

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARNOLD HICKOX and U.S. POSTAL SERVICE,
POST OFFICE, Waycross, GA

*Docket No. 03-111; Submitted on the Record;
Issued March 3, 2003*

DECISION and ORDER

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

The issue is whether appellant is entitled to a schedule award under section 8107 of the Federal Employees' Compensation Act¹ based on his accepted aggravation of spondylolisthesis.

This is the second appeal in the present case. In the prior appeal, the Board issued a decision and order² on October 27, 2000, in which it set aside denial decisions dated July 2 and April 24, 1998 and July 19, 1999, and remanded the case to the Office of Workers' Compensation Programs for further development. The Board found that the medical reports submitted from Dr. Calvin Hudson, a Board-certified neurologist, provided support that appellant's claimed back and bilateral leg pain was causally related to his April 30, 1997 employment incident. The Board remanded the case to the Office to develop the medical evidence as appropriate regarding appellant's traumatic injury claim, to be followed by a *de novo* decision on appellant's claim. The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On remand, the Office referred appellant, along with the statement of accepted facts and medical record, to Dr. Douglas Hein, a Board-certified neurologist, for a second opinion examination and a rationalized medical opinion as to whether appellant's claimed condition was caused or aggravated by factors of his federal employment. In a March 7, 2001 report, Dr. Hein reported that appellant had chronic back pain with surgically-treated spondylolisthesis, Grade I, L5-S1 performed July 29, 1997 and normal neurologic findings. Based on his March 7, 2001 report, the Office accepted appellant's claim for aggravation of spondylolisthesis.

On July 17, 2001 appellant filed a claim for a schedule award claiming that he had a permanent impairment as a result of the spondylolisthesis condition. In a letter dated July 31, 2001, the Office requested that Dr. Hudson, appellant's treating physician provide an impairment rating. The Office advised Dr. Hudson that it does not make impairment ratings to the back alone or the body as a whole, however, it does make an accommodation issuing schedule awards

¹ 5 U.S.C. §§ 8101, 8107.

² Docket No. 99-1359.

to the extent that nerve impairment exists in an extremity as a result of the spinal condition. The Office further advised that the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*³ would be used to assess impairment and furnished him a copy of the guidelines for a spinal nerve impairment rating.

In a letter dated September 6, 2001, Dr. Hudson reported that appellant had a 10 percent physical impairment rating of the body as a whole based on his accepted condition and surgery and continuing limitation of activities.

On January 16, 2002 an Office medical adviser reviewed Dr. Hudson's report along with the medical record. He opined that the evidence of record did not support any impairment in this case based on the March 7, 2001 second opinion examination by Dr. Hein, which indicated that appellant's neurologic examination was normal.

By decision dated January 23, 2002, the Office denied appellant's claim for a schedule award. The Office determined that the report from Dr. Hudson was inadequate in determining impairment since Dr. Hudson was advised that the Office does not recognize impairments to the body as a whole or the spine alone. The Office advised that Dr. Hein, the Office referral physician found that appellant had a normal neurologic examination. Therefore, the Office determined that, since Dr. Hudson did not provide an impairment rating to an extremity as a result of an effected nerve, and Dr. Hein's report showed a normal neurologic examination, there was no basis for the payment of a scheduled award to an impairment of any extremity.

In a letter dated February 8, 2002, appellant, through counsel, requested a review of the written record and submitted additional evidence.

By decision dated July 18, 2002, an Office hearing representative found that appellant failed to submit medical evidence substantiating that he sustained permanent impairment to a part of the body enumerated in the Act and affirmed the prior decision.

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

The schedule award provisions of the Act and its implementing regulation⁴ 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 A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

³ A.M.A., *Guides*, 5th ed. (2001).

⁴ 20 C.F.R. § 10.404 (1999).

No schedule award is payable for permanent loss of or loss of use of, anatomical members or functions or organ of the body not specified in the Act or in the implementing regulations.⁵ As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole,⁶ no claimant is entitled to such an award.⁷ However, a schedule award is payable for a permanent impairment of any of the extremities that is due to an employment-related back condition.⁸

In the present case, the evidence of record is insufficient to establish that appellant is entitled to a schedule award in accordance with the fifth edition of the A.M.A., *Guides*. The only medical evidence submitted by appellant containing an impairment rating, was a report from Dr. Hudson dated September 6, 2001. Dr. Hudson reported that appellant had a 10 percent physical impairment rating of the body as a whole based on his accepted condition and surgery and continuing limitation of activities. No impairment rating was assigned for nerve impairment in an extremity as a result of the employment-related back condition. Appellant has submitted no medical reports from a physician explaining how, pursuant to the fifth edition of the A.M.A., *Guides*, that his accepted aggravation of spondylolisthesis caused any permanent impairment to a schedule member of the body. Consequently, appellant has not established entitlement to a schedule award.

The July 18 and January 23, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed

Dated, Washington, DC
March 3, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

⁵ *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies only 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).

⁶ The Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19); *see also Jay K. Tomokiyo*, 51 ECAB 361 (2000); *Rozella L. Skinner*, 37 ECAB 398 (1986).

⁷ *George E. Williams*, 44 ECAB 530 (1993).

⁸ *Denise D. Cason*, 48 ECAB 530, 531 (1997); *S. Gordon McNeil*, 42 ECAB 140 (1990).