

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

CANDACE A. PEAVY, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cleveland, OH, Employer**

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**Docket No. 04-1998
Issued: January 28, 2005**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On August 9, 2004 appellant, through her attorney, filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated February 26, 2004, which denied her claim for a schedule award and a nonmerit decision dated July 8, 2004, which denied her request for reconsideration. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award issue.

ISSUES

The issues are: (1) whether appellant has established entitlement to a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On November 19, 1999 appellant, then a 36-year-old mail handler, filed a traumatic injury claim alleging that on September 6, 1999 she injured her back while in the performance of her job duties. She did not stop work. On May 15, 2000 the Office accepted the claim for a

displacement of a thoracic disc and paid appropriate compensation for wage loss and medical benefits. On December 3, 2003 appellant filed a Form CA-7 claim for a schedule award.

In a letter dated December 18, 2003, the Office explained to appellant that schedule awards could not be paid for impairment to the back, but that such awards could be paid for impairment of the lower extremities if there was significant pain, sensory deficit or motor impairment. The Office requested that she have her treating physician provide a comprehensive medical report with specific information included addressing whether under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), appellant had any permanent impairment of the lower extremities causally related to her accepted work injury. The Office further noted that the physician should complete the lower extremity evaluation record and worksheet (Figure 17) to rate appellant's lower extremity impairment. The Office, however, received no further evidence.

By decision dated February 26, 2004, the Office denied appellant's claim for a schedule award on the grounds that the requirements have not been met for entitlement to a schedule award.

On July 1, 2004 appellant requested reconsideration. Submitted with her request was a January 15, 2004 functional capacity evaluation signed by a physical therapist.

By decision dated July 8, 2004, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review of the record.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulation² 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.³

ANALYSIS -- ISSUE 1

No schedule award is payable for a member, function or organ of the body not specified in the Act or in the regulation. In this case, the Office correctly informed appellant that the back

¹ 5 U.S.C § 8107.

² 20 C.F.R § 10.404 (1999).

³ See *id.*; Jacqueline S. Harris, 54 ECAB ____ (Docket No. 02-203, issued October 4, 2002).

is not a payable member identified by the Act or the regulation.⁴ Notwithstanding, since the schedule award provisions of the Act include the extremities, appellant could be entitled to a schedule award for permanent impairment to the upper or lower extremities that is due to her work-related back injury.⁵ The issue of permanent impairment is a medical issue which can only be resolved by medical evidence. The Office had informed appellant of the necessary medical evidence required in its December 18, 2003 letter. Appellant, however, did not submit any medical evidence to support any permanent partial impairment of either the lower or upper extremities causally related to her work-related back injury. Because there is no evidence of record from which to conclude that appellant has impairment of the upper or lower extremities due to her work injury, the Board finds that appellant did not meet her burden of proof to establish entitlement to a schedule award.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.⁶ Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁷

ANALYSIS -- ISSUE 2

Appellant's July 1, 2004 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).⁸

With respect to the third requirement, constituting relevant and pertinent new evidence not previously considered by the Office, appellant submitted a January 15, 2004 functional capacity evaluation which outlines her limitations and is signed by a physical therapist. Although the functional capacity evaluation was not previously of record, the Board considers this evidence to be immaterial to the issue of whether appellant is entitled to a schedule award for permanent impairment of the lower extremities as evidence of limitations. Additionally, as a

⁴ The Act specifically excludes the back as an organ and, therefore, the back does not come under the provisions for payment of a schedule award. *Francesco C. Veneziani*, 48 ECAB 572 (1997).

⁵ See generally *George E. Williams*, 44 ECAB 530 (1993).

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ 20 C.F.R. § 10.608(b).

⁸ 20 C.F.R. §§ 10.608(b)(2)(i) and (ii).

physical therapist signed the functional capacity evaluation, the evaluation does not constitute medical evidence⁹ and, therefore, the functional capacity evaluation is not relevant to the schedule award issue. Inasmuch as appellant did not submit any “relevant and pertinent new evidence,” she is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2).¹⁰

Because appellant has failed to satisfy the requirements of section 10.606(b)(2), she is not entitled to a merit review. Accordingly, the Board finds that the Office properly denied appellant’s request for reconsideration.

CONCLUSION

Because there is no evidence of record from which to conclude that appellant has impairment of the upper or lower extremities due to her work injury, the Board finds that she did not meet her burden of proof to establish entitlement to a schedule award. The Board further finds that the Office properly denied appellant’s request for reconsideration as she failed to satisfy the requirements of section 10.606(b)(2).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers’ Compensation Programs dated July 8 and February 26, 2004 are affirmed.

Issued: January 28, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁹ A physical therapist is not a physician as defined under the Act and is not competent to render a medical opinion. *See Thomas R. Horsfall*, 48 ECAB 180 (1996).

¹⁰ 20 C.F.R. § 10.608(b)(2)(iii).