

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

D.K., Appellant)	
)	
and)	Docket No. 10-174
)	Issued: July 2, 2010
)	
U.S. POSTAL SERVICE, POST OFFICE, Lexington, KY, Employer)	
)	
)	

Appearances:
Phyllis L. Robinson, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 28, 2009 appellant, through counsel, filed a timely appeal from the July 30, 2009 schedule award decision of the Office of Workers' Compensation Programs. 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 is entitled to a schedule award for a brain or emotional disorder.

FACTUAL HISTORY

On September 10, 2003 appellant, a 35-year-old mail processor, filed a traumatic injury claim alleging that he developed depression, panic attacks and anxiety as a result of a hostile work environment. The Office accepted his claim for aggravation of major depression and aggravation of anxiety disorder.

On June 16, 2007 appellant requested a schedule award. In a decision dated September 21, 2007, the Office denied the schedule award claim on the grounds that there was

no provision in the Federal Employees' Compensation Act for payment of a schedule award for an emotional condition. On September 19, 2008 appellant requested reconsideration.

Appellant submitted a May 28, 2008 report from his treating physician, Dr. C. William Briscoe, a Board-certified psychiatrist, who diagnosed major depression and anxiety disorder. Dr. Briscoe opined that appellant had 70 percent "impairment of the whole man" due to his Axis I psychological disorders under the third edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

By decision dated December 4, 2008, the Office denied modification of its September 21, 2007 decision, finding that appellant was not entitled to a schedule award for a mental condition. It noted that the brain was specifically excluded from the definition of "organ" under the Act.

On June 2, 2009 appellant, through his representative, again requested reconsideration, contending that Dr. Briscoe's report was sufficient to establish entitlement to a schedule award. He disagreed that mental conditions are specifically excluded from the Act's definition of "organ," arguing that it was discriminatory to deny benefits for a mental injury. Alternatively, the representative argued that appellant was entitled to a schedule award under 5 U.S.C. § 8103, which provides for the allocation of medical services and other benefits.

By decision dated July 30, 2009, the Office denied modification of its previous decisions on the grounds that the Act does not provide for a schedule award for an emotional condition.

LEGAL PRECEDENT

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.¹ The specific members enumerated include the eye, arm, hand, fingers, leg, foot and toes. As to functions, the Act provides compensation for loss of hearing and loss of vision.² In addition, 5 U.S.C. § 8107(c)(22) vests the Secretary of Labor with the authority to expand the list of scheduled members to include any other important external or internal organ of the body. Under the authority granted by section 8107(c)(22), the Secretary added the breast, kidney, larynx, lung, penis, testicle, ovary, uterus and tongue as scheduled members or organs.³

No schedule award is payable for a member, function or organ of the body not specified under the Act or the implementing regulations.⁴ The Act specifically provides that the brain,

¹ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid -- additional members of the body are found at 20 C.F.R. § 10.404(a).

² 5 U.S.C. § 8107(c).

³ 20 C.F.R. § 10.404(a).

⁴ *Patricia J. Horney*, 56 ECAB 256 (2005).

heart and back are excluded under the term “organ.”⁵ Neither the Act nor the regulations authorize payment of a schedule award for loss of cognitive function.⁶ Moreover, a schedule award is not payable under section 8107 of the Act for an impairment of the whole person.⁷

For consistent results and to ensure equal justice for all claimants, the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants in calculating a schedule award.⁸

ANALYSIS

The Board finds that the Office properly denied appellant’s request for a schedule award, as he failed to establish impairment to a scheduled member, function or organ of the body under the Act.

The Office accepted appellant’s claim for aggravation of major depression and aggravation of his anxiety disorder. His claim for schedule award compensation in connection with the accepted emotional condition does not relate to any of the scheduled members, functions or organs specified in the Act or the Office’s regulations.⁹ The Office has not accepted that appellant sustained a physical condition as a consequence of his accepted conditions and he has not submitted medical evidence showing that he has impairment of a scheduled member. Dr. Briscoe did not identify a scheduled member, function or organ of the body with respect to his impairment ratings. Rather, he opined that appellant had 70 percent whole person impairment due to his psychological conditions. As noted, a schedule award is not payable under the Act for an impairment of the whole person for an accepted emotional condition.¹⁰

On appeal, counsel argues that Dr. Briscoe’s May 28, 2008 report is sufficient to establish appellant’s entitlement to a schedule award. As noted, Dr. Briscoe’s opinion regarding a whole person impairment, absent a finding of a permanent impairment of a scheduled member, function or organ, is insufficient to warrant a schedule award under the Act.

Counsel also argues that denial of benefits due to a mental injury is unconstitutional and cites to section 8107 and the implementing federal regulations. Congressional enactments are administered under a presumption of constitutionality and the Board accepts the presumption of constitutionality of this provision.¹¹

⁵ 5 U.S.C. § 8101(19) (“organ means a part of the body that performs a special function and for purposes of this subchapter excludes the brain, heart and back.”) *Id.*

⁶ *Brent A. Barnes*, 56 ECAB 336 (2005).

⁷ *See Ann L. Tague*, 49 ECAB 453 (1998); *Gordon G. McNeill*, 42 ECAB 140, 145 (1990).

⁸ *A. George Lampo*, 45 ECAB 441 (1994).

⁹ *See supra* notes 4-7 and accompanying text.

¹⁰ *Id.* *See also Gary M. Goul*, 54 ECAB 702 (2003); *Loretta M. Shideler*, 50 ECAB 115 (1998); *John F. Critz*, 44 ECAB 788 (1993).

¹¹ *See G.H.*, 60 ECAB ____ (Docket No. 08-1499, issued January 26, 2009), n.7.; *Vittorio Pittelli*, 49 ECAB 181, 186 (1997). *See also Harry D. Butler*, 43 ECAB 859 (1992).

The only issue is whether appellant is entitled to a schedule award for his accepted injury under the Act. The Board finds that appellant has not articulated a reason that his accepted emotional condition would entitle him to schedule award compensation and the Office properly denied his claim.¹² Finally, it is noted that appellant requested a discretionary oral argument. As there is no legal entitlement to a schedule award for appellant's injury, the Board finds that the request for oral argument will not be granted.¹³

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he is entitled to a schedule award in connection with his accepted emotional condition claim.

ORDER

IT IS HEREBY ORDERED THAT the July 30, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 2, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹² The Board notes that the Office has awarded schedule awards for conditions, which are not covered under the compensation schedule if the condition is shown to have contributed to impairment of a scheduled member. *See Thomas J. Engelhart*, 50 ECAB 319, 320-21 (1999).

¹³ 20 C.F.R. § 501.5(a).