

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SAMUEL WILKS, JR. and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Houston, TX

*Docket No. 99-614; Submitted on the Record;  
Issued November 21, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
VALERIE D. EVANS-HARRELL

The issue is whether appellant sustained an injury in the performance of duty for which he is entitled to receive a schedule award.

On January 17, 1991 appellant, then a 42-year-old custodial worker, sustained a lumbar strain in the performance of duty. On April 12, 1996 he filed a claim for a back injury on April 9, 1996, which he attributed to his 1991 employment injury. By decision dated April 2, 1998, the Office of Workers' Compensation Programs found that appellant had sustained an aggravation of his employment-related back condition on April 9, 1996 due to a change in his job duties.

On February 3, 1998 appellant filed a claim for a schedule award.

In a report dated April 17, 1998, Dr. Thaddeus W. Hume, a Board-certified orthopedic surgeon, indicated that appellant had sustained an eight percent impairment of the spine.

In a report dated May 21, 1998, Dr. Ronald H. Blum, an Office district medical adviser, noted that Dr. Hume had not indicated any findings relating to impairment of the extremities in connection with appellant's lumbar spine condition. He noted that the spine is not a scheduled member under the Federal Employees' Compensation Act and, therefore, appellant was not entitled to receive a schedule award based on his impairment of the spine.

By decision dated June 9, 1998, the Office denied appellant's claim for a schedule award.

By letter dated October 20, 1998, appellant requested reconsideration and submitted additional evidence.

In a report dated August 31, 1998, Dr. Andre H. Keichian opined that appellant had a 10 percent impairment of the lumbar spine.

In a memorandum dated November 12, 1998, an Office district medical adviser noted that the medical evidence did not indicate any impairment to appellant's extremities, only to his spine and that there was no provision under the Act for a schedule award based upon permanent impairment of the spine.

By decision dated November 16, 1998, the Office denied modification of its June 9, 1998 decision.

The Board finds that appellant did not sustain an injury in the performance of duty for which he is entitled to receive a schedule award.

An employee seeking compensation under the Act<sup>1</sup> has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,<sup>2</sup> including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.<sup>3</sup> Section 8107 of the Act provides that if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.<sup>4</sup> However, a schedule award is not payable for the loss, or loss of use, of a part of the body that is not specifically enumerated under the Act. Neither the Act nor its implementing regulations provides for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of "organ" under the Act.<sup>5</sup> Therefore, the Office properly denied appellant's claim for a schedule award.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Donna L. Miller*, 40 ECAB 492 (1989); *Nathaniel Milton*, 37 ECAB 712 (1986).

<sup>3</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>4</sup> 5 U.S.C. § 8107(a).

<sup>5</sup> 5 U.S.C. § 8101(19); *see also James E. Mills*, 43 ECAB 215 (1991); *James E. Jenkins*, 39 ECAB 860 (1990).

The decisions of the Office of Workers' Compensation Programs dated November 16 and June 9, 1998 are affirmed.

Dated, Washington, DC  
November 21, 2000

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Member

Valerie D. Evans-Harrell  
Alternate Member