

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS J. ENGELHART and DEPARTMENT OF THE NAVY,
PUGET SOUND NAVAL SHIPYARD, Bremerton, Wash.

*Docket No. 97-403; Submitted on the Record;
Issued April 9, 1999*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant is entitled to a schedule award for impairment of his bladder and anus resulting from a 1989 work injury.

In this case, appellant's claim, filed on March 2, 1989 after he hurt his lower back while working as a pipefitter, was accepted by the Office of Workers' Compensation Programs. Appellant underwent emergency back surgery on July 31, 1989 for an L4-5 disc rupture after being diagnosed with an acute cauda equina syndrome.¹

Appellant returned to light-duty work on April 9, 1990 following physical therapy and a work-hardening program. After June 5, 1990 no light duty was available and appellant was referred for vocational rehabilitation. Subsequently, appellant returned to work in private industry as an insurance claims representative.

On June 15, 1993 appellant requested a schedule award for his lower extremities, buttocks, tailbone, penis, testicles, bladder and sphincter, stating that he was unable to have a normal bowel movement or urinate without medication. Following correspondence between the Office and appellant's physicians, the Office medical adviser determined that appellant had a three percent impairment of his left and right lower extremities due to his spinal injury. On January 12, 1995 the Office issued a schedule award for appellant's loss of use of his lower extremities; the award ran from August 24 through December 22, 1994.

Appellant requested an oral hearing, which was held on March 19, 1996. On May 20, 1996 the hearing representative amended the schedule award to an additional nine percent impairment for each lower extremity, based on the April 5, 1996 report of Dr. C. Stephen Settle,

¹ The cauda equina is the collection of spinal roots that descend from the lower part of the spinal cord and occupy the vertebral canal below the cord; their appearance resembles the tail of a horse, hence the name. *DORLAND'S ILLUSTRATED Medical Dictionary* (27th ed. 1988).

Board-certified in physical medicine and rehabilitation, and the Office medical adviser's calculations. On July 17, 1996 the Office issued an amended schedule award.

On July 22, 1996 the Office determined that appellant was not entitled to a schedule award for impairment of his bladder and anus because these were not specified as compensable members of the body in either the Federal Employees' Compensation Act or its implementing regulations.

The Board finds that no schedule award is payable for impairment of appellant's bladder or anus.

Under section 8107 of the Act² and section 10.304 of the implementing federal regulations,³ schedule awards are payable for the permanent impairment of specified bodily members, functions and organs. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.⁴

Neither the Act nor the regulations specify the method by which the percentage of impairment shall be determined.⁵ The method used in making such determinations rests in the sound discretion of the Office.⁶ For consistent results and to ensure equal justice for all claimants, the Office has adopted and the Board has approved, the use of the appropriate edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) as the uniform standard applicable to all claimants for determining the percentage of permanent impairment.⁷

However, no schedule award is payable for a member, function, or organ of the body not specified in the Act or in the regulations.⁸ This principle applies to body members that are not

² 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.304.

⁴ 5 U.S.C. § 8107(c)(19); *John M. Gonzales, Jr.*, 48 ECAB ____ (Docket No. 95-397, issued February 25, 1997).

⁵ *A. George Lampo*, 45 ECAB 441, 443 (1994).

⁶ *George E. Williams*, 44 ECAB 530, 532 (1993).

⁷ *James J. Hjort*, 45 ECAB 595, 599 (1994).

⁸ *William Edwin Muir*, 27 ECAB 579, 581 (1976); *see also Terry E. Mills*, 47 ECAB 309, 313 (1996) (listing the members and organs of the body for which the loss or loss of use is compensable under the schedule award provisions).

enumerated in the schedule award provision before the 1974 amendments⁹ as well as to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendments.¹⁰

In 1960, amendments to the Act 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 originated in a scheduled or nonscheduled member. Thus, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders, or spine.¹¹

In 1987, the Secretary of Labor exercised her authority, pursuant to section 8107(c)(22), to add to the compensation schedule “any other important” internal or external organs and listed the following: breast, kidney, larynx, lung, penis, testicle and tongue.¹²

In this case, appellant received a schedule award for the impairment to his lower extremities, caused by his work-related spinal injury, and his claim for the loss of use of his penis is pending before the Office.¹³ However, the bladder and anus are not specified members of the body, in either the Act or the regulations,¹⁴ and the Board has no power to change or add to the plain meaning of the terms used in the statute.¹⁵

Appellant argues on appeal that the language of section 8107(c)(22), “*any other important external or internal organ of the body*,” would not have been included if Congress had intended to limit schedule awards to only the members of the body enumerated in the preceding clauses. (Emphasis added.) Appellant’s counsel contends that the Secretary cannot contravene the clear intent of Congress.

The intent of subsection 22 of section 8107(c) is to enable the Secretary to determine what other organs of the body may qualify for schedule awards. That intent is evident from the language, “as determined by the Secretary.” Congress thus intended to leave further determinations of what specific organs would be considered “important” for the purpose of a schedule award to the discretionary authority of the Secretary. For example, the Board has

⁹ The Act itself specifically excludes the back from the definition of “organ.” 5 U.S.C. § 8101(19).

¹⁰ *John F. Critz*, 44 ECAB 788, 792-93 (1993) (brain disorder); *Ted W. Dietderich*, 40 ECAB 963, 965 (1989) (gallbladder); *Thomas E. Stubbs*, 40 ECAB 647, 649 (1989) (spleen).

¹¹ *Rozella L. Skinner*, 37 ECAB 398, 402 (1986).

¹² 20 C.F.R. § 10.304(b). Effective May 25, 1992, the female reproductive organs were added to the compensation schedule.

¹³ Appellant’s claim for a schedule award for loss of use of his penis and testicles is not before the Board on the current appeal. See 20 C.F.R. § 501.2(c).

¹⁴ See *Terry E. Mills*, *supra* n. 8 (finding that the loss of appellant’s fifth rib to form a bone graft in a work-related injury is not compensable under the schedule award provisions of the Act).

¹⁵ See *Virginia Chappell (William F. Chappell)*, 45 ECAB 275, 277 (1993) (finding that the terms of the Act are specific as to the method and amount of payment of compensation; neither the Office nor the Board has the authority to enlarge the terms of the Act or to award benefits under any terms other than those specified in the statute).

found that the Act provides no statutory requirement for the payment of a schedule award for a claimant's loss of her sense of smell.¹⁶

So, too, with loss of use of the bladder and anus. The Act clearly provides the Secretary of Labor with the authority to add other organs to the list of those that now qualify for a schedule award. The fact that she has not designated the bladder and the anus is not a contravention of congressional intent, but rather a proper exercise of her discretionary authority granted by Congress.¹⁷

Inasmuch as loss of use of the excretory functions is not specifically enumerated in the compensation schedule, the Board finds that the Office properly denied appellant's claim for a schedule award for permanent impairment of his anus and bladder.¹⁸

The July 22, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.

April 9, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁶ See *Billie Sue Barnes*, 47 ECAB 478 (1996) (finding that the Office's authority to add other important internal or external organs to the compensation schedule will be exercised through properly promulgated regulations).

¹⁷ See *John Yera*, 48 ECAB ____ (Docket No. 95-2771, issued December 9, 1996) (finding that bowel, bladder and sexual dysfunction were taken into account in the 100 percent impairment rating of appellant's penis).

¹⁸ Cf. *Gordon G. McNeill*, 40 ECAB 790, 795 (1989) (remanding the case for the Office to consider the impairment of appellant's urinary functions in calculating a schedule award for the loss of use of his penis); *William T. Trull*, 36 ECAB 659, 663 (1985) (same).