

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

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**J.K., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Cherry Hill, NJ, Employer**

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**Docket No. 06-2153  
Issued: May 23, 2007**

*Appearances:*

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 25, 2006 appellant filed a timely appeal of the September 13, 2006 merit decision of the Office of Workers' Compensation Programs, which denied his claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim.

**ISSUE**

The issue is whether appellant is entitled to a schedule award.

**FACTUAL HISTORY**

Appellant, a 72-year-old retired letter carrier, was involved in an employment-related motor vehicle accident on February 14, 1978. The Office accepted his claim for cervical strain. Appellant continued to work for approximately 23 years following his 1978 injury. However, during this timeframe, he experienced a number of recurrences of disability associated with his February 14, 1978 cervical injury.

Appellant filed a claim for a schedule award on February 21, 2001. In a February 26, 2004 report, Dr. Kenneth C. Peacock, a Board-certified orthopedic surgeon, provided three alternative impairment ratings regarding appellant's cervical, thoracic and lumbosacral spine, which ranged from six to seven percent impairment of the whole person.<sup>1</sup> With respect to the existence of any upper extremity impairment, Dr. Peacock explained that because appellant's physical examination did not support a finding of cervical radiculopathy, there was no impairment (zero percent) attributable to either upper extremity.

The district medical adviser reviewed the case record and, in a report dated March 2, 2006, found that appellant did not have any upper extremity impairment (zero percent) secondary to either neurological or radiculopathic problems.

Believing there was a conflict of medical opinion between Dr. Peacock and the district medical adviser, the Office referred appellant for an impartial medical evaluation to determine if he had any permanent impairment of the upper extremities attributable to the February 14, 1978 employment injury.

In a June 13, 2006 report, Dr. David A. Bundens, a Board-certified orthopedic surgeon and impartial medical examiner, diagnosed cervical disc disease. He further noted that, while appellant had radicular complaints, his left arm was neurologically normal and he had full strength and full sensation. Dr. Bundens found that appellant had a DRE cervical category II impairment, which represented five percent impairment of the whole person. He also indicated that appellant had reached maximum medical improvement in 2001.

On August 28, 2006 Dr. Henry J. Magliato, a Board-certified orthopedic surgeon and Office medical adviser, noted that Dr. Bundens had assigned five percent impairment of the whole person based on appellant's cervical condition, but assigned nothing for the extremities. Based on the impartial medical examiner's June 13, 2006 report, Dr. Magliato opined that appellant had zero percent impairment of the right upper extremity. Dr. Magliato explained that there was no mention in the June 13, 2006 report of any radicular complaints and no abnormal findings recorded. He also assigned zero percent impairment of the left upper extremity because Dr. Bundens found appellant's left arm was neurologically normal.

By decision dated September 13, 2006, the Office denied appellant's claim for a schedule award.

### **LEGAL PRECEDENT**

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions

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<sup>1</sup> Dr. Peacock employed varying methodology to assess appellant's back condition. Under the diagnosis-related estimate (DRE) method, he found that appellant had degenerative arthritis of the cervical spine, loss of flexibility and suggestions of radicular pain without objective findings. Dr. Peacock rated appellant's condition as DRE cervical category II, with a corresponding seven percent whole person impairment. Alternatively, he found six percent whole person impairment when applying the specific spinal disorders method. Finally, Dr. Peacock also applied the range of motion method, which resulted in a whole person impairment rating of seven percent.

and organs of the body.<sup>2</sup> No schedule award is payable for a member, function or organ of the body that is not specified in the Act or in the implementing regulations.<sup>3</sup> The Act's list of scheduled members includes the eye, arm, hand, fingers, leg, foot and toes.<sup>4</sup> Additionally, the Act specifically provides for compensation for loss of hearing and loss of vision.<sup>5</sup> By authority granted under the Act, the Secretary of Labor added the breast, kidney, larynx, lung, penis, testicle, ovary, uterus and tongue to the list of scheduled members.<sup>6</sup>

The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulation has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.<sup>7</sup> Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5<sup>th</sup> ed. 2001).<sup>8</sup>

### ANALYSIS

Both Dr. Peacock and Dr. Bundens provided whole person impairment ratings with respect to appellant's loss of function in his back. However, neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole.<sup>9</sup> Therefore, appellant is not entitled to a schedule award based on the spine-related whole person impairment ratings provided by Dr. Peacock and Dr. Bundens. To the extent that appellant's accepted cervical strain resulted in permanent impairment to his upper extremities, an award would be appropriate under the Act. But neither Dr. Peacock nor Dr. Bundens found any upper extremity impairment attributable to his accepted cervical strain. Appellant had not complained about his right upper extremity and Dr. Bundens noted that the left upper extremity was neurologically normal, with full strength and full sensation. Dr. Peacock indicated that, in the absence of evidence of cervical radiculopathy, there was no impairment attributable to either upper extremity. Accordingly, the Board finds that the medical evidence of record fails to establish that appellant has permanent impairment of a scheduled member. The Office, therefore, properly denied appellant's claim for a schedule award.

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<sup>2</sup> 5 U.S.C. § 8107(a), (c) (2000).

<sup>3</sup> *Henry B. Floyd, III*, 52 ECAB 220, 222 (2001).

<sup>4</sup> 5 U.S.C. § 8107(c).

<sup>5</sup> *Id.*

<sup>6</sup> 5 U.S.C. § 8107(c)(22); 20 C.F.R. § 10.404(a) (2006).

<sup>7</sup> 20 C.F.R. § 10.404.

<sup>8</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

<sup>9</sup> *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

**CONCLUSION**

Appellant has not established entitlement to a schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 13, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 23, 2007  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board