

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

R.A., Appellant)	
)	
and)	Docket No. 22-0197
)	Issued: July 29, 2022
U.S. POSTAL SERVICE, WALTHAM)	
CARRIER ANNEX, Waltham, MA, Employer)	
)	

Appearances:

Douglas L. Lawrence, Jr., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 19, 2021 appellant, through his representative, filed a timely appeal from an October 12, 2021 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 an 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 The record also contains an October 4, 2021 decision, finding that appellant had no more than 10 percent right lower extremity impairment and a July 19, 2021 decision finding that appellant received an overpayment of compensation in the amount of \$3,782.14 for the period February 28 through March 27, 2021 and denying waiver of recovery of the overpayment. Appellant's representative did not appeal from those decisions and thus they will not be addressed by the Board in this appeal. 20 C.F.R. § 501.3.

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.

ISSUE

The issue is whether appellant has met his burden of proof to establish greater than 20 percent permanent impairment of the left eye for which he previously received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

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 fractured two ribs when he fell on ice while delivering mail in the performance of duty. OWCP accepted the claim for systemic inflammatory response syndrome due to infection with organ dysfunction/septic shock, early pneumonia, and a closed fracture of two ribs. It paid appellant wage-loss compensation on the periodic rolls as of April 12, 2010.⁵

In a January 28, 2010 discharge summary, Dr. Michael S. Rosenblatt, a Board-certified endocrinologist, advised that, while hospitalized for his fractured ribs, appellant had required intubation, developed sepsis, and became hypotensive requiring maximum doses of vasopressors to tighten blood vessels and raise his blood pressure. He further sustained an acute renal injury and multi-organ failure due to hospital-acquired pneumonia. On January 11, 2010 appellant reported a lack of sight in his right eye and blurry vision in his left eye when he was weaned from the ventilator. Dr. Rosenblatt opined that appellant's loss of vision was secondary to retinal ischemia from his "massive" vasopressor requirements. He 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.

In a March 11, 2010 report, Dr. Scott H. Greenstein, a Board-certified ophthalmologist, 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. He determined that appellant had 20/25 distance vision in the left eye and a superior field defect and mild pallor likely secondary to ischemic optic neuropathy. Dr. Greenstein also found mild cataracts in both eyes.

³ 5 U.S.C. § 8101 *et seq.*

⁴ Docket No. 19-0098 (issued January 24, 2020).

⁵ On June 12, 2017 appellant elected to receive federal retirement benefits in lieu of FECA benefits effective June 1, 2017.

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

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

In a development letter dated August 9, 2017, OWCP requested a detailed narrative report from appellant's attending physician addressing the extent of any permanent impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁶ It afforded him 30 days to submit the requested evidence.

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

On January 26, 2018 OWCP referred appellant to Dr. David Eisenberg, a Board-certified ophthalmologist for a second opinion evaluation.⁷

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 a total superior field loss and a partial inferior field loss in the left eye. Dr. Eisenberg asserted that appellant was totally blind in his right eye and that he was partially blind in his left eye as his vision field was severely compromised. He diagnosed optic atrophy in both eyes related to septic shock with hypotension. Dr. Eisenberg found that appellant's conditions were permanent and that he had reached MMI. He opined that, under the A.M.A., *Guides*, appellant had 100 percent permanent impairment of the right eye and 50 percent permanent impairment of the left eye. Dr. Eisenberg concluded that appellant had "a completely blind right eye and a permanently completely absent superior half of the vision in the left eye with some central sparing of vision along with a small amount of inferior field scattered defects."

On May 29, 2018 Dr. Kevin Yuhan, a Board-certified ophthalmologist serving as a district medical adviser (DMA), found 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 and that the 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*. He advised that appellant's right eye had 100 percent permanent impairment or a visual acuity score of 0 while his left eye had 20/50 vision and a visual acuity score of 80. Utilizing Table 12-3 on page 289, Dr. Yuhan determined that appellant's functional

⁶ A.M.A., *Guides* (6th ed. 2009).

⁷ OWCP also referred appellant for a second opinion examination with Dr. Kenneth Polivy, a Board-certified orthopedic surgeon.

acuity score was 64. He concluded that appellant had 37 percent permanent impairment for loss of vision based on loss of visual acuity. Dr. Yuhan calculated appellant's visual field impairment using Table 12-5 on page 296 as 81 percent binocular loss. Using a formula set forth in section 12.4 on page 304, he calculated the impairment of the total visual system as 88 percent.

On June 26, 2018 OWCP referred the DMA's report to Dr. Eisenberg for review.

In a report dated July 9, 2018, Dr. Eisenberg concurred with Dr. Yuhan's impairment rating.

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

Appellant appealed to the Board. By decision dated January 24, 2020, the Board set aside the August 22, 2018 decision.⁸ The Board noted that the DMA had calculated 88 percent permanent impairment of the visual system using Table 12-3, which uses scores from each eye to reach a functional acuity score.⁹ The Board found, however, that using Table 12-2 to determine the impairment of a single eye yielded 100 percent permanent impairment of appellant's right eye. The Board modified the schedule award to reflect 100 percent permanent impairment of the right eye entitling appellant to 160 weeks of compensation. The Board further found that, for the left eye, the DMA found a visual acuity score of 80 using Table 12-2 and a visual field score of 30 based on appellant's complete loss of superior field and loss of the inferotemporal quadrant. The Board noted, however, that it was unable to determine how the DMA reached the visual field calculations under Table 12-5. The Board remanded the case for the DMA to clarify the extent of permanent impairment of appellant's left eye.

On April 20, 2020 Dr. Yuhan found that appellant had 20 percent permanent impairment due to his loss of visual acuity of the left eye using Table 12-2 on page 288 of the A.M.A., *Guides*. He advised that, if evaluating the field loss of the left eye only, appellant had complete loss of superior field, which yielded a loss of 40 points using Figure 12-1 on page 295 and Table 12-5 on page 296. Dr. Yuhan further found a loss of 30 points due to a loss of the inferotemporal quadrant and an additional loss of 7 points for the inferonasal quadrant. He opined that, for the left eye, "a total loss of the superior field (40 points) minus the inferotemporal (30 points) minus the loss of some spots in the inferonasal quadrant (7 points)," yielded a total functional field score of 23 points. Dr. Yuhan related that the "functional visual score for the left eye only would be $(80 \times 23)/100 + 18.4$," which he found showed a functional visual impairment of 82 percent.

On April 22, 2020 OWCP advised the DMA that the only issue was the extent of the left eye impairment rating. It indicated that the Board had found that Table 12-2 should be used to determine the impairment of a single eye.

⁸ *Supra* note 4.

⁹ A.M.A., *Guides* 288, Table 12-2.

On May 4, 2020 Dr. Yuhan again found a functional vision impairment of 82 percent of the left eye using Table 12-5. He noted that the Board had found that Table 12-2 was used to determine the impairment of a single eye. Dr. Yuhan found that appellant had 80 percent visual acuity score in his left eye, which yielded 20 percent permanent impairment of the left eye using Table 12-2.

By decision dated May 20, 2020, OWCP granted appellant a schedule award for 100 percent permanent impairment of the right eye and 20 percent permanent impairment of the left eye.¹⁰

On May 11, 2021 appellant, through his representative, requested reconsideration. He contended that OWCP failed to include a rating for his visual field deficits.

Appellant's representative submitted a May 2, 2019 report from Dr. Stacey C. Brauner, a Board-certified ophthalmologist, who found optic atrophy with a superior visual field deficit in the left eye. Dr. Brauner recommended against driving due to appellant's loss of visual field. She provided similar findings in a May 20, 2021 progress report.

By decision dated October 12, 2021, OWCP denied modification of its May 20, 2020 decision.

LEGAL PRECEDENT

The schedule award provisions of FECA,¹¹ and its implementing federal regulations,¹² 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. FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such a 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*, published in 2009.¹³ The Board has approved the use by OWCP of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.¹⁴

¹⁰ By decision dated April 1, 2021, OWCP granted appellant a schedule award for 10 percent permanent impairment of the right lower extremity. By decision dated October 4, 2021, an OWCP hearing representative affirmed the April 1, 2021 decision.

¹¹ *Supra* note 3.

¹² 20 C.F.R. § 10.404.

¹³ For decisions issued after May 1, 2009 the sixth edition of the A.M.A., *Guides* is used. A.M.A., *Guides*, (6th ed. 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, *id.* at 2.808.5a (March 2017); *see also id.* at Chapter 3.700, Exhibit 1 (January 2010).

¹⁴ *P.R.*, Docket No. 19-0022 (issued April 9, 2018); *Isidoro Rivera*, 12 ECAB 348 (1961).

Although the A.M.A., *Guides* provides that impairment ratings should be based on the best-corrected visual acuity,¹⁵ FECA mandates that the degree of loss of vision must be determined without regard to correction.¹⁶ For 100 percent loss of an eye, as with blindness, FECA provides a maximum 160 weeks of compensation.¹⁷ A loss of 80 percent or more of the vision of an eye is considered the same as loss of the eye.¹⁸ Partial losses are compensated proportionately.¹⁹

The sixth edition of the A.M.A., *Guides* indicates that the evaluation of visual impairment is based on the functional vision score (FVS). FVS 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).²⁰ 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.²¹ 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.”²²

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish greater than 20 percent permanent impairment of the left eye, for which he previously received a schedule award.

On prior appeal, the Board found that appellant had 100 percent permanent impairment of the right eye using Table 12-2 as he had NLP. Regarding the left eye, the Board noted that the DMA had found a visual acuity score of 80 under Table 12-2 and further found an impairment in his left visual field. The Board advised that it was unable to calculate how the DMA reached his visual field calculations under Table 12-5. The Board remanded the case for additional development regarding the extent of appellant’s left eye impairment.

In an April 20, 2020 report, Dr. Yuhan determined that appellant had 20 percent permanent impairment of the left eye due to loss of visual acuity under Table 12-2. He further found that

¹⁵ A.M.A., *Guides* 287, Chapter 12.2c.

¹⁶ 5 U.S.C. § 8107(c)(19).

¹⁷ *Id.* at § 8107(c)(5).

¹⁸ *Id.* at § 8107(c)(14).

¹⁹ *Id.* at § 8107(c)(19).

²⁰ A.M.A., *Guides* (6th ed. 2009) at 282, 285; *see also D.M.*, Docket No. 18-0285 (issued September 26, 2019).

²¹ *Id.* at 305.

²² *Id.* at section 12.2c, 287.

appellant had a functional field loss of 23 points for the left eye, which he opined yielded a functional visual impairment of 82 percent of the left eye.

OWCP subsequently informed Dr. Yuhan that only Table 12-2 should be used to determine the impairment of a single eye. On May 4, 2020 Dr. Yuhan found 20 percent permanent impairment of the left eye using Table 12-2.

The Board has held that Table 12-2 is used to determine the extent of permanent impairment of single eye.²³ Dr. Yuhan's report constitutes the weight of the evidence and establishes that appellant has no more than 20 percent permanent impairment of the left eye.²⁴

Appellant has not submitted evidence demonstrating a greater impairment rating of the left eye based on the standards of the sixth edition of the A.M.A., *Guides*.²⁵ In reports dated May 2 and 20, 2019, Dr. Brauner found that he had optic atrophy with a left eye superior field deficit. She recommended that appellant not drive due to his visual field loss. Dr. Brauner did not, however, address the extent of permanent impairment of the left eye and thus her reports are insufficient to establish that he has more than 20 percent permanent impairment of the left eye. Therefore, they are insufficient to overcome the weight of the medical evidence as represented by Dr. Yuhan or to create a conflict.

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 met his burden of proof to establish greater than 20 percent permanent impairment of the left eye, for which he previously received a schedule award.

²³ *F.C.*, Docket No. 18-0975 (issued January 10, 2019); *R.A.*, Docket No. 19-0098 (issued January 24, 2020).

²⁴ *See J.C.*, Docket No. 21-0426 (issued October 21, 2021).

²⁵ *See M.H.*, Docket No. 20-1109 (issued September 27, 2021).

ORDER

IT IS HEREBY ORDERED THAT the October 12, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 29, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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