

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

R.W., Appellant

and

**DEPARTMENT OF THE ARMY, NATIONAL
GUARD, Jefferson City, MO, Employer**

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**Docket No. 10-2211
Issued: June 10, 2011**

Appearances:
David A. Weidner, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 30, 2010 appellant, through his attorney, filed a timely appeal from a July 26, 2010 merit decision of the Office of Workers' Compensation Programs denying his claim for a schedule award. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

ISSUE

The issue is whether appellant is entitled to a schedule award for a permanent impairment of the extremities.

FACTUAL HISTORY

On March 4, 2003 appellant, then a 38-year-old training officer, filed a claim alleging that on February 28, 2003 he injured his left knee and left elbow when he slipped on snow. The

¹ 5 U.S.C. § 8101 *et seq.*

Office accepted his claim for a left knee contusion, back strain and a herniated C5-6 cervical disc. On April 27, 2004 appellant underwent an anterior cervical fusion at C5-6.

By decision dated March 17, 2004, the Office denied appellant's request for authorization for an anterior cervical fusion. On October 18, 2004 a hearing representative vacated the March 17, 2004 decision and instructed the Office to further develop the medical evidence regarding whether his surgery resulted from his accepted work injury.

In a June 30, 2005 report, Dr. Don Miskew, a Board-certified orthopedic surgeon and Office referral physician, opined that appellant's herniated C5-6 disc was causally related to his February 28, 2003 work injury. He further found that the cervical fusion was necessary and employment related. Dr. Miskew noted appellant's complaints of intermittent numbness of the hands. He measured range of motion of the neck and noted that he had tenderness over the left trapezius with palpation but "no gross motor, sensory, or reflex loss to the upper extremities."

On August 25, 2005 the Office determined that the April 2004 surgery was causally related to appellant's February 28, 2003 work injury and expanded acceptance of the claim to include a herniated cervical disc.

On August 24, 2009 appellant filed a claim for a schedule award. Counsel asserted that appellant had impairment due to numbness of the arms and hands bilaterally.

By letter dated August 28, 2009, the Office informed appellant that the medical evidence was currently insufficient to show that he had a permanent impairment. It noted that the last medical evidence in the record was a June 30, 2005 report from Dr. Miskew. The Office requested that he submit a detailed impairment evaluation in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*).

On December 27, 2009 an Office medical adviser reviewed the June 30, 2005 report from Dr. Miskew. He opined that appellant reached maximum medical improvement on June 30, 2005. The Office medical adviser found that pain over the left trapezius was "not a radicular finding" and that numbness of the hands "could not be a residual of the surgical management at the C5, C6 level." He noted that the intermittent numbness might be the result of peripheral nerve entrapment. The Office medical adviser found that appellant had "no radicular sensory, pain or motor impairments" of the upper extremities due to his cervical fusion and thus no upper extremity impairment.

By decision dated January 14, 2010, the Office denied appellant's claim for a schedule award. On February 23, 2010 appellant requested a telephone hearing. At the hearing, held on May 6, 2010, he described his symptoms of pain and numbness in his arms, a loss of strength and decreased range of motion. Appellant's counsel requested that the Office schedule an impairment evaluation. The hearing representative advised that Dr. Miskew did not address the issue of permanent impairment and that appellant should submit an evaluation from his attending physician with current findings.

By decision dated July 26, 2010, the hearing representative affirmed the January 14, 2010 decision. He found that appellant had not submitted any evidence in support of his schedule award claim.

On appeal counsel argued that his testimony showed that he had an impairment of the upper extremities. He asserted that his attending physician, Dr. Robert Gaines, a Board-certified orthopedic surgeon, found that he had a 10 percent whole person impairment, which equaled a 17 percent impairment of the upper extremities. Counsel also argued that the Office should refer appellant for an impairment evaluation.

LEGAL PRECEDENT

The schedule award provision of the Act,² and its implementing federal regulations,³ 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁴ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁵

Before the A.M.A., *Guides* can be utilized, a description of appellant's impairment must be obtained from his physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, 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 descriptions of the impairment. 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.⁶

ANALYSIS

The Office accepted that appellant sustained a left knee contusion, back strain and a herniated cervical disc at C5-6 due to a February 28, 2003 employment injury. Appellant underwent an anterior cervical fusion at C5-6 on April 27, 2004. On June 30, 2005 Dr. Miskew, a second opinion examiner, listed findings on examination and opined that the cervical fusion was related to the accepted work injury. Based on his opinion, the Office accepted the April 27, 2004 cervical fusion as necessary and due to the February 28, 2003 employment injury.

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404.

⁴ *Id.* at § 10.404(a).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁶ *Peter C. Belkind*, 56 ECAB 580 (2005); *Vanessa Young*, 55 ECAB 575 (2004).

On August 24, 2009 appellant requested a schedule award. The Office advised appellant in a letter dated August 28, 2009 to obtain an impairment evaluation from his attending physician in accordance with the provisions of the A.M.A., *Guides*. Appellant did not submit any medical evidence in support of his schedule award claim.

An Office medical adviser reviewed Dr. Miskew's report and asserted that numbness of the hand and left trapezius pain was not a radicular finding related to the C5-6 fusion. Dr. Miskew's 2005 opinion, however, was relevant to the issue of surgical authorization and did not address the extent of any permanent impairment. Office procedures and Board precedent require that, for a schedule award, the record contain a medical report with a detailed description of the impairment.⁷ 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.⁸

Appellant has the burden of proof to submit medical evidence supporting that he has a permanent impairment of a scheduled member or function of the body.⁹ As he did not submit such evidence, the Office properly denied his request for a schedule award.

On appeal counsel argues that the Office should have referred appellant for an impairment evaluation. As discussed, however, appellant has the burden to submit evidence showing a permanent impairment.

Counsel also argues that Dr. Gaines found a 10 percent whole person impairment. The record, however, does not contain an impairment evaluation from Dr. Gaines. Counsel further contends that appellant's testimony at the hearing establishes that he has a permanent impairment. The extent of permanent impairment, however, is a medical question and must be established by probative medical evidence.¹⁰

Appellant may submit new evidence or argument with a written request for reconsideration to the Office within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not established that he is entitled to a schedule award for a permanent impairment of the extremities.

⁷ See *Peter C. Belkind*, *supra* note 6; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(c)(1) (August 2002).

⁸ See *Vanessa Young*, *supra* note 6; *Robert B. Rozelle*, 44 ECAB 615 (1993).

⁹ See *D.H.*, 58 ECAB 358 (2007); *Annette M. Dent*, 44 ECAB 403 (1993).

¹⁰ See *Ronald M. Cokes*, 46 ECAB 967 (1995).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 26, 2010 is affirmed.

Issued: June 10, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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