United States Department of Labor
Employees' Compensation Appeals Board

C.R., Appellant	)	
and	)	**Docket No. 14-1526**
	)	**Issued: May 27, 2015**
U.S. POSTAL SERVICE, MAIN POST OFFICE, Winter Haven, FL, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 24, 2014 appellant, through his attorney, filed a timely appeal of a May 30, 2014 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 to consider the merits of the case.

ISSUE

The issue is whether appellant has met his burden of proof to establish permanent impairment of a scheduled member.

On appeal counsel argues that OWCP improperly referred appellant to a second impartial medical examiner (IME) without explaining why Dr. Kevin Lee, a Board-certified urologist, was no longer being used. He stated that there was no evidence of record showing that OWCP actually corresponded with Dr. Lee after the remand order from the Board and that Dr. Lee was improperly bypassed for a second selection as the IME. Counsel further argued that the impartial

[1] 5 U.S.C. § 8101 *et seq.*

medical report of Dr. Elias Jacobo, a Board-certified urologist, was unrationalized and did not resolve the existing conflict of medical opinion evidence. He also argued that OWCP had improperly designated Dr. Stephen F. Dobkin, a Board-certified urologist selected as IME on a prior conflict, as appellant's treating physician and improperly refused to pay associated charges.

FACTUAL HISTORY

This case has previously been before the Board on appeal. On May 6, 2004 appellant, then a 57-year-old group leader/custodian, sustained a lumbar injury while mopping the front lobby floor. OWCP accepted his claim for aggravation of a herniated disc at L2-3 and L3-4.

Appellant requested a schedule award on June 10, 2009. By decision dated August 18, 2009, OWCP granted him a schedule award for eight percent left leg impairment. Appellant requested reconsideration alleging that he had sustained sexual dysfunction as a result of the employment injury in his July 21, 2009 report. OWCP denied this claim on September 3, 2009 and he appealed this decision to the Board. In the August 13, 2010 decision,[2] the Board found that appellant had no more than eight percent impairment of his left leg. The Board also found that OWCP erroneously rejected the rating regarding penile impairment on the basis that a sexual dysfunction condition had not been accepted. The Board remanded the case for OWCP to undertake further development of appellant's claim for penile impairment and refer the case to the medical adviser for an opinion on whether the medical evidence established that appellant's sexual dysfunction was related to his accepted lumbar spine conditions, and if so, to issue an appropriate impairment percentage based on the A.M.A., *Guides* and OWCP's procedures.

By decision dated September 20, 2010, OWCP denied appellant's claim for sexual dysfunction as causally related to his accepted back condition and for a schedule award for penile impairment finding the weight of the medical evidence was with OWCP's medical adviser. Appellant appealed this decision to the Board. In a decision dated July 12, 2011,[3] the Board found that there was an unresolved conflict of medical opinion evidence between appellant's physician and the medical adviser on the issue of whether appellant's sexual dysfunction was causally related to his accepted employment injury. The Board remanded the case for further development of the medical evidence.

On July 18, 2012 OWCP referred appellant for an impartial medical examination with Dr. Lee. In a report dated September 14, 2012, Dr. Lee stated, "I do not think his problem is neurological. Appellant's problem is multifactorial and certainly his chronic back pain would contribute to his ability to perform." On December 13, 2012 Dr. Lee stated that appellant's back injury would not cause vasculogenic impotence, but that the chronic use of pain medication could lower his testosterone level and the chronic pain could cause some psychological problems with sex. He submitted a report dated January 18, 2013 and diagnosed impotence of organic origin. Dr. Lee stated that appellant had vasculogenic erectile dysfunction with low testosterone level. He stated that appellant's pain medication may interfere with his condition, but that his herniated discs were not contributing to his condition. Dr. Lee reviewed Table 13-15 of the

[2] Docket No. 09-2301 (issued August 13, 2010).

[3] Docket No. 10-2375 (issued July 12, 2011).

A.M.A., *Guides*[4] and stated that appellant had one to two percent whole person impairment as a result of dysfunction due to pain medication. He noted that, if appellant underwent back surgery and pain medication was no longer required, then there was no impairment from his back injury at all.

An OWCP medical adviser reviewed appellant's claim on March 14, 2013 and agreed that his lumbar condition was not contributing to his erectile dysfunction. He stated, "FECA does not provide a schedule award for chronic impairment or pain of the spine and does not consider whole person impairment."

OWCP accepted the additional condition of impotence organic origin on April 23, 2013.

By decision dated April 25, 2013, OWCP denied appellant's claim for a schedule award as he had not established permanent impairment of a scheduled member due to his accepted work injury. The Board reviewed this decision on December 3, 2013[5] and remanded for OWCP to determine appellant's impairment to his penis for schedule award purposes. The facts and the circumstances of the case as set out in the prior decisions are adopted herein by reference.

Appellant underwent L2 through L5 laminectomy with posterior fusion with internal fixation and local one graft on November 19, 2013.

OWCP requested a supplemental report from Dr. Lee on December 23, 2013. No response was received from Dr. Lee. The record contains a ME023 -- Appointment Schedule Notification, selecting Dr. Jacobo, a Board-certified urologist, as the IME. The record contains the bypass history for the scheduled appointment which noted that Dr. Lee was bypassed as appellant had established him as his physician. In a letter dated February 3, 2014, OWCP referred appellant for an impartial medical examination with Dr. Jacobo.

In a report dated April 7, 2014, Dr. Jacobo described appellant's history of injury and accepted conditions. He reviewed appellant's medical records and described appellant's wife's inability to move easily, her bad knees, and her weight gain. Dr. Jacobo performed a physical examination and noted appellant's 14-year history of smoking approximately one pack of cigarettes a day. He diagnosed erectile dysfunction, history of previous laminectomy L2-3 and L3-4 with congenital spinal stenosis. Dr. Jacobo also diagnosed claudication dyslipidemia, history of tobacco abuse disorder, mild elevation of creatinine, likely drug related, and previous history of hypogonadism, probably drug related. He noted interviewing appellant's wife who stated that she was not in physical condition for an intimate encounter with her husband. Dr. Jacobo stated that appellant's history of cigarette smoking in the past contributed to his endothelial vascular damage to the penile corpora, and this was probably the genesis of his vasculogenic erectile dysfunction. He stated that appellant had multifactorial erectile dysfunction with a significant vasculogenic component. Dr. Jacobo concluded that appellant's lumbar injury had no discernable clinical role. He awarded appellant a class 0 impairment for erectile dysfunction under the sixth edition of the A.M.A., *Guides*.

[4] A.M.A., *Guides* 338, Table 13-15.

[5] Docket No. 13-1258 (issued December 3, 2013).

The medical adviser reviewed Dr. Jacobo's report on May 29, 2014 and found that it was correct in regard to the application of the A.M.A., *Guides*.

By decision dated May 30, 3014, OWCP denied appellant's claim finding that Dr. Jacobo concluded that appellant had no permanent impairment of his penis due to his accepted back condition or its required medication.

LEGAL PRECEDENT

The schedule award provision of FECA[6] and its implementing regulations[7] set forth the number of weeks of compensation payable to employees sustaining permanent impairment for 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 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. OWCP evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[8]

It is the claimant's burden to establish that he or she has sustained a permanent impairment of the scheduled member or function as a result of any employment injury.[9] OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of maximum medical improvement), describes the impairment in sufficient detail so that it can be visualized on review and computes the percentage of impairment in accordance with the A.M.A., *Guides*.[10]

The sixth edition requires identifying the impairment Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE), and Clinical Studies (GMCS).[11] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).

[6] 5 U.S.C. §§ 8101-8193, 8107.

[7] 20 C.F.R. § 10.404.

[8] For new decisions issued after May 1, 2009 OWCP began using the sixth edition of the A.M.A., *Guides*. A.M.A., *Guides*, 6th ed. (2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[9] *Tammy L. Meehan*, 53 ECAB 229 (2001).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (February 2013).

[11] A.M.A., *Guides*, 494-531.

While the A.M.A., *Guides* express the impairment of bodily organs in terms of the whole person due to a particular injury or medical condition, OWCP procedures provide a formula to convert the whole person rating of a particular organ. The whole person impairment of the claimant, identified as A, is divided by B, the maximum impairment of the organ, which equals X, the impairment rating, divided by 100. For organs such as the penis, which have more than one physiologic function, the A.M.A., *Guides* provide whole person impairment measurements for each function. When calculating the impairment of these organs, the medical adviser must consider all functions as instructed in the A.M.A., *Guides*. The maximum impairment rating ascribed to the particular organ (B) is obtained by combining the maximum levels for all functions using the Combined Values Chart in the current edition of the A.M.A., *Guides*. The actual impairment rating (A) is obtained by combining all functional impairments found using the Combined Values Chart in the A.M.A., *Guides*.[12]

ANALYSIS

OWCP accepted that appellant sustained aggravation of a herniated disc at L2-3 and L3-4 and granted a schedule award for eight percent left leg impairment. Appellant asserted that he had additional impairment for impotence. OWCP developed this claim and referred him to Dr. Lee for an impartial medical examination. Following the Board's directive and its procedures,[13] it requested a supplemental report from Dr. Lee on December 23, 2013. This request was mailed to Dr. Lee at his address of record. Contrary to counsel's argument, the Board presumes receipt by Dr. Lee under the mailbox rule as it was mailed in the normal course of business to the address of record.[14] Dr. Lee did not respond to OWCP's request for a supplemental report. As he was unwilling or unable to submit a supplemental report, OWCP properly referred appellant for another IME.[15]

Counsel also argues that OWCP improperly bypassed Dr. Lee in reaching the selection of Dr. Jacobo to serve as the IME. The Board notes that OWCP's procedures specifically require that the IME be a physician "who has had no prior connection with the case."[16] As Dr. Lee was previously involved with the case, the Board finds that OWCP properly bypassed him and proceeded with the selection of Dr. Jacobo.[17] As counsel's arguments regarding Dr. Dobkin,

[12] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700(4)(d)(2)(b) (January 2010).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11.e (June 2014). (Only if the referee physician does not respond, or does not provide a sufficient response after being asked, should the claims examiner request a new referee examination).

[14] *L.C.*, Docket No. 15-216 (issued April 1, 2015).

[15] If an IME is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative, or lacking in rationale, OWCP must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue. *Harold Travis*, 30 ECAB 1071, 1078 (1979).

[16] Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.4 (December 2012).

[17] *Guiseppe Aversa*, 55 ECAB 164 (2003); *Harold Travis*, *supra* note 15.

these reports were addressed in the previous Board's decision and are not subject to additional review.[18] Absent further merit review of this issue by OWCP, pursuant to section 8128 of FECA, this issue is *res judicata*.[19]

In his April 7, 2014 report, Dr. Jacobo reviewed appellant's history of injury and medical records. He performed a physical examination and noted appellant's 14-year history of smoking about one pack a day. Dr. Jacobo diagnosed erectile dysfunction, history of previous laminectomy L2-3 and L3-4 with congenital spinal stenosis as well as claudication dyslipidemia, history of tobacco abuse disorder, and previous history of hypogonadism probably drug related. He stated that appellant's history of cigarette smoking in the past contributed to his endothelial vascular damage to the penile corpora and that this was probably the genesis of his vasculogenic erectile dysfunction. Dr. Jacobo stated that appellant had multifactorial erectile dysfunction with a significant vasculogenic component. He concluded that appellant's lumbar injury had no discernable clinical role. Dr. Jacobo awarded appellant a class 0 impairment for erectile dysfunction under the sixth edition of the A.M.A., *Guides*.

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[20] The Board finds that Dr. Jacobo's report is entitled to special weight. Dr. Jacobo provided detailed findings and determined that appellant's erectile dysfunction was not due to his back injury, but instead caused by vasculogenic deficits attributable to appellant's history of smoking. He found that appellant's accepted back injury had no clinical role in his penile impairment and concluded that appellant was not entitled to a schedule award. The medical adviser agreed with Dr. Jacobo's application of the A.M.A., *Guides*. As the special weight of the medical evidence establishes that appellant's diagnosed sexual dysfunction is not due in any part to his accepted back injury, the Board finds that appellant is not entitled to a schedule award. The Board finds that Dr. Jacobo's report is sufficiently detailed and well-reasoned to constitute the weight of the medical opinion evidence contrary to the arguments of counsel on appeal.

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 the weight of the medical evidence establishes that appellant is not entitled to a schedule award for sexual dysfunction.

[18] 20 C.F.R. § 501.6(d). On May 30, 2012 Dr. Dobkin stated that he was treating appellant for low testosterone and hypogonadism. He provided appellant with a prescription and scheduled a follow-up visit on the same date. On November 28, 2011 OWCP advised Dr. Dobkin that he was not authorized to treat appellant.

[19] *See Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998); *see also E.S.*, Docket No. 15-49 (issued March 13, 2015).

[20] *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

ORDER

IT IS HEREBY ORDERED THAT the May 30, 3014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 27, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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