U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of ROBERT C. CREVIER and U.S. POSTAL SERVICE,
POST OFFICE, Naples, FL

*Docket No. 99-626; Submitted on the Record;*
*Issued June 8, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was not entitled to a schedule award for his employment-related respiratory condition.

The Board has duly reviewed the case on appeal and finds that it is not in posture for decision.

In the instant case, the Office accepted that as a result of appellant's federal employment, he sustained a temporary aggravation of asthma on or about May 23, 1996.[1] For the purposes of determining appellant's entitlement to a schedule award, the Office referred appellant for evaluation by Dr. Milton S. Braunstein, a Board-certified internist specializing in pulmonary diseases. He examined appellant on May 11, 1998 and issued his findings that same day. Additionally, in response to the Office's request for clarification, Dr. Braunstein provided a supplemental report dated July 28, 1998, wherein he indicated, *inter alia*, that appellant's "VA [Veterans Administration] rating of 60 [percent] should be adequate to describe his overall disability."

By decision dated October 7, 1998, the Office advised appellant that based on the standards set forth in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), "there [was] … no evidence of impairment or disability." Consequently, the Office explained that there was no basis for the payment of monetary compensation benefits.

[1] The record indicated that appellant had a prior history of asthma dating back to 1973. Additionally, the record indicated that the Department of Veterans Affairs determined that appellant had a 60 percent impairment due to his asthma.

Section 8107 of the Federal Employees' Compensation Act[2] sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The Office has adopted the A.M.A., *Guides* (4th ed. 1993) as an appropriate standard for evaluating schedule losses and the Board has concurred in such adoption.[3]

In order to meet his burden of proof, appellant must submit sufficient medical evidence to show a permanent impairment causally related to employment that is ratable under the A.M.A., *Guides*. Under the procedures promulgated by the Office, the evidence must show that the impairment has reached a permanent and fixed state and indicate the date this occurred, describe the impairment in detail and contain an evaluation of the impairment under the A.M.A., *Guides*.[4]

Although the Office advised appellant that the medical evidence of record failed to meet the standards for impairment or disability set forth in the A.M.A., *Guides*, the record does not include an evaluation of appellant's respiratory condition in accordance with the A.M.A., *Guides*. Dr. Braunstein, who was retained by the Office to provide such an evaluation, did not reference the A.M.A., *Guides* (4th ed. 1993) in either of his two reports. He merely stated, without elaboration, that appellant's "VA rating of 60 [percent] should be adequate to describe his overall disability."[5] Inasmuch as Dr. Braunstein did not provide an impairment rating utilizing the A.M.A., *Guides* (4th ed. 1993), his opinion is of diminished probative value in determining the extent of appellant's permanent impairment.[6]

Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office

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[2] 5 U.S.C. § 8107.

[3] *James J. Hjort*, 45 ECAB 595 (1994).

[4] Federal (FECA) Procedure Manual, Part 2 -- *Claims, Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (March 1995).

[5] Dr. Braunstein was apparently reluctant to provide an impairment rating because of his belief that the temporary aggravation of appellant's condition "would likely reverse with more aggressive therapy." Notwithstanding his stated belief that the temporary aggravation was reversible, appellant's condition had persisted for approximately two years when Dr. Braunstein examined him in May 1998 and he offered no clear opinion as to the shortcomings of appellant's prior treatment. In his supplemental report, Dr. Braunstein merely indicated "If [appellant] continues with the same treatment [his condition] is not likely to return to baseline in the foreseeable future." Moreover, Dr. Braunstein failed to explain the basis of his opinion that the condition was in fact reversible nor did he provide any specific details of the "aggressive therapy" he suggested would resolve appellant's condition. Under the circumstances, his opinion does not rise to the level of rationalized medical opinion evidence. *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[6] *See Paul R. Evans Jr.*, 44 ECAB 646, 651 (1993).

shares responsibility in the development of the evidence to see that justice is done.[7] Once the Office undertakes to develop the medical evidence, as it did in this case by referring appellant to Dr. Braunstein for evaluation, it has the responsibility to do so in a proper manner.[8] In view of the noted deficiencies in his opinion, the Board will remand the case to the Office for such further development and consideration of the evidence as may be necessary and for an appropriate final decision.

The Board further notes that with respect to the payment of schedule awards, the Office's procedural manual provides:

> "(2) Any previous impairment to the member under consideration is included in calculating the percentage of loss except when:"
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> (b) The VA has already paid a claimant for a previous impairment to the same member, in which case an election will be required if the VA has increased the percentage payable due to the injury in civilian employment. In this instance an election will be between the entire schedule award and all VA benefits prior to any increase, on the one hand, and all VA benefits subsequent to the increase, on the other. Such an election should be offered only for the period of the schedule, as any determination of LWEC will involve different entitlement and require a separate election."[9]

[7] *William J. Cantrell*, 34 ECAB 1223 (1983).

[8] *Henry G. Flores*, 43 ECAB 901, 905 (1992).

[9] Federal (FECA) Procedure Manual, Part 2 -- *Claims, Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(a)(2)(b) (March 1995).

The October 7, 1998 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, D.C.
June 8, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member