

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

K.S., Appellant)	
)	
and)	Docket No. 14-133
)	Issued: April 1, 2014
DEPARTMENT OF HOMELAND SECURITY,)	
FEDERAL MARSHAL AIR SERVICE,)	
Atlantic City, NJ, Employer)	

Appearances:
Appellant, pro se
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 October 22, 2013 appellant filed a timely appeal from a May 8, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant established entitlement to a schedule award.

FACTUAL HISTORY

On April 17, 2007 appellant, a 34-year-old federal air marshal, sustained abdominal pain while performing weighted assisted pull ups. OWCP accepted the claim for left inguinal hernia. It authorized surgery which was performed on June 7, 2007.

¹ 5 U.S.C. §§ 8101-8193.

Appellant came under the treatment of Dr. Glenn M. Zuck, an osteopath, on May 9, 2007 for a left groin injury. He reported being a fitness instructor for the federal air marshals and two weeks prior he was performing pull-ups with weights and felt a sharp pain in the left inguinal region. Dr. Zuck noted examination findings of slight fullness on the left and tenderness to palpation about the left inguinal region. He diagnosed left inguinal strain and probable left inguinal hernia. Dr. Zuck recommended a general surgical consultation. Thereafter, appellant was treated by Dr. David May, a Board-certified general surgeon, who diagnosed left inguinal hernia. On May 17, 2007 Dr. May noted findings of a cyst on the right testicle. On June 7, 2007 he performed an open repair of the left inguinal hernia with mesh and diagnosed left inguinal hernia.²

On January 22, 2013 appellant filed a claim for a schedule award.

By letter dated February 11, 2013, OWCP noted that the evidence of record did not contain a physician's report which established that appellant had reached maximum medical improvement or provided an impairment rating. It indicated that, while his claim was accepted for inguinal hernia of the abdomen, it was not a scheduled member or function. OWCP requested that appellant obtain a report from his physician who evaluates the extent of permanent impairment of a scheduled member of the body under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³

Appellant submitted a March 4, 2012 statement noting that his current physician could not adequately evaluate his injury for a schedule award for permanent impairment and requested that OWCP recommend a specialist for his evaluation. No additional medical evidence was submitted.

In a March 18, 2013 decision, OWCP denied appellant's claim for a schedule award, finding that the evidence was not sufficient to establish that he sustained any permanent impairment to a scheduled member or function of the body under section 8107 of FECA.

Appellant submitted a March 26, 2013 letter requesting his medical file. He also resubmitted his March 4, 2013 letter noting that his current physician could not adequately evaluate his injury for a schedule award impairment and requested that OWCP recommend a specialist for his evaluation.

In an April 5, 2013 letter, OWCP advised that it would schedule a second opinion examination if appellant's claim met the essential elements for a schedule award claim of work related permanent condition involving a scheduled body member. It advised that his claim did not meet these elements. OWCP explained that there was no evidence to show that appellant sustained a work-related permanent impairment due to the accepted inguinal hernia that involved a scheduled body member.

² On August 5, 2008 appellant filed a Form CA-2a, notice of recurrence of disability, alleging that on July 20, 2008 he sustained a recurrence of disability which had been ongoing since the injury. He submitted an August 12, 2008 computerized tomography scan of the abdomen and pelvis which revealed a hydrocele in both testicles. On September 19, 2008 OWCP accepted appellant's recurrence of disability on July 20, 2008.

³ A.M.A., *Guides* (6th ed. 2008).

On April 9, 2013 appellant requested reconsideration. In a letter of that date, he referenced an operative report documenting his injury and initial injury information and diagnosis from a physician. Appellant indicated that he could not find a specialist to provide an impairment rating and notified OWCP by telephone and in writing and did not receive a response. He requested that he be scheduled for a second opinion physician. Appellant submitted an attending physician's report and narrative report from Dr. Zuck dated May 9, 2007 previously of record.

In a decision dated May 8, 2013, OWCP denied modification of the March 18, 2013 decision.

LEGAL PRECEDENT

The schedule award provision of FECA⁴ and its implementing regulations⁵ 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, FECA 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*⁶ has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁷

It is the claimant's burden to establish that he or she has sustained a permanent impairment of the scheduled member or function as a result of any employment injury.⁸ OWCP 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 the date on which this occurred (date of maximum medical improvement), describes the impairment in sufficient detail so that it can be visualized on review and computes the percentage of impairment in accordance with the A.M.A., *Guides*.⁹

No schedule award is payable for a member, function or organ of the body not specified in FECA or in the implementing regulations.¹⁰ FECA identifies members such as the arm, leg, hand, foot, thumb and finger, organs to include the eye and functions as loss of hearing and loss

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Supra* note 3.

⁷ *See supra* note 5.

⁸ *Tammy L. Meehan*, 53 ECAB 229 (2001).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(b) (August 2002).

¹⁰ *See Leroy M. Terska*, 53 ECAB 247 (2001).

of vision.¹¹ Section 8107(c)(22) of FECA provides for the payment of compensation for permanent loss of any other important external or internal organ of the body as determined by the Secretary of Labor.¹² The Secretary of Labor has made such a determination and pursuant to the authority granted in section 8107(c)(22), added the breast, kidney, larynx, lung, penis, testicle, ovary, uterus and tongue to the schedule.¹³

ANALYSIS

OWCP accepted appellant's claim for left inguinal hernia due to an April 17, 2007 work-related injury. On January 22, 2013 appellant filed a schedule award claim for his hernia. OWCP denied his schedule award claim finding that he had not submitted sufficient evidence to establish that he sustained a permanent impairment to a scheduled body member.

The Board notes that a schedule award cannot be granted for permanent impairment based on appellant's hernia condition because the hernia or abdomen have not been included under FECA or the regulations as a scheduled member.¹⁴ The terms of FECA are specific as to the method and amount of payment of compensation. Neither, OWCP nor the Board has the authority to enlarge the terms of FECA or to make an award of benefits under terms other than those specified in the statute.¹⁵

The Board finds that the medical evidence fails to establish that appellant has any permanent impairment which would entitle him to a schedule award. Appellant has not submitted sufficient evidence to establish that he sustained any permanent impairment to a scheduled member as defined under section 8107 of FECA or the implementing federal regulations. By letter dated February 13, 2013, OWCP informed him of the evidence necessary to establish a schedule award. It requested that appellant submit an impairment evaluation from his attending physician using the sixth edition of the A.M.A., *Guides*. No medical report from his physicians specifically found permanent impairment to a scheduled member based on the accepted hernia. Thus, OWCP properly denied appellant's request for a schedule award.

On appeal, appellant asserts that he could not find a specialist to provide an impairment rating and notified OWCP by telephone and in writing and did not receive a response. He requested that he be scheduled for a second opinion physician. However, it is the claimant's burden to establish that he has sustained a permanent impairment of the scheduled member or function as a result of any employment injury.¹⁶ OWCP procedures further provide that, if he does not provide an impairment evaluation from his physician when requested, and there is no

¹¹ 5 U.S.C. § 8107(c).

¹² *Id.* at § 8122(c)(22).

¹³ *Supra* note 5; *Henry B. Floyd, III*, 52 ECAB 220 (2001).

¹⁴ *K.H.*, Docket No. 09-275 (issued August 14, 2009); *S.K.*, Docket No. 08-848 (issued January 26, 2009).

¹⁵ *Danny E. Haley*, 56 ECAB 393 (2005).

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

indication of permanent impairment in the medical evidence of file, it may proceed with a formal denial of the award.¹⁷

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the May 8, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 1, 2014
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

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(c) (February 2013).