

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

B.N., Appellant)	
)	
and)	Docket No. 09-1775
)	Issued: March 4, 2010
U.S. POSTAL SERVICE, POST OFFICE,)	
Washington, DC, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 1, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' May 29, 2009 merit decision denying his request for a schedule award. 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 permanent impairment to a scheduled member as a result of his accepted employment injury.

FACTUAL HISTORY

This case has been before the Board on two prior appeals. In decisions dated May 4, 2000 and May 16, 2003, the Board remanded the case to the Office for further development of

the medical evidence.¹ On November 17, 2003 appellant's claim was accepted for permanent aggravation of cervical radiculopathy.

On November 3, 2006 appellant requested a schedule award. He submitted a November 3, 2006 attending physician's report from Dr. Marc Schlosberg, a Board-certified neurologist, who diagnosed cervical spondylosis with radiculopathy and carpal tunnel syndrome (CTS). Dr. Schlosberg indicated, by placing a checkmark in the "yes" box, that he believed appellant's CTS condition was work related.

By letter dated March 21, 2007, the Office asked Dr. Schlosberg to provide an impairment rating. It requested an opinion as to whether appellant had reached maximum medical improvement with regard to his accepted back condition and as to whether he had any upper extremity impairment causally related to the accepted condition.

Medical evidence submitted included a September 19, 2005 report of a magnetic resonance imaging (MRI) scan of the cervical spine, which reflected lumbar spinal stenosis and right-sided foraminal stenosis. A February 26, 2007 emergency room report, signed by Dr. Alem Mehari, a Board-certified internist, reflected that appellant sought treatment for a left knee injury, which occurred on February 25, 2007. A March 30, 2007 emergency room report, signed by Dr. Monica Smith Pearl, a treating physician, contained diagnoses of lumbar spinal stenosis and cervical degenerative joint disease. Dr. Pearl related appellant's report that his knees "gave out," causing him to fall. The record contains March 30, 2007 diagnostic test results, including reports of x-rays of the left hand and chest, and computerized tomography (CT) scans of the cervical spine and brain.

By letter dated April 7, 2009, the Office informed appellant that, in order to obtain a schedule award, it was necessary for him to provide a physician's opinion that he had reached maximum medical improvement, as well as an assessment on the loss of function of an affected body member. It provided appellant with a letter, which it advised him to deliver to his treating physician. The letter requested information as to whether maximum medical improvement has occurred and, if so, the approximate date, objective findings on examination, subjective complaints and a diagnosis of the condition(s) affecting the upper extremities; and the percentage of impairment of one or both of the upper extremities with an explanation of how the physician calculated it using applicable tables found in the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

By decision dated May 29, 2009, the Office denied appellant's claim for a schedule award on the grounds that the evidence was not sufficient to support that the claimant had any impairment to a scheduled member, which would entitle him to a schedule award under the Federal Employees' Compensation Act.

¹ Docket No. 99-254 (issued May 4, 2000); Docket No. 02-732 (issued May 16, 2003). On October 11, 1994 appellant filed a traumatic injury claim alleging that he experienced pain in his neck and right shoulder while lifting a mailbag. On July 31, 1997 he filed an occupational disease claim for compensation alleging that he developed a back condition in the performance of duty. In the first appeal, the Board found that appellant's traumatic injury claim of October 11, 1994 was related to his July 31, 1997 occupational claim and instructed the Office to double the claims.

LEGAL PRECEDENT

An employee seeking compensation under the Act² has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,³ including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.⁴

The schedule award provision of the Act⁵ and its implementing regulations⁶ 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 regulations as the appropriate standard for evaluating schedule losses.⁷

A schedule award is not payable for the loss, or loss of use, of a part of the body that is not specifically enumerated under the Act. Neither the Act nor its implementing regulations provide for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under the Act.⁸

ANALYSIS

The Office accepted that appellant sustained a permanent aggravation of cervical radiculopathy due to an employment injury. On November 3, 2006 appellant filed a claim for a schedule award. The Office requested that he specify the member or function of the body he believed was permanently impaired and further advised him to obtain an impairment evaluation from his attending physician in accordance with the provisions of the A.M.A., *Guides*. Appellant submitted medical reports from Dr. Schlosberg, emergency room reports and reports of MRI scans and x-rays. However, the medical evidence submitted by appellant is not sufficient to establish his entitlement to a schedule award.

On November 3, 2006 Dr. Schlosberg diagnosed cervical spondylosis with radiculopathy and CTS, and indicated that he believed appellant's CTS condition was work related. As his report does not contain an opinion as to whether appellant had a permanent impairment due to his accepted injury, it is of limited probative value and insufficient to establish his schedule

² 5 U.S.C. §§ 8101-8193.

³ *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

⁴ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

⁸ *George E. Williams*, 44 ECAB 530 (1993); *James E. Mills*, *supra* note 7.

award claim. The Board notes that the Office asked Dr. Schlosberg to provide an impairment rating, as well as an opinion as to whether appellant had reached maximum medical improvement with regard to his accepted cervical condition and as to whether he had any upper extremity impairment causally related to the accepted condition. The record does not contain a report from Dr. Schlosberg addressing the Office's request.

The February 26, 2007 emergency room report signed by Dr. Mehari reflected that appellant sought treatment for a left knee injury, which occurred on February 25, 2007. In the March 30, 2007 emergency room report, Dr. Pearl diagnosed lumbar spinal stenosis and cervical degenerative joint disease and related appellant's report that his knees "gave out," causing him to fall. As neither report contained an impairment rating or an opinion as to whether appellant had reached maximum medical improvement with regard to his accepted cervical condition and as to whether he had any upper extremity impairment causally related to the accepted condition, they are not relevant to the issue at hand. The remaining medical evidence includes reports of MRI scans and x-rays. As these reports do not contain an opinion on the issue of permanent impairment, they are of limited probative value.

The Board notes that, while appellant is not entitled to a schedule award for impairment to his back,⁹ he may be entitled to a schedule award for permanent impairment to an upper extremity, even though the cause of the impairment originated in the spine.¹⁰ There is no medical evidence of record, however, that contains an opinion as to whether appellant has a permanent impairment of either extremity due to his accepted injury.

None of the medical reports submitted by appellant addressed the issue of whether he sustained any permanent impairment to a scheduled member or function of the body as a result of the accepted work injury. Office procedures and the Board precedent require that the record contain a medical report with a detailed description of the impairment.¹¹ This description must be in sufficient detail, so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.¹² Appellant has the burden of proof to submit medical evidence supporting that she has a permanent impairment of a scheduled member or function of the body.¹³ As such evidence has not been submitted, the Office properly denied his request for a schedule award.¹⁴

⁹ *Id.*

¹⁰ *Rozella L. Skinner*, 37 ECAB 398 (1986).

¹¹ See *Peter C. Belkind*, 56 ECAB 580; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(c)(1) (August 2002).

¹² See *Vanessa Young*, 55 ECAB 575 (2004); *Robert B. Rozelle*, 44 ECAB 616 (1993).

¹³ See *Annette M. Dent*, 44 ECAB 403 (1993).

¹⁴ The Board notes that the Office did not forward the case to the district medical adviser for review. The Office procedure manual provides that the claims examiner will ask the district medical adviser to evaluate cases when the case appears to be in posture for a schedule award determination. As the matter was deemed not to be in posture for a schedule award determination, the Office was not required to seek review by the district medical adviser. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3 (June 2003).

CONCLUSION

Appellant has not established that he is entitled to a schedule award for a permanent impairment to a scheduled member as a result of his accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 29, 2009 is affirmed.

Issued: March 4, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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