

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHNNIE WILKINS and U.S. POSTAL SERVICE,
POST OFFICE, Omaha, Nebr.

*Docket No. 97-241; Submitted on the Record;
Issued January 15, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant is entitled to a schedule award under the Federal Employees' Compensation Act.

In the present case, the Office of Workers' Compensation Programs accepted that appellant, then a motor vehicle operator, contracted tuberculosis in 1965 from exposure to a coworker. Appellant's last exposure to the coworker occurred in December 1965. He received payment of appropriate wage loss and medical benefits.

On June 10, 1993 appellant requested a schedule award for permanent impairment to his lungs. The medical evidence of record supports a finding that in 1993 appellant was diagnosed with tuberculous bronchiectosis, which was a sequelae of appellant's accepted tuberculosis. By decision dated October 26, 1995, the Office denied appellant's claim on the grounds that the medical evidence did not establish a permanent impairment which was compensable pursuant to section 8107 of the Act. On December 21, 1996 the Office modified its prior decision and denied appellant's claim on the grounds that appellant was not entitled to a schedule award as his exposure to the contributing work factors ceased prior to enactment of the 1974 amendments to the Act, which authorized payment of schedule awards for impairments of the lungs.

The Board has duly reviewed the case record and finds that appellant is not entitled to a schedule award in this case.

The Act at section 8107 provides for payment of schedule awards for a permanent loss of use of certain specified anatomical members or functions of the body.¹ The Board has previously held that for an injury which occurred prior to September 7, 1974, a schedule award is not

¹ 5 U.S.C. § 8107.

payable for the loss of use of a part of the body not specifically enumerated in the Act.² The lung was not one of the members of the body so specified.³

The Act was amended effective September 7, 1974, authorizing payment of schedule awards for loss or loss of use of “any other important external or internal organ of the body as determined by the Secretary.”⁴ Pursuant to regulations, the Office has provided for a schedule award for a lung impairment.⁵ However, the 1974 amendments specifically state that this provision is applicable only to an injury or death occurring on or after the date of enactment, September 7, 1974.

This amendment does not allow for payment of a schedule award to appellant because his employment injury, his exposure to a coworker which caused his pulmonary condition, occurred in 1965, prior to the effective date of the 1974 amendment.⁶ The Board has explained in cases such as *Barbara A. Dunnavant*,⁷ *Sherron A. Roberts*⁸ and *Jack R. Lindgre*,⁹ that date of injury is the date of last exposure to the work factors causing injury. The date of last exposure to work factors will constitute the “date of injury” in those cases where the exposure ceased even though the extent of permanent impairment may continue to increase thereafter,¹⁰ or in cases wherein the permanent impairment only develops after exposure has ceased.¹¹

In a factually similar case, an employee filed a claim in 1978 requesting a schedule award for a lung impairment due to asbestosis. The employee’s employment-related exposure to asbestosis ceased in 1953. The Board held that the claim was properly denied as the last

² *Hiram L. Hendricks*, 33 ECAB 1487 (1982).

³ *Id.*

⁴ Act of September 7, 1974, 88 Stat. 1145.

⁵ 20 C.F.R. § 10.304(a).

⁶ *See supra* note 2.

⁷ 48 ECAB ____ (Docket No. 97-58, issued May 14, 1997).

⁸ 47 ECAB 617 (1996).

⁹ 35 ECAB 676 (1984).

¹⁰ *See George Crowley*, 34 ECAB 988 (1983).

¹¹ *See Hiram L. Hendricks*, *supra* note 2; *see also Johnnie B. Baker Sr.*, 10 ECAB 489 (1959) wherein discussing the October 14, 1949 amendments to the Act, 63 Stat. 854, the Board noted:

“All of the specific situations discussed during the 81st Congress concerned incidents in which the injury and impairments occurred simultaneously, for example: arms blown off by explosion, vision destroyed in a blast, etc. Not a single situation discussed by the Congress indicated that Congress intended to comprehend in section 5(a) the case in which the *injury* had occurred before enactment but the compensable impairment occurred *after* the enactment. That Congress clearly intended to cover the situation in which the impairment arose after the enactment similarly is *not* supported.” (Emphasis in the original.)

exposure to asbestos in his employment was before the effective date of the 1974 amendments to the Act, which first provided for schedule awards for impairment of the lungs.¹²

In the present case, appellant has alleged that his bronchial condition causing permanent impairment only arose after 1974 and therefore his injury occurred after the 1974 amendments to the Act. The Board has held that if the condition causing permanent impairment was a consequence of the employment-related injury, only one “injury” has been sustained within the meaning of the term “injury” under the Act. The Board has held that an injury which is suffered as a consequential effect of a primary employment-related injury “does not constitute a new, separate, or independent injury.”¹³

The Board must therefore still look to the original date of injury, even if a consequential injury is sustained, to determine date of injury. As in this case the date of last exposure to work factors causing injury was the date of injury, appellant’s date of injury was December 1965. As appellant’s date of injury was December 1965 and as there was no provision for a schedule award for permanent impairment of the lungs unless the injury occurred after September 7, 1974, the Office properly denied appellant’s claim for a schedule award.

The decision of the Office of Workers’ Compensation Programs dated December 21, 1996 is hereby affirmed.

Dated, Washington, D.C.
January 15, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

¹² *Nino V. Digrezio*, 39 ECAB 366 (1988).

¹³ *Ruey J. Yu*, 49 ECAB _____ (Docket No. 95-766, issued December 23, 1997). *See also Marjorie D. Striepeke*, (*Edward J. Striepeke*), 14 ECAB 446 (1963) wherein the Board held that appellant’s pulmonary tuberculosis treatment aggravated appellant’s left eye iritis, resulting in a loss of vision, the left eye condition was a consequential effect of the primary employment-related injury, and that such consequential effect did not constitute a new, separate, or independent injury.