

**United States Department of Labor
Employees' Compensation Appeals Board**

SHAWN R. NGUYEN, Appellant

and

DEPARTMENT OF HOMELAND SECURITY,
FEDERAL AIR MARSHAL SERVICE,
Houston, TX, Employer

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**Docket No. 05-1762
Issued: December 12, 2005**

Appearances:
Jeffrey P. Zeeland, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On August 24, 2005 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated August 17, 2005, which found that he was not entitled to a schedule award for his condition of dysphagia because the injury was not to a scheduled member. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he has a permanent impairment to a scheduled member caused by his accepted conditions that would entitle him to an additional schedule award. On appeal counsel contends that the dysphagia

condition consists of an injury to appellant's larynx, a scheduled member, thus entitling him to a schedule award.¹

FACTUAL HISTORY

On October 14, 2002 appellant, then a 35-year-old air marshal, filed a traumatic injury claim, alleging that on September 30, 2002 he felt a sharp pain in his right shoulder with numbness in the right arm and hand when reaching for luggage in an overhead compartment on an airplane. On December 18, 2002 the Office accepted that appellant sustained herniated discs at C4-5 and C6-7. He continued to work limited duty until spinal fusion surgery was performed on March 4, 2003 by Dr. David W. Strausser, Board-certified in orthopedic surgery, after which appellant was placed on the periodic rolls.

In reports dated May 1, June 11, July 24 and August 29, 2003, Dr. Strausser noted, *inter alia*, that appellant was having difficulty swallowing (dysphagia). In reports dated September 26, 2003, the physician advised that maximum medical improvement had been reached and appellant could return to limited duty.²

Appellant returned to limited duty on October 14, 2003 and on January 15, 2004 filed a schedule award claim, stating that it was for his cervical injury which led to pain and numbness in his right upper extremity and caused difficulty swallowing. In a decision dated January 20, 2004, the Office determined that appellant's actual employment as a modified security specialist fairly and reasonably represented his wage-earning capacity.

In a February 9, 2004 report, Dr. Strausser advised that appellant had significant difficulty swallowing and suggested that removal of a plate inserted during surgery could diminish his swallowing difficulties. The accepted conditions were expanded to include intervertebral disc disorder with myelopathy, displacement of cervical intervertebral disc without myelopathy, disorder of bone and cartilage, unspecified and mechanical complication of internal orthopedic device implant. On March 23, 2004 Dr. Strausser performed surgical plate removal and exploration of appellant's spinal fusion. He was returned to the periodic rolls.

Dr. Rex A.W. Marco, a Board-certified orthopedist, provided an August 25, 2004 report in which he advised that appellant's dysphagia had improved.³ Appellant returned to full-time modified duty on August 30, 2004 and to regular duty as an air marshal on September 16, 2004. In a decision dated November 11, 2004, the Office found that appellant was at fault in the

¹ The Board notes that the record contains a decision dated November 10, 2004, which found that an overpayment in compensation in the amount of \$1,099.36 had been created because appellant continued to receive wage-loss compensation after his return to work in August 2004 and a February 4, 2005 schedule award for a nine percent impairment to appellant's right upper extremity. Appellant has not filed an appeal of these decisions with the Board. *See* discussion *infra*.

² In his reports, Dr. Strausser also reported on appellant's further recovery from surgery and improvement of his right upper extremity symptoms.

³ Dr. Marco also advised that appellant could return to his previous employment as an air marshal and on September 3, 2004, Dr. Strausser noted his agreement.

creation of an overpayment in compensation in the amount of \$1,099.36 because he continued to receive wage-loss compensation after his return to work in August 2004. Appellant entered a repayment schedule with the Office.

In a report dated October 19, 2004, Dr. James A. Ghadially, a Board-certified orthopedic surgeon, provided an assessment for schedule award purposes and opined that he agreed with Dr. Strausser regarding the date of maximum medical improvement. He advised that, under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁴ appellant's chronic right upper extremity pain and numbness entitled him to a nine percent right upper extremity impairment. Regarding the dysphagia, the physician determined that under Table 11-17 of the A.M.A., *Guides*, appellant would be entitled to a 15 percent whole person impairment because he fell into the category of "diet is limited to semi-solid or soft food," continuing "for this, this complaint of abnormal deglutition may be confirmed by treatment that he received and the postoperative scarring that has been diagnosed."

By report dated January 25, 2005, an Office medical adviser reviewed Dr. Ghadially's report and agreed with his analysis that appellant was entitled to a nine percent right upper extremity impairment. The Office medical adviser, however, did not provide an impairment rating for dysphagia "because I can find no OWCP procedure that provides for impairment due to swallowing abnormalities. The claimant does not have difficulty in speaking."

By decision dated February 4, 2005, appellant was granted a schedule award for a 9 percent impairment of the right upper extremity, for a total of 28.08 weeks of compensation, to run from October 19, 2004 to May 3, 2005. On February 10, 2005 appellant, through his attorney, requested a review of the written record, arguing that appellant was entitled to a schedule award for his dysphagia condition as this was caused by a laryngeal nerve injury.

In an April 23, 2005 report, Dr. Strausser noted that appellant now had complaints of left upper extremity pain numbness and recommended magnetic resonance imaging (MRI) scan.⁵ On June 6, 2005 Dr. Strausser noted appellant's continued left upper extremity complaints and reported EMG and MRI scan findings. He provided an assessment of status post C4-5 and C5-6 anterior cervical discectomy and fusion now with severe bilateral C6-7 foraminal stenosis, left upper extremity pain, numbness and paresthesia, left C7 weakness and bilateral C6 and left C7 radiculopathy on EMG. He concluded that appellant would perhaps need further surgery.

By letter dated June 10, 2005, the Branch of Hearings and Review informed appellant that the cause was not in posture for a review of the written record regarding whether he was entitled to a schedule award for a laryngeal nerve injury. On August 2, 2005 Dr. Strausser recommended further surgery. In a decision dated August 17, 2005, the Office found that

⁴ A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

⁵ A May 12, 2005 cervical spine MRI scan demonstrated disc protrusions at C3-4 and C6-7 and advised that the fusion at C4-5 and C5-6 appear solid and in good alignment. Electromyography (EMG) performed on May 24, 2005 demonstrated bilateral C6 radiculopathies with probable left C7 radiculopathy.

appellant was not entitled to a schedule award for his dysphagia condition because the injury was not to a scheduled member.⁶

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act⁷ and section 10.404 of the implementing federal regulation,⁸ schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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 Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.⁹

The Act identifies members as the arm, leg, hand, foot, thumb and finger, functions as loss of hearing and loss of vision and organs to include the eye. Section 8107(c)(22) provides for payment of compensation for permanent loss of any other important external or internal organ of the body as determined by the Secretary of Labor,¹⁰ who has made such a determination and, pursuant to the authority granted in section 8107(c)(22), added the breast, kidney, larynx, lung, penis, testicle, tongue, ovary, uterus/cervix and vulva/vagina to the schedule.¹¹

Although the A.M.A., *Guides* include guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under the Act for injury to the spine.¹² 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.¹³ An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized.¹⁴

⁶ The record indicates that subsequent to the Office's August 17, 2005 decision, additional surgery was authorized.

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ See *Joseph Lawrence, Jr.*, *supra* note 4; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

¹⁰ 5 U.S.C. § 8107(c)(22).

¹¹ 20 C.F.R. § 10.404(a); see *Gary M. Goul*, 54 ECAB ____ (Docket No. 03-1235, issued July 14, 2003).

¹² *Pamela J. Darling*, 49 ECAB 286 (1998).

¹³ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹⁴ *Patricia J. Penney-Guzman*, 55 ECAB ____ (Docket No. 04-1052, issued September 30, 2004).

Office procedures provide that to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates that the date on which this occurred (“date of maximum medical improvement”), describes the impairment in sufficient detail to include, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent description of the impairment and the percentage of impairment should be computed in accordance with the fifth edition of the A.M.A., *Guides*. The procedures further provide that after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for opinion concerning the nature and percentage of impairment and the Office medical adviser should provide rationale for the percentage of impairment specified.¹⁵

ANALYSIS

It is appellant’s burden to submit sufficient evidence to establish entitlement to a schedule award.¹⁶ In the case at hand, appellant was granted a schedule award for a right upper extremity impairment but the Office determined that he was not entitled to a schedule award for his dysphagia condition because this was not to a scheduled member.

Appellant has asserted that his employment injury caused an injury to his larynx, a scheduled member.¹⁷ There is no medical evidence of record, however, that indicates that appellant sustained a laryngeal injury. In reports dated May through August 2003, Dr. Strausser reported that appellant had difficulty swallowing and opined in February 2004 that removal of the surgical plate inserted at surgery would perhaps help the condition and this was done in March 2004. In his August 25, 2004 report, Dr. Marco merely mentioned that appellant’s dysphagia had improved. While Dr. Ghadially advised on October 14, 2004 that under Table 11-17 of the A.M.A., *Guides*, appellant would be entitled to a 15 percent whole person impairment for dysphagia because his diet was limited to semi-solid or soft food as shown by treatment received and postoperative scarring, he did not provide an opinion that this was caused by an injury to appellant’s larynx. Furthermore, neither operative report contains any mention of a laryngeal injury and in his reports dated April 23, June 6 and August 2, 2005, Dr. Strausser did not mention that appellant continued to suffer from dysphagia. The Board, therefore, finds that the medical evidence of record is insufficient to establish that appellant sustained an injury to his larynx.

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Evaluation of Schedule Awards*, Chapter 2.808.6(b-d) (August 2002).

¹⁶ *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹⁷ 20 C.F.R. § 10.404(a).

The Board further finds that the swallowing function is not a scheduled member. The medical definition for dysphagia is defined as difficulty in swallowing with the following types identified:

“[C]ontractile ring dysphagia: dysphagia due to an overactive interior esophageal sphincteric mechanism which gives rise to painful sticking sensations under the lower sternum;

“[E]sophageal dysphagia: dysphagia caused by an abnormality in the esophagus, such as a smooth muscle disorder that interferes with peristalsis or an obstruction from external compression or a stricture;

“[D]ysphagia inflammatoria: dysphagia due to inflammation of the pharynx or esophagus;

“[D]ysphagia lusoria: dysphagia resulting from compression of the esophagus caused by an anomalous right subclavian artery that arises from the descending aorta and passes behind the esophagus;

“[D]ysphagia nervosa: diffuse esophageal spasm;

“[O]ropharyngeal dysphagia: dysphagia caused by difficulty in initiating the swallowing process, so that solids and liquids cannot move out of the mouth properly;

“[D]ysphagia paralytica: dysphagia due to paralysis of the pharyngeal or esophageal muscles;

“[S]ideropenic dysphagia: Plummer-Vinson syndrome;¹⁸

“[D]ysphagia spastica: diffuse esophageal spasm;

“[V] dysphagia: dysphagia caused by the lodgment of food in the valleculae.”¹⁹

The esophagus, pharynx or subclavian artery, noted above as causing various types of dysphagia, are not scheduled members such that appellant would be entitled to a schedule award for his dysphagia. The Secretary of Labor has not determined, pursuant to the discretionary authority granted under section 8107(c)(22), that these organs constitute “any other important external or internal organ of the body,”²⁰ The Board has long held that a schedule award is not

¹⁸ This is defined as a syndrome usually seen in middle-aged women with hypochromic anemia, chiefly characterized by cracks or fissures at the corners of the mouth, painful tongue with atrophy of filiform and later fungiform papillae and dysphagia due to esophageal stenosis or webs. *Dorland’s Illustrated Medical Dictionary*, 29th edition (2000).

¹⁹ *Dorland’s Illustrated Medical Dictionary*, 29th edition (2000).

²⁰ 5 U.S.C. § 8107(c)(22); see generally *Janet C. Anderson*, 54 ECAB ____ (Docket No. 02-2239, issued February 13, 2003).

payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.²¹ Inasmuch as the swallowing function is not specifically enumerated in the compensation schedule, the Board finds that the Office properly denied appellant's claim for a schedule award for permanent impairment due to dysphagia.²²

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he is entitled to a schedule award for his dysphagia condition.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 17, 2005 be affirmed.

Issued: December 12, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

²¹ 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); *see Leroy M. Terska*, 53 ECAB 247 (2001); *William Edwin Muir*, 27 ECAB 579 (1976).

²² *See Thomas J. Engelhart*, *supra* note 13.