

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U.S.C. Code 8101 et seq.
of _____, claimant; Employed by the _____ Case
No. _____ A hearing was held on _____ in Atlanta, Georgia.

The issue for determination is whether the claimant is eligible for a schedule award benefit for permanent partial impairment of the lower extremity(ies) related to his approved herniated disc at L4-5.

_____, born _____ was employed by the _____ at _____ as a custodian. He has an approved claim for a traumatic injury sustained on _____ while in the performance of duty. The claim was accepted for lumbar contusion and strain, cervical strain, and contusion of the right shoulder. The claim was later expanded to accept a conversion reaction and displacement of lumbar intervertebral disc. The claimant was paid compensation for wage loss until he returned to work in _____ as a billing clerk.

On _____ the claimant filed a claim for schedule award benefits for permanent impairment resulting from his injury. The Office received a letter dated _____ from Dr. _____ the attending orthopaedic specialist, providing an impairment rating of 10% whole body impairment.

By letter dated _____, the Office contacted Dr. _____ and advised that a schedule award is not payable for an impairment to the back but is payable for a lower extremity impairment related to the approved back condition. The Office requested that Dr. _____ provide an impairment rating of the lower extremities using the fifth edition of the AMA Guides to the Evaluation of Permanent Impairment. The Office also requested that Dr. _____ indicate whether maximum medical improvement had been reached and, if so, the date it was reached.

Dr. _____ responded that maximum medical improvement had been reached on _____ and again indicated that the claimant had a 10% whole body impairment.

In a decision dated _____ the Office denied the claim for schedule award for the reason that the medical evidence submitted did not support a permanent

impairment to a member or function of the body that is scheduled in 5 U.S.C. 8107 or 20 C.F.R. 10.404.

The claimant disagreed with the decision and requested an oral hearing. The hearing took place on _____ in Atlanta, Georgia. The claimant was not present but was represented by his attorney, Paul Felser.

At the hearing Mr. Felser argued that although Dr. _____ had not provided an impairment rating of a scheduled member, there was uncontroverted medical evidence in the file that supported that the claimant did have a permanent impairment of the lower extremity related to the approved lumbar condition. Mr. Felser further argued that because of the uncontroverted evidence, the Office was incumbent to assist in the development of evidence for the schedule award claim.

As required by Office procedures, a copy of the hearing transcript was forwarded to the employing agency to afford them the opportunity to comment on the claimant's testimony.

The schedule award provision of the FECA and its implementing regulations set forth the number of weeks of compensation to be paid for permanent loss, or loss of use, of body members listed in the schedule. The Act, however, does not specify the manner in which the percentage of loss of a member 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 to calculate schedule awards so that there may be uniform standards applicable to all claimants. The Office has adopted, and the Board has approved, the use of the American Medical Association, Guides to the Evaluation of Permanent Impairment, as an appropriate standard for evaluating schedule losses.¹

Review of the medical evidence on file does indicate that the claimant has complaints of right leg pain, and he has been diagnosed with right lower extremity radiculopathy. The claimant had considered undergoing lumbar fusion surgery in _____ and the surgery was approved under this claim. However, the claimant changed his mind and, in an office note of _____, Dr. _____ indicated that the claimant had decided against proceeding with the surgery. Dr. _____ office notes indicate that the claimant has reached maximum medical improvement without surgery.

¹ Andrew Aaron, Jr., 48 ECAB ____ (Docket No. 95-1827, issued October 23, 1996)

Although Dr. _____ has been unable to provide an impairment rating of the lower extremity according to the AMA Guides, there is sufficient medical evidence of a possible right lower extremity impairment to suggest that the Office proceed with further development.

Upon remand of the case file, the Office should refer the claimant for a second opinion schedule award evaluation with a board certified orthopaedic specialist who is able to provide a permanent impairment rating according to the fifth edition of the AMA Guides to the Evaluation of Permanent Impairment. The specialist should be requested to provide his opinion whether first, there is an permanent impairment of one or both lower extremities related to the approved displacement of the lumbar intervertebral disc and, if so, the percentage of impairment as per the AMA Guides. Following receipt of the report of the second opinion specialist, the Office should issue a *de novo* decision concerning the schedule award claim.

Accordingly, the decision of the Office dated _____ is hereby SET ASIDE and the case is REMANDED to the Office for further development of the schedule award claim as described above.

DATED: SEP - 7 2005

WASHINGTON, D.C.

Hearing Representative
For
Director, Office of
Workers Compensation Programs

² The Hearing Representative who originally conducted the oral hearing is no longer with the Branch of Hearings and Review and this decision is being issued under my signature