

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANOISE SMITH and DEFENSE LOGISTICS AGENCY,
ADMINISTRATIVE SUPPORT CENTER, Stockton, Calif.

*Docket No. 96-1849; Submitted on the Record;
Issued August 24, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant is entitled to a schedule award for permanent impairment of a member enumerated by the schedules provided under 5 U.S.C. § 8107(c) or 20 C.F.R. § 10.304(b).

The Office of Workers' Compensation Programs accepted that on July 12, 1989 appellant sustained cervical strain and a herniated nucleus pulposus at C5-6. He underwent corrective surgery for the herniated C5-6 disc on September 1, 1993 and thereafter did not return to work. Concurrent disability not due to injury was noted to include a C1-2 laminectomy for removal of a neurofibroma, carpal tunnel syndrome and coronary artery disease with bypass graft (CAB) surgery in 1994. Other conditions diagnosed but not accepted by the Office as being employment related included left tardy ulnar nerve palsy, left ulnar neuropathy, post-CAB residual left arm numbness and paresthesias, a bulging disc at C6-7, finger and elbow pain, headaches, cervical spondylosis at C3-4 and C6-7, hypertension and diabetes since 1994.

On August 10, 1995 appellant filed a claim for a schedule award.

In support appellant submitted April 27 and August 16, 1995 reports from his treating physician, Dr. Freddie L. Contreras, a Board-certified neurosurgeon, who stated that appellant had reached maximum medical improvement, was discharged from his care and had a 15 percent permanent impairment of the whole body. Dr. Contreras stated that this impairment rating was based upon objective evidence of limited range of motion in appellant's neck.

In an August 24, 1995 form report, Dr. Contreras diagnosed cervical spondylosis at C5-6, noted that objective findings were a limited range of motion in appellant's neck, he checked "yes" to the form question of whether the condition found was caused by the employment injury and he noted that, despite surgery, appellant continued to complain of neck pain, arm pain, shoulder pain, bilateral hand pain and numbness. Dr. Contreras reiterated his impairment estimate of 15 percent of the whole body.

The Office referred appellant for a second opinion neurological consultation to Dr. Warren D. Long, Jr., a Board-certified neurosurgeon. By report dated February 15, 1996, Dr. Long noted appellant's complaints of dizziness, headaches, neck pain and a five-year history of weakness in his arms with bilateral arm pain. Dr. Long noted equal and active upper extremity reflexes, no motor deficits, no atrophy, fasciculations or tremor, a good grip and no biceps or triceps weakness. Dr. Long did note some restriction in appellant's shoulder joints above 180 degrees but he did not ascribe a cause for this. Lower extremities were noted as being normal. Dr. Long opined that appellant's ulnar nerve was not symptomatic at that time and he agreed with Dr. Contreras' 15 percent whole body impairment rating. However, he then stated that according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, with a surgically treated lesions with residual pain and rigidity, the impairment rating would be nine percent whole body impairment.

By decision dated February 29, 1996, the Office rejected appellant's schedule award claim finding that the medical evidence of record failed to establish that appellant had a permanent impairment of a member enumerated under section 8107. The Office explained that if the accepted condition did not produce impairment to a member or function enumerated by section 8107 of the Federal Employees' Compensation Act then no schedule award was payable.

The Board finds that appellant has not established that he is entitled to a schedule award for permanent impairment to a member enumerated under 5 U.S.C. § 8107 or 20 C.F.R. § 10.304.

A schedule award is not payable for a member, function, or organ of the body not specified in the Act or in the implementing regulations. As neither the Act nor the implementing regulations provide for the payment of a schedule award for the permanent loss of use of the cervical spine, the back, or the body as a whole, no claimant is entitled to such an award.¹

In the present case, the medical evidence submitted by appellant gave him an impairment of 15 percent of the body as a whole. As whole body impairments are not compensable under the provisions of the Act, appellant is not entitled to a schedule award on this basis. Further, Dr. Contreras indicated that this impairment rating was based upon a limited range of motion of appellant's neck. As impairments of the cervical spine are not compensable under the provisions of the Act, any impairment rating based upon cervical spine losses of range of motion is not compensable under the Act and appellant is not entitled to a schedule award on this basis.

The second opinion physician, Dr. Long, concurred with Dr. Contreras' findings and whole body impairment rating, but then offered his own impairment rating in accordance with the A.M.A., *Guides*. Dr. Long based his findings of impairment on appellant's pain and rigidity of his cervical spine postoperatively and gave the rating of nine percent in terms of a whole body impairment. As previously discussed, impairments of the cervical spine are not compensable under the provisions of the Act and, therefore, any impairment rating based thereon is also not compensable for schedule award purposes. Further, Dr. Long gave his impairment rating in

¹ See *George E. Williams*, 44 ECAB 530 (1993); *James E. Mills*, 43 ECAB 215 (1991); *Joseph D. Lee*, 42 ECAB 172 (1990).

terms of a whole body impairment, which is not a compensable rating under the Act for schedule award purposes. Dr. Long also failed to identify any permanent impairment in a member of the body listed in the schedules of 5 U.S.C. § 8107 or 20 C.F.R. § 10.304, that would entitle appellant to a schedule award.

Section 8107(c) of Title 5 of the U.S. Code enumerates the following members and functions of the body as supporting the granting of a schedule award for permanent impairment thereto: arm, leg, hand, foot, eye, thumb, fingers, toes, hearing, vision and facial disfigurement. Section 10.304(b) of Title 20 of the Code of Federal Regulations adds the following members: breast, kidney, larynx, lung, penis, testicle, tongue, ovary and uterus. Schedule awards are payable for permanent impairment only to these enumerated body members and functions and are not payable for impairment to parts of the body other than these. If the medical evidence of record supported that appellant had permanent impairment to a body member listed in the schedules, causally related to his accepted employment conditions of cervical strain and/or herniated C5-6 disc, then he would be entitled to a schedule award. However, no such medical evidence identifying such a permanent impairment to a schedule member, causally related to the accepted cervical strain and/or herniated C5-6 disc, was included in the record. Both Drs. Contreras and Long related their impairment ratings only to cervical impairment; loss of cervical range of motion, cervical pain and rigidity, which is not compensable under the provisions of the Act. Consequently, appellant has failed to establish that he is entitled to a schedule award.

Accordingly, the decision of the Office of Workers' Compensation Programs dated February 29, 1996 is hereby affirmed.

Dated, Washington, D.C.
August 24, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member