

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JEFFREY C. BROWN and U.S. POSTAL SERVICE,  
POST OFFICE, Salem, Oreg.

*Docket No. 97-309; Submitted on the Record;  
Issued January 14, 1999*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether appellant has established his entitlement to a schedule award for permanent impairment of his left upper extremity.

On May 23, 1991 appellant, then a 39-year-old postal machine clerk, filed a notice of occupational disease, claiming that he had experienced pain in his left arm radiating to his fingers due to the repetitiveness of his work keying addresses on a letter-sorting machine. The Office of Workers' Compensation Programs accepted appellant's claim for aggravation of cervical spondylosis.

Following surgery for a cervical fusion at C4-5 on September 21, 1992, appellant, who had returned to light-duty work in February 1993, filed a claim for a schedule award on November 24, 1993. On January 5, 1994 the Office asked appellant's treating physician, Dr. Frederick W. Tiley, a Board-certified orthopedic surgeon, to determine the extent of permanent impairment of appellant's left arm.

In a letter dated August 1, 1994, Dr. Tiley stated that appellant had loss of range of motion in his neck, with about 15 degrees of extension and basically full flexion. Lateral bending was about 25 degrees to either side and rotation to the right was down about 10 degrees. Appellant had 1 to 1.5 centimeters atrophy in his left arm, and the changes were permanent from his neck condition and surgery. Dr. Tiley did not complete the form sent to him by the Office.

On July 25, 1995 the Office authorized appellant to seek an impairment rating from Dr. William Mayhall, a Board-certified orthopedic surgeon, who initially treated appellant for possible carpal tunnel syndrome in May 1990. In an August 16, 1995 report, he stated that appellant would be classified as a Diagnosis-Related Estimates (DRE) category 3 with 15 percent impairment of the cervical spine. Dr. Mayhall also used Table 75, page 3/113 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) to find a rating of 2.E "surgically treated lesion with residual, medically documented

pain and rigidity.” He then added range of motion estimates of 1 percent loss of flexion, 2 percent loss of extension, and 1 percent each of lateral flexion and right and left rotation to find 7 percent, which, combined with the above, makes 9 percent and comes out to 15 percent. Dr. Mayhall concluded that either method resulted in a 15 percent whole person impairment for residuals of appellant’s cervical disc fusion and radiculopathy.

The Office medical adviser found Dr. Mayhall’s calculations to be correct but noted that compensation under the Federal Employees’ Compensation Act is payable only for impairment of the extremities and certain organs. The Office medical adviser reviewed the August 16, 1995 report and concluded that appellant had a 3 percent loss of use of his left upper extremity resulting from his left C-5 radiculopathy. The nerve root involved was C-5 whose maximum impairment was 5 percent, according to Table 13, page 51 of the A.M.A., *Guides*. There were no ratable motor impairments and the sensory changes noted by Dr. Mayhall did not exceed Grade 3, 25 to 60 percent of maximum impairment, according to Table 11, page 48 of the A.M.A., *Guides*. The 60 percent impairment multiplied by 5 percent resulted in a 3 percent permanent impairment of the left arm. When asked to comment on the Office medical adviser’s conclusions, Dr. Mayhall stated that he believed the impairment rating for appellant’s left arm was “covered” in the 15 percent rating he found and that the separate 5 percent rating for sensory changes would fall under the category of radiculopathy.

Given this conflict of medical opinion,<sup>1</sup> the Office referred appellant to Dr. Ira Weintraub, a Board-certified orthopedic surgeon, who found a 16 percent impairment, noting that Table 75 was “key” in determining this figure. The Office medical adviser reviewed Dr. Weintraub’s December 22, 1995 report and stated that it had not been made clear to either physician that an impairment rating for the cervical spine was not authorized under the Act. Thus, there was no conflict of medical opinion but rather a misunderstanding. The Office medical adviser reiterated that a three percent rating for appellant’s left arm was correct.

On January 11, 1996 the Office requested that Dr. Weintraub provide a rating based solely on upper extremity impairment because compensation was not payable for permanent impairment of the cervical or lumbar spine. The Office repeated its request on March 12, 1996. Dr. Weintraub declined to offer such a rating, noting that there was “little if any impairment” in appellant’s upper extremities due to his neck problem.

The Office thereafter referred appellant for another impartial medical examination. On July 2, 1996 Dr. L. Phaon Gambee, a Board-certified orthopedic surgeon, examined appellant, noting the lack of atrophy, stiffness, tilt, or torticollis and the normal and valid range of motion of the cervical spine. He found range of motion in the upper extremities to be bilaterally symmetrical with no muscle weakness or spasm. Dr. Gambee concluded that appellant had no permanent impairment in his left upper extremity, with full range of motion and no “true sensory deficit.”

After reviewing Dr. Gambee’s report, the Office medical adviser stated that his conclusion was “actually the same” one reached by Drs. Weintraub and Mayhall in that

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<sup>1</sup> See *Dallas E. Mopps*, 44 ECAB 454, 456 (1993).

appellant's sensory changes were nonanatomic and causing no impairment. The Office medical adviser agreed that appellant had no ratable impairment of his left arm.

On October 1, 1996 the Office denied appellant's claim for a schedule award on the grounds that he had no impairment of his left upper extremity resulting from the accepted condition of aggravation of his preexisting cervical spondylitis.

The Board finds that the Office properly denied appellant's claim for a schedule award.

Under section 8107 of the Act<sup>2</sup> and section 10.304 of the implementing federal regulations,<sup>3</sup> 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.<sup>4</sup> However, neither the Act nor the regulations specify the method by which the percentage of impairment shall be determined.<sup>5</sup> The method used in making such determinations rests in the sound discretion of the Office.<sup>6</sup> 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 A.M.A., *Guides* as the uniform standard applicable to all claimants for determining the percentage of permanent impairment.<sup>7</sup>

The Board notes that no schedule award is payable for a member, function, or organ of the body not specified in the Act or in the implementing federal regulations.<sup>8</sup> This principle applies to body members that are not enumerated in the schedule award provision before the 1974 amendment<sup>9</sup> as well as to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment.<sup>10</sup> The Board has noted that the back is specifically excluded from the definition of "organ" under the Act and therefore no schedule award is payable for impairment to the spine.<sup>11</sup>

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.* (1974); 5 U.S.C. § 8107.

<sup>3</sup> 20 C.F.R. § 10.304.

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

<sup>5</sup> *A. George Lampo*, 45 ECAB 441, 443 (1994).

<sup>6</sup> *George E. Williams*, 44 ECAB 530, 532 (1993).

<sup>7</sup> *James J. Hjort*, 45 ECAB 595, 599 (1994).

<sup>8</sup> *William Edwin Muir*, 27 ECAB 579, 581 (1976); *see Terry E. Mills*, 47 ECAB \_\_\_\_ (Docket No. 94-837, issued January 30, 1996) (listing the members and organs of the body for which the loss or loss of use is compensable under the schedule award provisions).

<sup>9</sup> The Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

<sup>10</sup> *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).

<sup>11</sup> *See James E. Mills*, 43 ECAB 215 (1991).

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.<sup>12</sup>

In this case, all the physicians who examined appellant agree that he sustained some permanent impairment resulting from the cervical fusion he underwent in 1991 because of the accepted aggravation of his spondylosis. However, while the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, no schedule award is payable for spinal impairment unless the medical evidence demonstrates that the accepted spinal injury has resulted in impairment of the arms or leg. The medical evidence in this case establishes that appellant's impairment in his neck has caused no impairment to his upper extremities. Therefore, appellant is not entitled to a schedule award.<sup>13</sup>

The Office medical adviser's initial conclusion that appellant had a 3 percent impairment of his left upper extremity was based on Dr. Mayhall's assessment of sensory deficits in appellant's left arm, but Dr. Mayhall subsequently clarified that his 15 percent whole person rating covered any impairment in appellant's left arm without specifying a percentage. Dr. Mayhall concluded that appellant had little if any impairment in the arm, and Dr. Gambee found that the sensory deficits upon which the Office medical adviser relied to find a three percent impairment were only subjective manifestations without any anatomic basis. The medical evidence of record fails to establish impairment of appellant's left arm due to the accepted cervical condition.

The Board finds that appellant has failed to meet his burden of proof in establishing entitlement to a schedule award.<sup>14</sup> Inasmuch as the Act does not provide schedule awards for the spine,<sup>15</sup> and the medical evidence establishes that appellant has no work-related permanent

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<sup>12</sup> *Rozella L. Skinner*, 37 ECAB 398, 402 (1986).

<sup>13</sup> See *James E. Jenkins*, 39 ECAB 860, 867 (1988) (finding that the medical evidence failed to describe impairment to appellant's upper extremity based on his cervical injury).

<sup>14</sup> See *George E. Williams*, *supra* note 6 (finding that the medical evidence was insufficient to support permanent impairment of appellant's lower extremities as a result of his spinal condition).

<sup>15</sup> Appellant's argument on appeal reflects his misunderstanding of the scope of the schedule award provisions. While Dr. Weintraub was incredulous that no schedule award was payable for spinal impairment itself, he did agree that appellant had little if any impairment in his upper extremities caused by his cervical condition.

impairment of a schedule member, the Office properly found that appellant was not entitled to a schedule award for impairment of his left upper extremity.<sup>16</sup>

The October 1, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.  
January 14, 1999

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>16</sup> The A.M.A., *Guides* is the approved standard for evaluating permanent impairment; see *Hildred I. Lloyd*, 42 ECAB 944, 946 (1991) (finding that the Office properly followed the instructions in the A.M.A., *Guides* for evaluating the percentage of impairment of the right hand).