

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN P. O'NEIL, III and DEPARTMENT OF THE AIR FORCE,
TACTICAL AIR COMMAND, NELLIS AIR FORCE BASE, NV

*Docket No. 99-2141; Submitted on the Record;
Issued October 3, 2000*

DECISION and ORDER

Before DAVID S. GERSON, PRISCILLA ANNE SCHWAB,
VALERIE D. EVANS-HARRELL

The issue is whether appellant has established that he is entitled to a schedule award for his cervical disc condition.

The Office of Workers' Compensation Programs accepted that appellant, a 45-year-old carpenter, sustained a cervical disc herniation at C4-5 and C6-7 while performing his duties on August 1, 1996.¹ He had surgery for his injury on March 17, 1997 and returned to work on limited duty on September 22, 1997.²

Dr. Thomas Dunn, a Board-certified orthopedic surgeon, who performed the March 17, 1997 surgery, declared appellant to be permanent and stationary on September 4, 1997. Consequently, the Office referred appellant, along with a statement of accepted facts and his case record to Dr. Reynold Rimoldi, a Board-certified orthopedic surgeon, for an orthopedic evaluation to determine the extent of any permanent impairment. Dr. Rimoldi examined appellant on April 1, 1998 and reviewed the statement of accepted facts and medical records. He diagnosed appellant with herniated discs of C4-5 and C6-7, status post surgery; hardware loosening secondary to probable pseudoarthrosis of the cervical spine; and status post infection of the iliac crest. Dr. Rimoldi found some limited range of motion in appellant's cervical spine, but full range of motion in his shoulders, elbows and wrists. He found no pain in the affected area, no nerve root pain in the extremities and no sensory alteration, atrophy or loss of strength.

Upon receipt of Dr. Rimoldi's evaluation report, the Office referred appellant's claim to the district medical adviser for review. On May 13, 1998 an Office medical adviser reviewed

¹ The Board notes that the Office has accepted claims for appellant's previous injuries, including a sprain of the right forearm and cervical disc bulge with radiculopathy sustained on September 21, 1993 and a lumbar strain on April 13, 1996.

² Appellant later filed a recurrence of disability claim on March 1, 1999 due to pseudoarthrosis, which was accepted by the Office as related to the original work injury on September 21, 1993. Appellant stopped work on March 1, 1999 and has not returned.

appellant's file and related his medical history, including his condition before and after the March 17, 1997 surgery. The Office medical adviser also reviewed Dr. Rimoldi's April 1, 1998 report, and found that appellant's records made no mention of any pain in the upper or lower extremities or any sensory alteration and that there was no muscle atrophy, weakness or loss of motion involving any of the upper extremity joints. The Office medical adviser concluded that appellant's records indicated a 0 percent impairment of the right and left upper extremities, with a date of maximum medical improvement of April 1, 1998.

By decision dated May 20, 1998, the Office found that appellant was not entitled to a schedule award. It advised that section 8107 of the Federal Employees' Compensation Act³ does not provide for a schedule award for appellant's accepted cervical injury.

By letter received by the Office on June 19, 1998 appellant, through counsel, requested an oral hearing.

A hearing was held on February 23, 1999, in which appellant was represented by counsel. Appellant testified that he had numbness in his right hand, arm and leg prior to the surgery and that he experienced numbness in the hands and arm and neck pain going into his head since the surgery. He testified that he had difficulty walking and had to use a cane for a period of time. Appellant further testified that his grip strength on the right is reduced and he had pain and/or lack of sensation around the elbows of his right arm and problems with the donor site after the surgery, which had caused him to be ill with infection for quite some time.

Appellant's counsel argued that the neck is not included within the definition of back and therefore should not be excluded from consideration of a schedule award. He contended that the neck is a separate, important body part, which could be compensated for under section 8107(c) of the Act, which provides for the payment of compensation for permanent loss of any other important external or internal organ of the body, as determined by the Secretary of Labor. He also argued that cervical nerve root impairment should also be considered with regard to impairment to the upper extremities.

By decision dated April 29, 1999 the Office hearing representative affirmed the May 20, 1998 decision denying appellant entitlement to a schedule award because of appellant's accepted cervical injury.⁴ The hearing representative advised that although the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, fourth edition included guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable for injury to the spine under the Act. She also found no support for appellant's argument that the neck is not a part of the back for purposes of evaluating schedule losses, according to the A.M.A., *Guides*.

The Board finds that appellant has not established that he is entitled to a schedule award for his accepted cervical disc condition.

³ 5 U.S.C. § 8107.

⁴ On May 26, 1999 the Office advised appellant that he was entitled to compensation benefits at a weekly rate of \$800.40 for the period from January 4 to May 22, 1999 and May 23 to June 20, 1999. The Office further advised appellant of his responsibility to return to work if he is no longer totally disabled because of his injury.

The schedule award provisions of the Act⁵ and its implementing regulations⁶ set forth the number of weeks of compensation to be paid for permanent loss of the member, functions, and organs of the body listed in the schedule. No schedule award is payable for a member, function or organ of the body not specified in the Act or in the regulations.⁷ As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or cervical spine, or for the whole person,⁸ no claimant is entitled to such an award.⁹

However, amendments to the Act in 1960 modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originates in a scheduled or nonscheduled member. As the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originates in the spine, if the medical evidence establishes impairment as a result of the employment injury.¹⁰ The Act does not specify the manner in which the percentage of loss of a member shall be determined and the method for making such a determination rests in the sound discretion of the Office.¹¹ The Office has adopted, and the Board has approved, the use of the A.M.A., *Guides*.¹²

In this case, appellant alleged that he had experienced numbness in the hands and arm and had neck pain going into his head since the surgery, and that his grip strength on the right was reduced. He further alleged that he had pain and/or lack of sensation around the elbows of his right arm and problems with the donor site since the surgery, which had caused illness due to infection. Dr. Rimoldi reviewed appellant's records and on examination found some limited range of motion in the cervical spine, but full range of motion in the shoulders, elbows and wrists. He detected no pain in the affected area, no nerve root pain in the extremities and no sensory alteration, atrophy or loss of strength. The Office medical adviser reviewed appellant's records and concluded that there was zero percent impairment of the upper extremities.

At the hearing, appellant's counsel noted appellant's allegations of pain and argued that the neck is a separate body part, which could be compensated under section 8107(c) of the Act.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 20 C.F.R. § 10.404.

⁷ *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies equally to body members that are not enumerated in the schedule provision as it read before the 1974 amendment, and to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment); *see also Ted W. Dietderich*, 40 ECAB 963 (1989); *Thomas E. Stubbs*, 40 ECAB 647 (1989); *Thomas E. Montgomery*, 28 ECAB 294 (1977).

⁸ *Gary L. Loser*, 38 ECAB 673 (1987).

⁹ *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

¹⁰ *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹¹ *See Richard W. Robinson*, 39 ECAB 484 (1988).

¹² A.M.A., *Guides*.

He also argued that cervical nerve root impairment should be considered with regard to impairment to the upper extremities.

The Board finds that the medical evidence does not establish that appellant sustained any permanent impairment of the extremities for which a schedule award is payable. Dr. Rimoldi's report does not support nerve root damage to the upper extremities or show that the iliac crest donor site infection that appellant developed led to any permanent impairment of the extremities. The Board also finds that the neck has not been included on the list of organs or body parts which have been determined compensable under the Act.¹³ As previously stated, no schedule award is payable for permanent loss of, or loss of use of, anatomical members or functions or organs of the body not specified in the Act or in the implementing regulations. Thus, appellant is not entitled to a schedule award for his accepted cervical condition.

As the medical evidence fails to support that appellant has an impairment to any extremity, which originated in the spine resulting from the employment injury, appellant is not entitled to receive a schedule award.

The decisions of the Office of Workers' Compensation Programs dated June 14, 1999 and May 20, 1998 are affirmed.

Dated, Washington, DC
October 3, 2000

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

¹³ 5 U.S.C. § 8107(c).