

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

F.W., Appellant

and

**DEPARTMENT OF THE ARMY, WHITE
SANDS MISSILE RANGE, NM, Employer**

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**Docket No. 11-191
Issued: October 17, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 2, 2010 appellant filed a timely appeal from the May 14 and October 22, 2010 decisions of the Office of Workers' Compensation Programs (OWCP) denying a schedule award. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the schedule award decisions.²

ISSUE

The issue is whether appellant sustained employment-related permanent impairment, thereby entitling him to a schedule award.

¹ 5 U.S.C. §§ 8101-8193.

² By decision dated April 28, 2010, OWCP found that appellant returned to work for the employing establishment on June 1, 2009, that the position fairly and reasonably represented his wage-earning capacity. Because more than 180 days elapsed from this decision to the filing of the appeal, the Board lacks jurisdiction to review this decision pursuant to 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On April 20, 2007 appellant, then a 52-year-old toxic materials handler, filed a traumatic injury claim alleging that, on that date, while moving a scrap metal basket inside a metal hopper, he felt a sharp pain in his lower back. On June 12, 2007 OWCP accepted his claim for sprain of back, lumbar region. It also accepted the claim for lumbosacral radiculopathy, aggravation of degeneration lumbar/lumbosacral spine and lumbar spondylolisthesis. OWCP paid compensation and medical benefits. On September 22, 2008 appellant underwent an L4-S1 laminectomy, facetectomy, transforaminal lumbar interbody arthrodesis with instrumentation L4-5, L5-S1; and posteriolateral fusion with pedicle screw instrumentation at L4-S1.

On February 24, 2010 appellant filed a claim for a schedule award. He submitted a Maximum Medical Improvement and Impairment Rating Report by Dr. Kevin J. Sandberg, a Board-certified physiatrist, dated January 28, 2010. Dr. Sandberg found that appellant had some residual intermittent lumbar pain that was exacerbated by certain movements such as bending and twisting at the waist. There were no significant residual radicular symptoms to the lower extremities and appellant had been in a static and stable state for one year. Dr. Sandberg opined that appellant's impairment rating under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) was 21 percent of the whole person. This was derived using class 3 impairment using the Regional Grid for Intervertebral Disc Herniation and Alteration of Motion Segment Integrity at multiple levels with mild residual problems (grade modifier of one).³

On March 17, 2010 OWCP referred the case to an OWCP medical adviser for his determination as to percentage of impairment. In an April 28, 2010 report, OWCP's medical adviser determined that, although Dr. Sandberg appeared to have performed a correct evaluation, the regulations only allow for impairment to scheduled members, and the spine and whole person are not scheduled members. Accordingly, he was unable to recommend impairment for appellant based on impairment of the spine or whole person. The medical adviser noted that Dr. Sandberg indicated there were normal motor function and no sensory loss in the lower extremities. He concluded that appellant had zero percent impairment of each lower extremity.

By decision dated May 14, 2010, OWCP denied appellant's claim for a schedule award on the grounds that there was no employment-related impairment due to a scheduled member or function of the body as provided in section 8107 of FECA (5 U.S.C. § 8107).

On May 19, 2010 appellant requested review of the written record by an OWCP hearing representative.

In a letter dated May 27, 2010, Dr. Sandberg stated that he was not familiar with OWCP regulations stating that the spine and whole person are not scheduled members. He recommended that appellant request a hearing so that someone could explain OWCP's position with regard to the impairment rating.

³ Dr. Sandberg also found that appellant's impairment rating under the fifth edition of the A.M.A., *Guides* was 23 percent of the whole person.

By decision dated October 22, 2010, the hearing representative affirmed OWCP's May 14, 2010 decision.

LEGAL PRECEDENT

The schedule award provision of FECA⁴ and its implementing regulations⁵ 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. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates 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*.⁶ The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁷

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.⁸ Neither FECA nor the implementing federal regulations provide for payment of a schedule award for the permanent loss of use of the back, the spine or the body as a whole; a claimant is not entitled to such a schedule award.⁹ The Board notes that section 8101(19) specifically excludes the back from the definition of organ.¹⁰ A claimant may receive a schedule award for any permanent impairment to the upper or lower extremities even though the cause of the impairment originated in the spine.¹¹

ANALYSIS

OWCP accepted appellant's claim for sprain of the lumbar region of back, lumbosacral radiculopathy, aggravation of degeneration lumbar/lumbosacral spine and lumbar spondylolisthesis. Appellant filed a claim for a schedule award.

In a March 17, 2010 evaluation, Dr. Sandberg opined that appellant had 21 percent impairment of the whole person under the sixth edition of the A.M.A., *Guides*. FECA, however,

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* For impairment ratings calculated on and after May 1, 2009, OWCP should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

⁷ *See id.*; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁸ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

⁹ *See Jay K. Tomokiyo*, 51 ECAB 361 (2000).

¹⁰ 5 U.S.C. § 8101(19).

¹¹ *Thomas J. Engelhart*, *supra* note 8.

does not provide for impairment of the whole person.¹² Furthermore, it does not provide for a schedule award based on impairment to the back or spine.¹³ Appellant may only receive a schedule award for impairment to the upper or lower extremities if such impairment is established as being due to his accepted condition.¹⁴

The Board finds that the medical evidence does not support that appellant had any impairment to his extremities related to his accepted employment injury. Dr. Sandberg indicated that there was normal motor function and no sensory loss in the lower extremities. Based on Dr. Sandberg's evaluation OWCP's medical adviser found that appellant had zero percent impairment of each lower extremity resulting from the employment-related injury.

The Board finds that OWCP properly found that, pursuant to the A.M.A, *Guides*, appellant had no permanent impairment to a scheduled member or function of the body as defined in FECA.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established that he sustained an employment-related permanent impairment thereby entitling him to a schedule award.

¹² *N.D.*, 59 ECAB 344 (2008); *R.P.*, Docket No. 10-2107 (issued May 19 2001).

¹³ *A.S.*, Docket No. 10-1903 (issued May 20, 2011).

¹⁴ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 22 and May 14, 2010 are affirmed.

Issued: October 17, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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