

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL E. SUMMERS and U.S. POSTAL SERVICE,
POST OFFICE, Alcoa, TN

*Docket No. 03-798; Submitted on the Record;
Issued June 9, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether appellant has established entitlement to a schedule award related to his accepted condition of the cervical spine.

On August 31, 2000 appellant, then a 39-year-old city carrier, filed a claim for C5-6 radiculopathy that he attributed to repetitive movements of his neck in his employment.

The Office of Workers' Compensation Programs accepted that appellant sustained a permanent aggravation of a herniated nucleus pulposus at C5-6 and authorized surgery to correct this condition.

On March 16, 2001 Dr. Robert S. Davis, a Board-certified neurosurgeon, performed a C5-6 anterior cervical discectomy and fusion.

In an April 16, 2001 note, Dr. Davis stated that appellant persisted with neck and right upper extremity pain and referred him for physical therapy. In a May 14, 2001 note, Dr. Davis noted that appellant had chronic complaints of pain and stated that he would see appellant six months from the date of surgery for a final impairment rating.

On October 16, 2001 appellant filed a claim for a schedule award.

Appellant submitted a September 10, 2001 note from Dr. Davis, who stated that he persisted with neck and right upper extremity pain, but that neurological examination revealed "no focal motor deficits." Dr. Davis stated: "I would place [appellant] at MMI [maximum medical improvement] and assign him a whole person impairment rating per DRE cervical category 4 of 28 percent impairment of the whole person. This is determined using the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 5th edition."

By decision dated October 25, 2001, the Office found: “Since no portion of the back was intended for consideration of a schedule award, your claim for a schedule award for the cervical spine must now be denied.”

Appellant requested a review of the written record, contending that he had “decreased ability to use upper extremities with increased pain in arms, shoulders, neck, back and severe headaches.”

By decision dated April 15, 2002, an Office hearing representative found that there was some evidence that appellant had an impairment to his upper extremities and remanded the case to the Office to contact Dr. Davis and request that he provide a description of appellant’s impairment to the upper extremities as a result of his neck injury.

By letter dated April 22, 2002, the Office requested that Dr. Davis perform a new examination to determine what, if any, residual impairment remained to appellant’s arms as a result of his cervical fusion. The Office provided Dr. Davis with a copy of its spinal nerves impairment rating sheet. No response was forthcoming.

By letter dated May 21, 2002, the Office allotted appellant 21 days to advise it whether an appointment for an examination by Dr. Davis was scheduled. By letter dated June 13, 2002, the Office advised appellant that, barring receipt of further evidence on nerve impairment to the arms, his claim for a schedule award would be denied.

By decision dated June 27, 2002, the Office found: “Your claim for a schedule award based on a permanent partial impairment to either the right or left arm due to nerve damage caused by the accepted cervical condition has been denied as the medical evidence was not sufficient to establish that your cervical condition caused an impairment to the arms, as required by the Federal Employees’ Compensation Act.”

The Board finds that appellant has not met his burden of proof in establishing that he sustained a permanent partial impairment to a schedule member of his body causally related to his accepted condition of the cervical spine, thereby entitling him to a schedule award.

The schedule award provisions of the Act provide for payment of compensation to employees sustaining permanent impairment from loss or loss of use, of specified members of the body and set forth the number of weeks of compensation to be paid for permanent loss or loss of use, of the members of the body listed in the schedule.¹ A schedule award is not payable for the loss or loss of use, of a part of the body not specifically enumerated in the Act.² Neither the Act nor its regulation regarding schedule awards³ provide for a schedule award for impairment to

¹ 5 U.S.C. § 8107.

² *Ernest P. Govednik*, 27 ECAB 77 (1975).

³ 20 C.F.R. § 10.404.

the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of “organ” under the Act.⁴

In the present case, the only medical report addressing appellant’s permanent impairment is Dr. Davis’ September 10, 2001 report, rating appellant’s impairment of the cervical spine for which a schedule award is not payable under the Act. A schedule award can be paid for an impairment of the arms, a member listed in section 8107 of the Act, emanating from the back.⁵

As Dr. Davis stated in his September 10, 2001 report that appellant persisted with right upper extremity pain, the Office requested that Dr. Davis rate the impairment of appellant’s arms resulting from his accepted condition of the cervical spine, but he did not respond. The Office attempted to assist appellant in developing the evidence necessary to determine his entitlement to a schedule award, but the burden of proof on this issue ultimately rests with appellant.⁶ At the time the Office issued its final decision on June 27, 2002,⁷ there was no medical evidence that would allow the rating of any permanent impairment to appellant’s arms resulting from his accepted condition of the cervical spine. Appellant did not meet his burden of proof to establish entitlement to a schedule award.

⁴ 5 U.S.C. § 8101(19).

⁵ *Rozella L. Skinner*, 37 ECAB 398 (1986).

⁶ *James E. Jenkins*, 39 ECAB 860 (1988).

⁷ Subsequent to this decision, appellant submitted additional medical evidence. However, as the Board’s review is limited by 20 C.F.R. § 501.2(c) to the evidence that was before the Office at the time of its final decision, the Board cannot consider this new evidence.

The June 27, 2002 decision of the Office of Workers' Compensation Programs is affirmed.⁸

Dated, Washington, DC
June 9, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

⁸ On appeal appellant indicated that he wished to appeal a decision of the Office dated December 10, 2002. Perusal of a December 10, 2002 letter from the Office reveals that this letter is informational in nature and does not constitute a final decision from which an appeal can be taken.