

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA DAVIS and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, OH

*Docket No. 03-1685; Submitted on the Record;
Issued November 24, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant is entitled to a schedule award for permanent impairment due to her accepted work injuries; and (2) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

On November 30, 1994 appellant, then a 38-year-old letter carrier, filed a notice of traumatic injury alleging that she hurt her back when she lifted a bucket of mail. The Office accepted the claim for a lumbar strain and aggravation of preexisting degenerative disc disease. Appellant returned to work in June 1995 in a limited-duty position. She was injured again on August 24, 1995 when she fell on steps while delivering mail. The Office accepted her claim for a right knee contusion and authorized arthroscopic surgeries. Appellant next sustained a work-related injury on December 21, 1995, which was accepted for a lumbar strain.¹ Appellant received compensation for wages lost from December 21, 1995 until January 2000 when she returned to limited duty.

On June 6, 2001 appellant filed a Form CA-7 claim for a schedule award. In a decision dated November 30, 2001, the Office denied appellant's schedule award claim, finding that the evidence failed to establish that she had any permanent disability of a scheduled member due to her accepted work injuries. Appellant requested a hearing, which was held on April 30, 2002. In a decision dated July 24, 2002, an Office hearing representative affirmed the Office's November 30, 2001 decision.

While the case was pending before the Branch of Hearings and Review, appellant filed an occupational disease claim alleging that he suffered from a neck and shoulder condition caused or aggravated by her work duties. The case was assigned file number A9-2006535 and the Office accepted the claim for acute exacerbation of neck myalgia. Appellant was paid

¹ The Office combined these three claims under master file number A9-0396616.

compensation for wage loss from March 27 to April, 24, 2001, when she was released to work with restrictions. Appellant subsequently filed a claim for a recurrence of disability from June 21 to June 24 and August 15 to September 8, 2001. The record reflects that appellant began working only four hours per day effective September 18, 2001. In a decision dated November 21, 2001, the Office denied appellant's claim for recurrence of disability. The Office specifically held that the evidence did not support a material worsening of appellant's condition during the periods of June 21 to June 24, 2001 and August 15 to September 8, 2001. Appellant subsequently filed a request for reconsideration on December 13, 2001. The Office did not immediately act on appellant's reconsideration request since the case file was before the Office hearing representative on the issue of appellant's schedule award. When the case file was returned the Office combined the occupational disease claim with the traumatic injury claims under master file number A9-0396616. Appellant resubmitted his request for reconsideration on October 1, 2002. In a decision dated May 21, 2003, the Office denied the reconsideration request, finding that the evidence submitted in the record subsequent to December 13, 2001 was either repetitive or of no probative value to warrant a merit review.

The Board's jurisdiction to hear and decide appeals is limited to those final Office decisions issued within one year of the filing of the appeal. In this case, appellant filed her appeal on June 23, 2003. Because more than one year has elapsed between the issuance of the Office's decision dated November 21, 1001 and the date of appellant's appeal on June 23, 2003, the Board lacks jurisdiction to review the merits of the Office' denial of wage-loss compensation for the period of August 15 to January 11, 2001. The Board's jurisdiction is limited to the Office decision dated July 24, 2002 with respect to the schedule award and the May 21, 2003 Office decision denying appellant's request for reconsideration under 5 U.S.C. § 8128.²

The Board finds that the case is not in posture for a decision.

The schedule award provisions of the Federal Employees' Compensation Act³ and its implementing federal regulation,⁴ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use of specified members, functions or organs of the body. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.⁵ 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁶

² See 20 C.F.R. §§ 501.2(c), 501.3(d).

³ 5 U.C.S. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

⁵ 5 U.S.C. § 8107(c)(19).

⁶ See 20 C.F.R. § 10.404 (1999).

In his case, the Office denied appellant's schedule award claim finding that the evidence failed to establish that she had any permanent disability of a scheduled member based on her accepted November 30, 1994 work injury to the lumbar spine. While the Board agrees that appellant is not entitled to a schedule award for permanent impairment to the back,⁷ the Office also combined the traumatic injury claim with the occupational disease claim for a neck and shoulder condition due to work factors. The Office must ascertain whether or not appellant is entitled to a schedule award based on her occupational disease claim.

The Board also finds that the Office improperly denied appellant's request for reconsideration under section 8128.

The Office procedure manual provides: "When a reconsideration decision is delayed beyond 90 days and the delay jeopardizes the claimant's right to have review of the merits of the case by the Board, the Office should conduct a merit review."⁸ In this case, appellant filed a request for reconsideration of the Office's November 21, 2001 decision by letter dated December 13, 2001. The Office, however, did not issue a decision on appellant's request until May 21, 2003. As this was more than a 90-day delay and it jeopardized appellant's right to have the Board review the merits of her claim with respect to the denial of wage-loss compensation, the Office should have issued a decision on the merits of her claim in conformance with its procedures.⁹ Accordingly, this matter is remanded to the Office for consideration of the evidence on reconsideration followed by a merit decision to be issued to protect appellant's appeal rights.

⁷ No schedule award is payable for a member, function, or organ of the body not specified by the Act or in the regulations. This principle applies to body members that are not enumerated in the schedule award provisions before the 1974 amendments as well as the organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendments. Section 8109(19) specifically excludes the back from the definition of "organ." See *Thomas J. Englehardt*, 50 ECAB 319 (1999).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (June 2002).

⁹ See generally *Carlos Tola*, 42 ECAB 337 (1991).

The decisions of the Office of Workers' Compensation Programs dated May 31, 2003 and July 24, 2002 are hereby set aside and the case remanded to the Office for further action consistent with this opinion.

Dated, Washington, DC
November 24, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member