

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID N. WHALEY and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Murfreesboro, TN

*Docket No. 02-2128; Submitted on the Record;
Issued April 11, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant is entitled to a schedule award.

On March 27, 2000 appellant, then a 46-year-old nursing assistant, was helping to transfer a patient from a chair to a bed when the patient grabbed the back of his neck and pulled him downward. Appellant filed a claim for a disc protrusion at C6-7. He stopped working on March 28, 2000.

In a March 29, 2000 report, Dr. Roderick A. Vaughan, a Board-certified orthopedic surgeon, stated that appellant had a two-week history of shoulder pain. He stated that x-rays showed mild degenerative changes primarily involving the acromioclavicular articulation. Dr. Vaughan diagnosed left shoulder pain, associated degenerative changes and probable rotator cuff syndrome. He noted that appellant associated the left shoulder pain with lifting his arm overhead. Dr. Vaughan discussed activity modification, including no heavy lifting and repetitive overhead lifting.

In an April 25, 2000 report, Dr. Wesley L. Coker, a Board-certified orthopedic surgeon, stated that appellant had severe left arm pain and neck pain. He reported that a magnetic resonance imaging scan showed herniated discs at C5-6 and C6-7. Dr. Coker noted that appellant had excruciating pain into the medial aspect of the left scapula and into the left arm in a C7-8 distribution. He diagnosed herniated discs at C5-6 and C6-7. In a May 8, 2000 note, Dr. Coker stated that appellant's left arm pain had diminished significantly.

The Office of Workers' Compensation Programs accepted appellant's claim for temporary aggravation of the left rotator cuff syndrome and herniated nucleus pulposus at C5-6 and C6-7. The Office paid compensation for the period he did not work.

Appellant underwent surgery on July 7, 2000. Dr. Coker performed decompressions and excisions of both the C5-6 and C6-7 discs with medial foraminotomy. He then performed a fusion of the C5-6 and C6-7 discs.

Appellant returned to work on September 6, 2000 and returned to full duty on October 10, 2000. In an October 9, 2000 note, Dr. Coker stated that he was ready to have an impairment rating done. The Office informed him of the guidelines for spinal nerves impairment rating.

In an April 9, 2001 report, Dr. Coker stated that appellant had alteration of motion segment integrity due to his cervical fusion for cervical radiculopathy. He estimated that appellant was entitled to a 20 to 25 percent whole body impairment based on diagnosis-related estimate Category 4 for the cervical spine. Dr. Coker added that the impairment rating was not based on pain or postoperative sensory or motor deficit but on appellant's preoperative findings and then his postoperative findings because of a two level spinal fusion and loss of motion segment integrity. He calculated that appellant had a 74 percent permanent impairment of the cervical spine based on another set of calculations. In a June 13, 2001 report, Dr. Coker stated that appellant had muscle weakness and sensory loss prior to the operation but none of these conditions existed after his surgery. He indicated that appellant had made a full recovery as of October 9, 2000. Dr. Coker stated that appellant was entitled to a permanent impairment for what occurred to his neck. He indicated that post surgery appellant was entitled to a 15 to 18 percent permanent impairment of the whole person.

In a July 9, 2001 letter, the Office indicated that it wanted impairment ratings based on appellant's condition after the surgery and following his maximum medical improvement from the surgery. It noted that schedule awards could not be paid for the back but could be paid for impairment of the arms. The Office requested an impairment rating if appellant had significant pain, sensory deficit or motor impairment of the arms that were a result of job-related neck or upper back injuries.

In a November 13, 2001 response, Dr. Coker stated that appellant was not entitled to an impairment rating of the neck according to the Office's letter. He noted that appellant was entitled to an impairment rating on his arms. Dr. Coker indicated that since appellant's surgery, his arm pain had virtually cleared so he had no symptoms in his arms. He reminded the Office that appellant had a two level fusion of the neck. Dr. Coker commented that if he understood the Office's letter correctly, appellant was not entitled to any impairment rating regarding what was done to his neck and the loss of motion in the neck. He stated that appellant did not have any residual problems in either arm.

In a January 4, 2002 decision, the Office found that appellant was not entitled to a schedule award. He requested a hearing before an Office hearing representative, which was conducted on May 22, 2002. In a July 26, 2002 decision, the Office hearing representative affirmed the Office's January 4, 2002 decision.

The Board finds that appellant is not entitled to a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act¹ and its implementing regulation² set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment*³ has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

Under section 8107, schedule awards are given only for the parts and organs of the body specified in the Act or in the corresponding regulations.⁴ The Act specifically excludes the brain, heart and back as organs.⁵ Therefore, appellant is not entitled to a schedule award to any impairment, pain or loss of motion of his neck due to the cervical disc herniations and resultant surgery as that stems from the cervical spine, which is part of the back. Dr. Coker gave appellant a whole body impairment rating of 15 to 18 percent. However, neither the Act nor its implementing regulations give a schedule award for the body as a whole.⁶ Dr. Coker reported in his November 13, 2001 report, that appellant did not have any residual symptoms in his arms after the surgery on his neck. The arms would be the only affected parts of the body for which appellant would be entitled to a schedule award. Dr. Coker's report shows that after the surgery appellant had no impairment in the arms that would entitle him to a schedule award. As Dr. Vaughan's report was given prior to surgery, it does not represent appellant's condition at maximum medical improvement. It, therefore, cannot be used for a schedule award calculation. The Office, therefore, properly determined that appellant was not entitled to a schedule award.

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404 (1999).

³ (5th ed. 2000).

⁴ 20 C.F.R. § 10.404(a).

⁵ 5 U.S.C. § 8101(20).

⁶ *Terry E. Mills*, 47 ECAB 309 (1996).

The decisions of the Office of Workers' Compensation Programs, dated January 4, 2002 and July 26, 2000 are hereby affirmed.

Dated, Washington, DC
April 11, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member