

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARRY SANDS and DEPARTMENT OF JUSTICE,
BORDER PATROL, Laredo, TX

*Docket No. 00-1333; Submitted on the Record;
Issued March 16, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant is entitled to a schedule award as a result of an employment-related cervical spine injury.

On March 18, 1998 appellant, then a 39-year-old border patrol agent, filed a notice of occupational disease claiming ruptured cervical discs as a result of his federal employment. The Office of Workers' Compensation Programs accepted his claim on May 7, 1998 for herniated nucleus pulposus C5-6 left side and C6-7 right side. On August 30, 1998 appellant stopped work and underwent a C5-6 and C6-7 anterior cervical discectomy and fusion (ACDF) on August 31, 1998. On April 16, 1999 the Office received a treatment note from appellant's attending physician, Dr. Marcus Newton, dated April 13, 1999, stating that appellant can return to work full duty on April 18, 1999. Appellant returned to work on April 19, 1999.

On April 26, 1999 appellant filed a claim for a schedule award for permanent impairment. Appellant submitted a report dated the same day from Dr. Newton, finding that appellant has reached maximum medical improvement and assigning appellant with a 14 percent whole person impairment rating. In his report Dr. Newton found:

“(1) Status post C5-6 and C6-7 ACDF without evidence of neurologic defects.

“(2) Range of motion deficits in the cervical spine.

“(3) [Appellant] has reached maximum medical improvement as of April 26, 1999. He has been assigned a 14 percent whole person impairment rating.”

In calculating appellant's 14 percent whole person impairment rating, Dr. Newton found:

“The two level cervical fusion was assigned a 9 percent whole person impairment with 8 percent for the first level of fusion, 1 percent for the second level of fusion.

Cervical range of motion was minimally limited and resulted in an additional 5 percent impairment. There were no neurologic deficits. Nine percent and 5 percent were combined for a total of 14 percent whole person impairment.”

By decision dated July 21, 1999, the Office denied appellant’s claim for a schedule award since the cervical spine is not a scheduled member under section 8107 of the Federal Employees’ Compensation Act.

The Board has duly reviewed the record in the present appeal and finds that appellant is not entitled to a schedule award as a result of his employment-related cervical spine injury.

The schedule award provisions of the Act¹ and its implementing federal regulations² 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.³ 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,⁴ no claimant is entitled to such an award.⁵ 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.⁶ 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.⁷ The Office has adopted, and the Board has approved, the use of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.⁸

The Board notes that the Office correctly found a lack of a basis for a schedule award, as the spine and the whole person are specifically excluded from the schedule. In addition, there is no evidence of record indicating that appellant has a permanent impairment of any extremities. In his April 26, 1999 report, Dr. Newton indicated: “reflexes are 2+ at the biceps, triceps and

¹ 5 U.S.C. §§ 8101-8193.

² 20 C.F.R. § 10.404.

³ *Thomas E. Stubbs*, 40 ECAB 647 (1989).

⁴ *Gary L. Loser*, 38 ECAB 673 (1987).

⁵ *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

⁶ *Rozella L. Skinner*, 37 ECAB 398 (1986).

⁷ *See Richard W. Robinson*, 39 ECAB 484 (1988).

⁸ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) (hereinafter A.M.A., *Guides*).

brachial radialis. Long tract signs negative. Sensation intact in all dermatomes.” He also indicated: “strength 5/5 throughout the upper limbs.”

While the Office has adopted the A.M.A., *Guides*, the use of the A.M.A., *Guides* is limited to the coverage permitted by the Act and regulations under the Act. Since spinal conditions, other than impairment of the extremities is not covered, the Office properly found appellant not entitled to a schedule award for his continued back pain.

The decision of the Office of Workers’ Compensation Programs dated July 21, 1999 is hereby affirmed.

Dated, Washington, DC
March 16, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member