

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

S.S., Appellant

and

**U.S. POSTAL SERVICE, MOUNT HOOD
DELIVERY DISTRIBUTION CENTER,
Portland, OR, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 08-1612
Issued: January 7, 2009**

Appearances:

Judith L. Sala, for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 19, 2008 appellant filed a timely appeal from the August 6, 2007 decision of the Office of Workers' Compensation Programs and the April 3, 2008 decision of an Office hearing representative denying his claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant is entitled to a schedule award for a loss of equilibrium caused by his November 9, 2006 employment-related injury.

FACTUAL HISTORY

On November 24, 2006 appellant, then a 58-year-old building equipment mechanic, filed a traumatic injury claim (Form CA-1) alleging that while at work on November 9, 2006 he was hit by a black pipe air line causing him to fall off a six-foot-high platform onto a concrete floor. The accident was witnessed by several of appellant's coworkers, who stated that he experienced

a brief period of unconsciousness. Appellant was taken by ambulance to the hospital where he was admitted overnight. On November 10, 2006 he was diagnosed with a closed head injury and facial contusions. Appellant's medical records also noted a history of hypertension, post-traumatic stress disorder and a left frontal cavernoma. He was returned to light duty on December 4, 2006. Appellant was advised to avoid strenuous activity, heavy lifting and climbing for at least two months.

In a February 15, 2007 decision, the Office accepted appellant's claim for a head contusion with brief loss of consciousness.

Appellant was subsequently treated for complaints of dizziness and vertigo. After several magnetic resonance imaging (MRI) scans ruling out a change in appellant's preexisting cavernoma, he was referred to an ears, nose and throat physician. An April 25, 2007 audiogram revealed high frequency sensorineural hearing loss but with good bilateral speech discrimination. On June 8, 2007 appellant underwent an electronystagmography (ENG). Findings indicated canalithiasis in the posterior semicircular canal of appellant's left inner ear vestibular system, resulting in a diagnosis of left benign paroxysmal positional vertigo. On August 15, 2007 Dr. James D. Smith, a Board-certified otolaryngologist, diagnosed positional vertigo secondary to a traumatic injury based on the onset of vertigo shortly after appellant's loss of consciousness. He distinguished positional vertigo from the classical benign paroxysmal position vertigo, stating that the former was hard to treat and slow to recover. Dr. Smith further stated that positional vertigo secondary to a traumatic injury may never completely clear.

On July 23, 2007 appellant filed a claim for a schedule award. In a July 25, 2007 letter, the Office informed appellant that he was not entitled to a schedule award under the Federal Employees' Compensation Act for a head injury.¹ On July 28, 2007 appellant advised that he was claiming a schedule award for the loss of equilibrium due to inner ear damage.

In a decision dated August 6, 2007, the Office denied appellant a schedule award for his head injury. Appellant requested an oral hearing on August 16, 2007.

At the January 23, 2008 oral hearing, appellant testified that his hearing was "fairly good." He advised that his vertigo has negatively impacted his daily activities, including showering and working on his barn, and reduced his ability to perform normal work duties.

In an April 3, 2008 decision, the hearing representative affirmed the August 6, 2007 denial of appellant's claim for a schedule award finding that loss of equilibrium was not a compensable impairment under the scheduled provisions of the Act.

¹ 5 U.S.C. § 8107.

LEGAL PRECEDENT

The schedule award provision of the Act² and its implementing regulation³ sets 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. A schedule award is not payable for the loss or loss of use, of a member or function of the body not specifically listed in the Act and regulation.⁴ The Act's list of scheduled members includes the eye, arm, hand, fingers, leg, foot and toes.⁵ The Act also specifically provides for compensation for loss of hearing and loss of vision.⁶ Section 8107(c)(22) of the Act vests the Secretary of Labor with the authority to expand the list of scheduled members to include "any other important external or internal organ of the body..."⁷ In accordance with the authority granted under section 8107(c)(22), the Secretary added the breast, kidney, larynx, lung, penis, testicle, ovary, uterus and tongue to the list of scheduled members.⁸ The members and functions listed in the schedule award provision and the regulation do not include impairments of the back, brain, or the body as a whole.⁹

ANALYSIS

The issue is whether appellant is entitled to a schedule award for his loss of equilibrium resulting from his accepted injury. The Board finds that appellant has not sustained permanent impairment to a scheduled member and is not entitled to a schedule award.

In order to be eligible for a schedule award, appellant must show that his work injury caused an impairment of a schedule award member enumerated in the Act. In an April 15, 2007 medical report, Dr. Smith diagnosed appellant with positional vertigo secondary to a traumatic injury. Appellant testified at the oral hearing that his loss of equilibrium impacted his ability to perform his normal work and daily life activities. However, a loss of equilibrium is not specified in the Act or the implementing regulation as a compensable scheduled member. The Board has consistently denied schedule awards for a loss of equilibrium because it is not listed in the scheduled provision of the Act or regulations.¹⁰ The terms of the Act are specific as to the method and amounts payable under a schedule award. Neither the Office nor the Board has the

² *Id.*

³ 20 C.F.R. § 10.404.

⁴ *James E. Jenkins*, 39 ECAB 860 (1988).

⁵ 5 U.S.C. § 8107(c).

⁶ *Id.*

⁷ 5 U.S.C. § 8107(c)(22).

⁸ 20 C.F.R. § 10.404(a).

⁹ *See* 5 U.S.C. § 8101(19); *John Litwinka*, 41 ECAB 956 (1990).

¹⁰ *See Richard F. Miebach*, 31 ECAB 1474 (1980); *Lawrence H. Degroat*, 30 ECAB 795 (1980); *Thomas E. Montgomery*, 28 ECAB 294 (1977); *Leo F. Julien*, 22 ECAB 215 (1971).

authority to make an award of benefits under any terms other than those specified in the statute and implementing federal regulations.¹¹

CONCLUSION

Appellant is not entitled to a schedule award because loss of equilibrium is not enumerated under the schedule award provisions of the Act.

ORDER

IT IS HEREBY ORDERED THAT the April 3, 2008 and August 6, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 7, 2009
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

¹¹ See *Denise L. Crouch*, 57 ECAB 161 (2005); *Harry D. Butler*, 43 ECAB 859 (1992).