

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LELAND EUGENE PAULSON and DEPARTMENT OF ENERGY,
OPERATIONS OFFICE, Morgantown, WV

*Docket No. 01-2096; Submitted on the Record;
Issued April 25, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant is entitled to a schedule award for the destruction of the following organs: red and white cell platelets; lymph nodes; liver and spleen resulting from his accepted condition of acute lymphocytic leukemia.

On December 22, 1997 appellant, then a 59-year-old chemical engineer, filed an occupational disease claim for chronic leukemia believed to be caused by employment-related exposure.¹ The Office of Workers' Compensation Programs accepted appellant's claim for acute lymphocytic leukemia.

On February 22, 1999 appellant requested a schedule award for the organs that his condition destroys including his bone marrow, red and white cell platelets, lymph nodes, liver and spleen.

By letter dated March 19, 1999, the Office advised appellant that a condition of this type according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) 4th edition, Chapter 4, leukemia, was considered to be a disease of the hematopoietic system, which was not included in the organs and body parts covered under the compensation award schedule.

By letter dated April 2, 1999, appellant advised the Office that his senator was working with the Secretary of Labor to establish the compensation schedules for organs destroyed by leukemia.

By letter dated March 19, 2001, appellant asserted that the Office was responsible for payment of related medical expenses and that he should be compensated for the damage to his organs.

¹ The record reflects that appellant retired on December 30, 1997.

In support of his claim, appellant submitted a hematology report, articles on leukemia and related regulations.

On April 19, 2001 the Office referred appellant's March 19, 2001 letter to an Office medical adviser and requested his comments and findings with respect to a schedule award for appellant's condition. The medical adviser reviewed the regulations and the Federal Employees' Compensation Act Procedure Manual 2.0808.5b(5) noting that a schedule award was payable for internal organs specified by the Secretary of Labor since 1974. He further noted that the Secretary of Labor had added the following organs: vulva; vagina; uterus; cervix; tongue; larynx; penis; kidney; lung; testicles; breast; ovary and fallopian tubes. The medical adviser further added the latest update was November 1998. He opined that the five organs and organ systems listed by claimant were not on the above list.

Accordingly, on May 21, 2001 the Office denied payment of a schedule award for the five specified organs on the grounds that the Act did not contain a provision for permanent impairment of these organs.

The Board finds that the Office properly denied appellant's claim for a schedule award.

Under section 8107 of the Act² and section 10.404 of the implementing federal regulations,³ schedule awards are payable for the permanent impairment of specified bodily members, functions and organs. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.⁴

The schedule award provision of the Act⁵ and its implementing regulation⁶ 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 regulation as the appropriate standard for evaluating schedule losses.

However, no schedule award is payable for a member, function, or organ of the body not specified in the Act or in the regulations.⁷ This principle applies to body members that are not

² 5 U.S.C. §§ 8101-8193 (1974); 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

⁴ 5 U.S.C. § 8107(c)(3)(19); *John M. Gonzales, Jr.*, 48 ECAB 357, 360 (1997).

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404 (1999).

⁷ *Id.*

enumerated in the schedule award provision before the 1974 amendments⁸ as well as to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendments.⁹

In 1960, amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Thus, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders, or spine.¹⁰

In 1987, the Secretary of Labor exercised her authority, pursuant to section 8107(c)(22), to add to the compensation schedule “any other important” internal or external organs and listed the following: breast, kidney, larynx, lung, penis, testicles and tongue.¹¹

In this case, the Office accepted appellant’s claim for acute lymphocytic leukemia and made appropriate compensation.

However, the Office found that bone marrow, red and white cell platelets, lymph nodes, liver and spleen are not organ members covered under the provisions of section 8107 of the Act. Moreover, although section 10.404(b) of the implementing regulations provides coverage for additional internal and external organs, the above organs are not designated for coverage in this regulation.¹² Additionally, the Board has no power to change or add to the plain meaning of the terms used in the statute.¹³ The medical adviser correctly applied the A.M.A., *Guides* to determine that appellant was not entitled to a schedule award for the loss of his organs.

Appellant argues that the language of section 8107(c)(22), recognized that the schedule award list was not all inclusive and stated it required the Secretary of Labor to see that “‘proper and equitable compensation’ be paid to workers who had ‘other’ nonlisted organs damaged.” However, the intent of subsection 22 of section 8107(c) is to enable the Secretary of Labor to determine what other organs of the body may qualify for schedule awards. That intent is evident from the language, “as determined by the Secretary.” Congress thus intended to leave further determinations of what specific organs would be considered “important” for the purpose of a schedule award to the discretionary authority of the Secretary of Labor.¹⁴ For example, the

⁸ *William Edwin Muir*, 27 ECAB 579, 581 (1976); *see also Terry E. Mills*, 47 ECAB 309, 313 (1996) (listing the members and organs of the body for which the loss or loss of use is compensable under the schedule award provisions).

⁹ The Act itself specifically excludes the back from the definition of “organ.” 5 U.S.C. § 8101(19).

¹⁰ *John F. Critz*, 44 ECAB 788, 792-93 (1993) (brain disorder); *Ted W. Dietderich*, 40 ECAB 963, 965 (1989) (gallbladder); *Thomas E. Stubbs*, 40 ECAB 647, 649 (1989) (spleen).

¹¹ *Rozella L. Skinner*, 37 ECAB 398, 402 (1986).

¹² 20 C.F.R. § 10.404 (1999).

¹³ *See Terry E. Mills*, *supra* note 8 at 309, (finding that the loss of appellant’s fifth rib to form a bone graft in a work-related injury is not compensable under the schedule award provisions of the Act).

¹⁴ The Board has held that the schedule award provisions under the Act are limited to specific members or

Board has found that the Act provides no statutory requirement for the payment of a schedule award for a claimant's loss of her sense of smell.¹⁵

So, too, with loss of use of the bone marrow, red and white cell platelets, lymph nodes, liver and spleen. The Act clearly provides the Secretary of Labor with the authority to add other organs to the list of those that now qualify for a schedule award. The fact that the Secretary of Labor has not designated the above-listed organs is not a contravention of congressional intent, but rather a proper exercise of her discretionary authority granted by Congress.¹⁶

Inasmuch as loss of use of the bone marrow, red and white cell platelets, lymph nodes, liver and spleen is not specifically enumerated in the compensation schedule, the Board finds that the Office properly denied appellant's claim for a schedule award for permanent impairment of his bone marrow, red and white cell platelets, lymph nodes, liver and spleen.¹⁷

Appellant has not established that he is entitled to a schedule award for loss of his bone marrow, red and white cell platelets, lymph nodes, liver¹⁸ and spleen¹⁹ and the Office properly denied his claim in this regard.

functions of the body enumerated under 5 U.S.C. § 8107 and its implementing regulations. A schedule award is not payable for loss, or loss of use, of any member of the body not specifically enumerated, nor is it payable for the body as a whole. See *Ann L. Tague*, 49 ECAB 453 (1998).

¹⁵ See *Virginia Chappell (William F. Chappell)*, 45 ECAB 275, 277 (1993) (finding that the terms of the Act are specific as to the method and amount of payment of compensation; neither the Office nor the Board has the authority to enlarge the terms of the Act or to award benefits under any terms other than those specified in the statute).

¹⁶ See *Billie Sue Barnes*, 47 ECAB 478 (1996) (finding that the Office's authority to add other important internal or external organs to the compensation schedule will be exercised through properly promulgated regulations).

¹⁷ See *John Yera*, 48 ECAB 243 (1996) (finding that bowel, bladder and sexual dysfunction were taken into account in the 100 percent impairment rating of appellant's penis).

¹⁸ The Board has held that the liver is not included in the schedule award provisions of the Act and its regulations. *Thomas E. Stubbs*, 40 ECAB 647 (1989).

¹⁹ See *Michael P. Rakowski*, (Docket No. 97-2894) (1999), where the Board held that the spleen is not an organ member covered under the provisions of section 5 U.S.C. § 8107(c) of the Act.

The May 21, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
April 25, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member