

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

F.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Bellmawr, NJ, Employer**

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**Docket No. 06-1758
Issued: November 29, 2006**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 26, 2006 appellant filed a timely appeal from the February 24, 2006 merit decision of the Office of Workers' Compensation Programs which denied compensation for wage loss during the period of a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this decision.

ISSUE

The issue is whether the Office properly denied compensation for wage loss while appellant was in receipt of a schedule award under a different claim number.

FACTUAL HISTORY

On March 30, 2001 appellant, then a 44-year-old supervisor of distribution operations, sustained an injury in the performance of duty. The Office accepted her claim for aggravation of degenerative arthritis of the right foot, aggravation of a stress fracture of the second right toe and aggravation of right foot and ankle tendinitis. Appellant received a schedule award for a 34

percent impairment of her right lower extremity. The period of the award ran from May 20, 2003 through April 4, 2005.

On May 5, 2004 appellant filed a claim alleging that she sustained a recurrence of her March 30, 2001 injury on April 27, 2004: “Was placed in operations on the [small parcel bundle sorter] (SPBS), as a supervisor, December 2003. Condition has worsened with the requirements of the job. Repetitively getting up and sitting down with the demands of the machines operations and constant climbing up the steps to reach the desk which sits on a podium. Having severe pain in right foot and ankle.”

The Office notified appellant that it was treating her claim as one for a new injury, as she was implicating additional work factors. On November 24, 2004 it accepted this claim for aggravation of right ankle tendinitis and aggravation of right knee tendinitis.

Appellant filed claims for wage loss from April 27 through May 30, 2004 and from June 4 through November 26, 2004.

In a decision dated April 4, 2005, the Office denied appellant’s claims for wage loss on the grounds that she was currently receiving a schedule award involving the same part of the body under her other case file and, therefore, she was not entitled to concurrent payments for wage loss.

In a decision dated February 24, 2006, an Office hearing representative affirmed the denial of compensation for the periods of disability claimed. The hearing representative found that the case was one of a new injury, not of recurrence and did not merit an interruption of the schedule award being paid under the other case file.

LEGAL PRECEDENT

As used in the Federal Employees’ Compensation Act,¹ the term “disability” means incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.²

Section 8107 of the Act³ authorizes the payment of schedule awards for the loss or loss of use, of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment.⁴

¹ 5 U.S.C. §§ 8101-8193.

² *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17).

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404 (1999).

Disability is not synonymous with physical impairment, which may or may not cause incapacity to earn wages.⁵ An employee who has a physical impairment causally related to her federal employment, but who nonetheless has the capacity to earn the wages she was receiving at the time of injury, has no disability as that term is used in the Act and is not entitled to compensation for loss of wage-earning capacity.⁶ When, however, the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in her employment, she is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.⁷ Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn, not upon actual wages lost.⁸

A schedule award is payable consecutively but not concurrently with an award for wage loss for the same injury.⁹ A schedule award for one injury may be paid concurrently with compensation for wage loss paid for another injury, as long as the two injuries do not involve the same part of the body.¹⁰

ANALYSIS

After the Office accepted appellant's May 5, 2004 claim for aggravation of right ankle tendinitis and aggravation of right knee tendinitis, appellant filed claims for compensation alleging disability for work from April 27 through May 30, 2004 and from June 4 through November 26, 2004. The record indicates, however, that she was receiving a schedule award during these periods in her other case file. As both injuries involved the right lower extremity, the Board finds that the Office may not pay compensation for wage loss resulting from appellant's April 27, 2004 injury concurrently with the schedule award for her March 30, 2001 injury.

Appellant's attorney argues that appellant filed her claim as one of recurrence and that the Office should have interrupted the schedule award to pay for the recurrent wage loss. Counsel relies on this provision of the Office Procedure Manual: "If a recurrence is accepted for a period which overlaps a schedule award, it will be necessary to interrupt the schedule [award] in order to pay for the period of recurrence. If a recurrent pay rate is established, the claimant

⁵ See *Fred Foster*, 1 ECAB 21 at 24-25 (1947) (finding that the Act provides for the payment of compensation in disability cases upon the basis of the impairment in the employee's capacity to earn wages and not upon physical impairment as such).

⁶ See *Gary L. Loser*, 38 ECAB 673 (1987) (although the evidence indicated that appellant had sustained an impairment of his legs because of work-related thrombophlebitis, it did not demonstrate that his condition prevented him from returning to his work as a chemist or caused any incapacity to earn the wages he was receiving at the time of injury).

⁷ *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

⁸ *George W. Coleman*, 38 ECAB 782 (1987).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5.a (3) (March 1995).

¹⁰ *Id.*, Chapter 2.808.5.a(4).

will be entitled to that rate for the balance of the schedule award after the period of disability attributable to the recurrence has ceased.”¹¹

A “recurrence of disability” means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.¹² Appellant filed a claim of recurrence but did not allege a spontaneous change in her March 30, 2001 employment injury. Instead, she attributed her disability beginning April 27, 2004 to additional work factors. The Office, therefore, properly regarded appellant’s claim as one for a new injury. The facts do not warrant an interruption of her schedule award in order to pay for the period of recurrence.

CONCLUSION

The Board finds that the Office properly denied compensation for wage loss while appellant was in receipt of a schedule award under a different claim number. The wage loss resulted from a new injury involving the same part of the body, under which circumstances Office procedures prohibit concurrent payment.

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2006 decision of the Office of Workers’ Compensation Programs is affirmed.

Issued: November 29, 2006
Washington, DC

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

David S. Gerson, Judge
Employees’ Compensation Appeals Board

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

¹¹ *Id.*, Chapter 2.808.7.a(3).

¹² 20 C.F.R. § 10.5(x) (1999).