

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of DEBBIE A. ESLINGER and U.S. POSTAL SERVICE,  
BURLINGTON STATION, Knoxville, Tenn.

*Docket No. 97-2574; Submitted on the Record;  
Issued July 13, 1999*

---

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained an injury covered by the schedule award provisions of the Federal Employees' Compensation Act; and (2) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request to reopen her case for a merit review.

The Office accepted that on June 18, 1994, appellant, then a 39-year-old rural carrier, sustained cervical and thoracic strains and a C6 disc herniation when she lifted a tray of mail. She was off work from June 20 to November 6, 1994 and received appropriate compensation benefits.<sup>1</sup>

Dr. William S. Reid, an attending neurosurgeon, performed an anterior cervical discectomy and fusion at C6 on September 21, 1994.<sup>2</sup> He submitted periodic progress reports, and released her to work as of November 7, 1994 at which time appellant resumed full duty. In a February 7, 1995 report, Dr. Reid stated that appellant was working up to 12 hours per day full duty, with some increase in neck pain "and a sense of fullness in the anterior cervical region." He opined that appellant had reached maximum medical improvement and had a "nine percent permanent impairment as the result of her injury and surgery." In a May 30, 1995 report, Dr. Reid related appellant's "muscular strain symptoms" of posterior neck and low back pain, with no recurrence of radicular pain. Appellant continued full-time work.

---

<sup>1</sup> The record indicates that an overpayment of compensation in the amount of \$266.37 occurred in appellant's case as she was paid compensation for total disability through November 12, 1994 but had returned to work on November 7, 1994. The Office determined in February 1995 that collection efforts should be terminated as the costs of recovery exceeded the overpaid amount, and that appellant was not at fault in creation of the overpayment.

<sup>2</sup> A July 1994 cervical magnetic resonance imaging scan showed a large right lateral C6-7 disc herniation, compressing the thecal sac, nerve root, sleeves and spinal cord. In a July 19, 1994 report, Dr. Reid opined that if surgical fusion were not performed, appellant was at risk for spinal cord injury.

On May 1, 1996 appellant claimed a schedule award.

In an October 12, 1996 report, Dr. Reid found that appellant reached maximum medical improvement as of February 7, 1995 and noted no impairment of appellant's upper extremities. He stated that appellant had sustained a 15 percent impairment of the "whole person" due to a "DRE [Diagnosis-Related Estimate] cervicothoracic [category] III" impairment,<sup>3</sup> as described on page 104 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> edition) (hereinafter, the "A.M.A., *Guides*").

By decision dated December 5, 1996, the Office denied appellant's schedule award claim on the grounds that the Office had not accepted that appellant sustained an "impairment of a scheduled member or function of the body as set forth in section 8107 of the Act."<sup>4</sup>

In a May 21, 1997 letter, appellant, through her representative, requested an update regarding a March 1997 request for reconsideration, asserting that Dr. Reid's opinion and section 8107(c)(19) of the Act proved her schedule award claim.<sup>5</sup>

By decision dated July 2, 1997, the Office denied appellant's request for reconsideration on the grounds that the May 21, 1997 letter, the only evidence submitted in support thereof, was insufficient to warrant a review of the case on the merits as it did not raise "substantive legal questions" or include "new and relevant medical evidence."

Regarding the first issue, the Board finds that appellant has not established that she sustained an injury in the performance of duty entitling her to a schedule award.

---

<sup>3</sup> The A.M.A., *Guides*, in pertinent part, provides as follows: "DRE Cervicothoracic Category III: Radiculopathy. *Description and Verification*: The patient has significant signs of radiculopathy, such as: (1) loss of relevant reflexes or; (2) unilateral atrophy with greater than a 2-cm decrease in circumference compared with the unaffected side, measured at the same distance above or below the elbow. The neurologic impairment may be verified by electrodiagnostic or other criteria ... *Structural Inclusions*: (1) 25 percent to 50 percent compression of one vertebral body; (2) posterior element fracture, but *not* fracture of transverse or spinous process; a mild displacement disrupts the spinal canal, but the fracture is healed without loss of structural integrity. Radiculopathy may or may not be present ...." A.M.A., *Guides*, 4th edition, at 104.

<sup>4</sup> In a February 5, 1997 letter, appellant, through her representative requested that the Office contact her to "learn the reasons" for the denial of her claim and "provide the information ... need[ed] to expedite this matter." The record indicates that the Office contacted appellant's attorney, who was out of the office at the time. Appellant's attorney wrote a March 12, 1997 letter asking for another opportunity to speak with the claims examiner.

<sup>5</sup> Section 8107(c)(19) of the Act provides that: "[c]ompensation for permanent partial loss of use of a member may be for proportionate loss of use of the member. The degree of loss of vision or hearing under this schedule is determined without regard to correction." 5 U.S.C. § 8107(c)(19). Appellant's attorney representative also submitted a June 23, 1997 letter requesting a status update on the reconsideration request.

Under section 8107 of the Act<sup>6</sup> and section 10.304 of the implementing regulations,<sup>7</sup> schedule awards are payable for permanent impairment of specified body members, functions or organs. As the Act and regulations do not specify procedures to determine percentages of impairment, the Office has adopted the A.M.A., *Guides*) as a standard for determining the percentage of impairment, to ensure consistent results and equal justice for all claimants. The Board has concurred in such adoptions.<sup>8</sup>

No schedule award is payable for a member, function, or organ of the body not specified in the Act or in the implementing regulations.<sup>9</sup> In this case, the Office accepted that appellant sustained cervical and thoracic strains and a C6 disc herniation. Thus, the accepted injuries are to the spine or “back.” As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back,<sup>10</sup> which includes the cervical spine and cervical and thoracic musculature, no claimant is entitled to such an award.<sup>11</sup> Thus, appellant has not established that she sustained an impairment to a body member, function or organ enumerated in section 8107 of the Act.

The Board notes that 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. As the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.<sup>12</sup>

The medical evidence in this case, however, does not support that appellant sustained a permanent impairment of any extremity attributable to the accepted injuries. In a May 30, 1995 report, Dr. Reid noted “muscular strain symptoms” but that appellant had no recurrence of radicular pain and continued full-time work. In an October 12, 1996 report, he found that appellant reached maximum medical improvement as of February 7, 1995 and noted no

---

<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> 20 C.F.R. § 10.304.

<sup>8</sup> *Leisa D. Vassar*, 40 ECAB 1287, 1290 (1989); *Francis John Kilcoyne*, 38 ECAB 168, 170 (1986).

<sup>9</sup> *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies equally to body members that are not enumerated in the schedule provision as it read before the 1974 amendment and to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment); *see also Ted W. Dieterich*, 40 ECAB 963 (1989); *Thomas E. Stubbs*, 40 ECAB 647 (1989); *Thomas E. Montgomery*, 28 ECAB 294 (1977).

<sup>10</sup> The Act itself specifically excludes the back from the definition of “organ.” 5 U.S.C. § 8101(19) provides, in pertinent part, that ‘organ’ means a part of the body that performs a special function and for purposes of this subchapter excludes the brain, heart and back....”

<sup>11</sup> *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

<sup>12</sup> *George E. Williams*, 44 ECAB 530 (1993); *Rozella L. Skinner*, 37 ECAB 398 (1986).

impairment of appellant's upper extremities. Also in the October 12, 1996 report, Dr. Reid calculated that appellant had sustained a 15 percent impairment of the "whole person" due to cervicothoracic impairment. However, the Act contains no schedule award provision for impairment of the whole person.<sup>13</sup>

Thus, appellant has not established that she sustained an injury covered under the schedule award provisions of the Act, as she submitted insufficient medical evidence indicating that she sustained a work-related injury to a member, function or organ of the body enumerated under section 8107 of the Act.

Regarding the second issue, the Board finds that the Office did not abuse its discretion by denying appellant's request for a merit review.

To require the Office to open a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of the claim by written request to the Office, identifying the decision and the specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed, by showing that the Office erroneously applied or interpreted a point of law, or advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office.<sup>14</sup> Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the three requirements will be denied by the Office without review of the merits of the claim.<sup>15</sup>

The critical issue in this case is whether appellant has established that she sustained an injury to a body member, organ or function enumerated under the Act's schedule award provisions. Thus, appellant's May 21, 1997 letter, the only evidence submitted in support of her reconsideration request, must be evaluated as to whether it constitutes new, relevant evidence on this issue.

In May 21, 1997 letter, appellant's representative asserted that appellant was entitled to a schedule award for the accepted injury based on Dr. Reid's reports and section 8107(c)(19) of the Act. The Board finds that section 8107(c)(19) of the Act is not relevant to appellant's claim, as it does not pertain to injuries of the back or spine. Dr. Reid's reports, as explained above, do not support that appellant sustained an injury covered by the schedule award provisions of the Act. Thus, the May 21, 1997 letter is not relevant to the critical issue involved, and the Office properly denied a merit review.

---

<sup>13</sup> *Gordon G. McNeill*, 42 ECAB 140 (1990); *Rozella Skinner*, *supra* note 12.

<sup>14</sup> 20 C.F.R. § 10.138(b)(1).

<sup>15</sup> 20 C.F.R. § 10.138(b)(2).

The decisions of the Office of Workers' Compensation Programs dated July 2, 1997 and December 15, 1996 are hereby affirmed.

Dated, Washington, D.C.  
July 13, 1999

Michael J. Walsh  
Chairman

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member