

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

J.E., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Francisco, CA, Employer**

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**Docket No. 07-453
Issued: May 31, 2007**

Appearances:
Ron Watson, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 7, 2006 appellant filed a timely appeal from the September 12, 2006 merit decision of the Office of Workers' Compensation Programs, which denied his claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the schedule award issue.

ISSUE

The issue is whether appellant is entitled to a schedule award for his accepted employment injury.

FACTUAL HISTORY

On April 10, 2003 appellant, then a 61-year-old mail carrier, filed a claim alleging that his asthma and pulmonary fibrosis were a result of his federal employment. He contended:

“Ever since we moved to 1199 Ortega the conditions and environment around the building has been unsuitable -- like 34 holes in the ceiling that when it rains, water leak. And when panels dry off it creates dust-mess and with not ventilation

the breathing gets worse or get sick. Also the floor is all patch-ups and with minimum portion of asbestos in the long sun it may affect your breathing. This is been going on for years with not result on better condition.”

The Office accepted appellant’s claim for exacerbation of pulmonary fibrosis. A conflict later arose between appellant’s attending physician, Dr. Peter N. Kao, and an Office referral physician, Dr. James J. Hershon, on whether the aggravation of appellant’s preexisting pulmonary fibrosis was permanent or temporary, and whether continued medical treatment was therefore indicated. Dr. Hershon, together with an Office medical consultant, Dr. Charles C. McDonald, reported that the aggravation was temporary, leaving no permanent functional loss of use of the lungs. Appellant filed a claim for a schedule award.

To resolve the conflict, the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Virgilio C. Ereso, a Board-certified specialist in internal medicine, selected as the impartial medical specialist. Dr. Ereso reported that appellant’s exposure to dust and asbestos temporarily aggravated his pulmonary fibrosis and that the aggravation ceased after he stopped working.

In a decision dated November 9, 2005, the Office denied appellant’s claim for a schedule award. The Office found that the weight of the medical evidence rested with the impartial medical specialist and established that appellant did not sustain a permanent impairment and did not have any continuing injury-related disability or residuals due to the accepted work injury.

On December 19, 2005 Dr. Kao reported that removing the patient from the offending agent does not allow reversal of pulmonary fibrosis and restoration of his prior health condition. The Office reviewed the merits of appellant’s claim and issued a decision on September 12, 2006 denying modification of its November 9, 2005 decision. The Office found that appellant did not meet his burden of proof to establish with probative medical evidence his entitlement to a schedule award.

LEGAL PRECEDENT

Section 8107 of the Federal Employees’ Compensation Act authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body.¹ A claimant seeking compensation under the Act has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence.² A claimant seeking a schedule award, therefore, has the burden of establishing that his accepted employment injury caused permanent impairment of a scheduled member, organ or function of the body.³

¹ 5 U.S.C. § 8107.

² *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

³ *E.g., Russell E. Grove*, 14 ECAB 288 (1963) (where medical reports from the attending physicians showed that the only leg impairment was due to arthritis of the knees, which was not injury related, the claimant failed to meet his burden of proof to establish entitlement to a schedule award).

If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁴ When there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁵ When, however, the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.⁶ If the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative, or lacking in rationale, the Office must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining a rationalized medical opinion on the issue.⁷

ANALYSIS

Pursuant to section 8123(a) of the Act, the Office referred appellant to Dr. Ereso, a Board-certified internist, to resolve a conflict on whether the occupational aggravation or exacerbation of appellant's pulmonary fibrosis was permanent or temporary. Appellant may receive a schedule award only if the aggravation caused a permanent impairment of his lungs under the criteria of the A.M.A., *Guides*.

Dr. Ereso related appellant's history and his findings on examination. He reviewed the pertinent medical records, including the reports of the attending physician, Dr. Kao, and the Office referral physician, Dr. Hershon. Dr. Ereso determined that appellant's clinical findings were consistent with the diagnosis of advanced pulmonary fibrosis. He then addressed the issue to be resolved:

"The etiology of the pulmonary fibrosis is unclear. Considering the factor, [sic] of his employment as described in the [statement of accepted facts], I cannot conclude beyond a reasonable doubt that his exposure to dust and asbestos caused his pulmonary fibrosis. However, his condition was aggravated temporarily when he was exposed to dust and asbestos while at work and that the aggravation ceased after he stopped working.

"The condition of pulmonary fibrosis is irreversible and usually progressive as manifested in [appellant's] condition."

The Board finds that Dr. Ereso's opinion on the extent of the accepted aggravation is not well rationalized. His opinion amounts to a single declaratory sentence that the aggravation was

⁴ 5 U.S.C. § 8123(a).

⁵ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

⁶ *April Ann Erickson*, 28 ECAB 336, 341-42 (1977).

⁷ *Harold Travis*, 30 ECAB 1071, 1078 (1979).

temporary and ceased after appellant stopped working. Dr. Ereso did not explain how removing appellant from the offending environment would cause the aggravation to cease. He pointed to no clinical findings to support that the aggravation ceased after appellant stopped work. In short, Dr. Ereso offered insufficient medical reasoning to support his opinion that the employment-related aggravation was temporary.

The Board will set aside the Office's September 12, 2006 decision denying appellant's claim for a schedule award and will remand the case for further development. The Office shall ask Dr. Ereso to provide a supplemental opinion to support his assertion that the employment-related aggravation of appellant's pulmonary fibrosis was temporary and ceased after appellant stopped work. Following such further development of the evidence as may be necessary, the Office shall issue an appropriate final decision on appellant's claim for a schedule award.

CONCLUSION

The Board finds that this case is not in posture for decision. The opinion of the impartial medical specialist requires clarification.

ORDER

IT IS HEREBY ORDERED THAT the September 12, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: May 31, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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