

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SAMUEL W. CARTER and U.S. POSTAL SERVICE,
POST OFFICE, St. Louis, MO

*Docket No. 99-930; Oral Argument Held February 2, 2000;
Issued March 27, 2000*

Appearances: *Jack A. Strellis, Esq.*, for appellant; *Miriam D. Ozur, Esq.*,
for the Director, Office of Workers' Compensation Programs.

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant is entitled to a schedule award for his back.

The Office of Workers' Compensation Programs accepted appellant's claim for a lumbar sprain and a permanent aggravation of spondylolisthesis. On March 20, 1997 appellant filed a claim for a schedule award.

By letter dated March 18, 1997, Dr. Robert E. Schultz, a Board-certified neurological surgeon, stated that he did not rate a person's impairment.

In a report dated June 3, 1997, Dr. Allen G. Adams, a Board-certified orthopedic surgeon and a referral physician, considered appellant's history of injury, performed a physical examination and opined that, based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition 1994), there was no "objective basis" for attaching any degree of permanent partial disability or any aggravation of appellant's preexisting spondylolisthesis as a result of the July 12, 1996 employment injury. He stated that appellant had a complaint of ongoing discomfort and subjective complaints of pain since the time of the injury, but there was no objective basis on which to explain the onset or ongoing nature of his discomfort relative to the injury.

In a report dated July 19, 1997, the Office medical adviser reviewed Dr. Adams' June 3, 1997 report and Dr. Schultz's January 28, 1997 report in which Dr. Schultz prescribed mild anti-inflammatories and stated that the physical examination demonstrated full lumbar range of motion with minimal pain, normal range of motion in both hips, no evidence of any motor or sensory deficit in the lower extremities and no radicular pain. The Office medical adviser stated that he agreed with Dr. Adams that there was no evidence for a permanent partial impairment of the lower extremities according to the A.M.A., *Guides* (fourth edition 1994).

By decision dated August 28, 1997, the Office denied the claim, stating that the medical evidence failed to demonstrate any permanent or partial impairment of appellant's lower extremities.

By letter dated September 5, 1997, appellant requested an oral hearing before an Office hearing representative which was held on September 24, 1998. At the hearing, appellant described the July 12, 1996 employment injury, his regular workday and his symptoms of pain. He stated that he was constantly in pain, in varying degrees and he felt the pain in his lower left back and all the way down his left leg.

Appellant also submitted additional evidence. In a deposition dated February 16, 1998, Dr. Schultz stated that as of the last time he examined appellant in January 1997, his condition had stabilized. He reiterated that on July 12, 1996 appellant aggravated a preexisting problem and could be subject to that type of episode again in the future. Dr. Schultz opined that appellant's current symptoms of pain were related to the July 12, 1996 employment injury and appellant was subject to periodic recurrences of pain due to the weather and his activities at work or at home or both. He also stated that the magnetic resonance imaging scan was consistent with pain radiating down appellant's lower back and some loss of motion.

In a report dated September 4, 1998, Dr. Edward L. Eyerman, a Board-certified psychiatrist and neurologist, considered appellant's history of injury, performed a physical examination and reviewed MRI scans and nerve conduction studies. He concluded that appellant had radiculopathy involving the L5-S1 nerve roots on the left, was clinically weak and had severe limitation of motion in his low back. Dr. Eyerman stated that appellant "fulfilled the DRE guidelines for lumbosacral category V disability with radiculopathy as well as loss of motion segment integrity pursuant to page 3/102 of the A.M.A., *Guides* (fourth edition "copyright 1995"). He stated that appellant had neurologic deficits of motor strength and sensation and "EMG evidence of abnormality." Dr. Eyerman opined that appellant had an impairment of 25 percent of the whole person based on his lumbosacral disc herniation and L5-S1 nerve root compression as a result of his July 12, 1996 employment injury.

By decision dated November 20, 1998, the Office hearing representative affirmed the Office's August 28, 1997 decision.

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

The schedule award provision of the Federal Employees' Compensation Act¹ provides for compensation to employees sustaining permanent impairment from loss or loss of use of specified members of the body. The Act's compensation schedule specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act does not, however, specify the manner by which the percentage loss of a member, function, or organ shall be determined. The method used in making such a determination is a matter that rests in the sound discretion of the Office.² For consistent results

¹ 5 U.S.C. § 8107 *et seq.*

² *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Danniel C. Goings*, 37 ECAB 781, 783 (1986).

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.³

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.⁴ As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back⁵ or an impairment of the whole person,⁶ no claimant is entitled to such an award.⁷

Since the Act does not provide for a schedule impairment of the back or the whole person, Dr. Ayerman's calculation that appellant had a 25 percent impairment to the whole person based on appellant's back condition is not probative. Appellant argued on appeal that the back should be included in the compensation schedule under section 8107(c) stating that the back is an organ and the A.M.A., *Guides* have guidelines for rating an impairment of the back. The Act, however, expressly provides that "organ" under the Act excludes the brain, heart and "back."⁸ (Emphasis added). Appellant has not presented any legal authority to support his contentions that the law as set forth in the Act and regulations which exclude the back under the listing of a schedule injury should be changed. He has therefore failed to establish that he is entitled to a schedule award for his back.

³ *Arthur E. Anderson*, *supra* note 2 at 697; *Henry L. King*, 25 ECAB 39, 44 (1973).

⁴ *George E. Williams*, 44 ECAB 530, 533 (1993); *William Edwin Muir*, 27 ECAB 579, 581 (1976).

⁵ *See* 5 U.S.C. § 8107(c); *George E. Williams*, *supra* note 4.

⁶ *See Gordon G. McNeill*, 43 ECAB 140, 145 (1990); *Rozella L. Skinner*, 37 ECAB 398, 402 (1986).

⁷ *E.g.*, *Timothy J. McGuire*, 34 ECAB 189, 193 (1982).

⁸ 5 U.S.C. § 8101(19).

The decision of the Office of Workers' Compensation Programs dated November 20, 1998 is hereby affirmed.

Dated, Washington, D.C.
March 27, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member