedule award determination to reflect the total loss of the right eye and award the appropriate schedule award benefits.

In regard to appellant's left eye, the Board notes that the DMA found a VAS of 80 in the left eye in accordance with Table 12-2. The DMA further found that appellant's left VFS was 30 based on complete loss of the superior field and loss of the inferotemporal quadrant. The Board is unable to determine how the DMA reached the visual field calculations in accordance with Table 12-5. This table does not employ the terms used by the DMA. Furthermore, the DMA did not provide a clear impairment rating for appellant's monocular loss of vision in his left eye. As noted above, this is necessary as appellant has 100 percent impairment of the right eye which would entitle him to no less than 160 weeks of schedule award compensation. The medical record suggests that appellant has additional impairment of his left eye entitling him to greater than 160 weeks of schedule award compensation when considering both eyes. As OWCP did not request clarification from the DMA regarding the extent of appellant's permanent impairment of his left eye, the case must be remanded to OWCP for further development of the medical evidence.³⁰

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden of proof to establish entitlement

²⁴ A.M.A., *Guides* 288, Table 12-2.

²⁵ *F.C.*, Docket No. 18-0975 (issued January 10, 2019); *Michele Tousley*, 57 ECAB 130 (2005).

²⁶ Docket No. 99-2059 (issued September 15, 2000).

²⁷ Docket No. 18-0466 (issued July 27, 2018).

²⁸ Docket No. 11-1512 (issued April 9, 2012) (finding that the claimant was entitled to the full 160 weeks of compensation for total permanent loss of vision in his right eye).

²⁹ Docket No. 17-0630 (issued July 18, 2017) (finding that the claimant was entitled to the full 160 weeks of compensation for total permanent loss of vision in his right eye).

³⁰ *D.A.*, Docket No. 19-0314 (issued September 18, 2019).

to compensation, OWCP shares responsibility in the development of the evidence.³¹ It also has an obligation to see that justice is done.³²

The Board finds that OWCP failed to properly develop the evidence regarding permanent impairment of appellant's left eye following the DMA's May 29, 2018 report. As such, the case will be remanded to OWCP for additional development of appellant's claim for left eye schedule award compensation. Following this and any other further development deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim.

CONCLUSION

The Board finds that appellant has 100 percent permanent impairment of his right eye entitling him to 160 weeks of schedule award compensation. The Board further finds that the case is not in posture for decision regarding the extent of permanent impairment of appellant's left eye.

ORDER

IT IS HEREBY ORDERED THAT the August 22, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further action consistent with this decision of the Board.

Issued: January 24, 2020
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

³¹ *A.G.*, Docket No. 19-0153 (issued May 13, 2019); *A.P.*, Docket No. 17-0813 (issued January 3, 2018); *Jimmy A. Hammons*, 51 ECAB 219, 223 (1999); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

³² *C.M.*, Docket No. 17-1977 (issued January 29, 2019); *B.C.*, Docket No. 15-1853 (issued January 19, 2016); *William J. Cantrell*, *id.*