

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

E.G., Appellant)	
)	
and)	Docket No. 07-2346
)	Issued: April 1, 2008
U.S. POSTAL SERVICE, SAN FRANCISCO)	
BULK MAIL CENTER, Richmond, CA,)	
Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 17, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated November 27, 2006, finding that he had no partial disability after October 2, 2003 and July 30, 2007, finding that he was not entitled to a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof in establishing that he was partially disabled due to his accepted employment conditions on or after October 2, 2003; and (2) whether appellant is entitled to a schedule award due to his accepted employment injuries.

FACTUAL HISTORY

This case has previously been before the Board on appeal. On March 27, 1998 appellant, then a 53-year-old custodian group leader, sustained injury when he rode his bicycle through some dust. He stated that he was diagnosed with asthma. On June 8, 1998 the Office accepted appellant's claim for a single episode of acute asthma and authorized compensation for intermittent periods of total disability. By decision dated April 2, 1999, the Office informed him that his employment as a modified custodial group leader fairly and reasonably represented his wage-earning capacity and, as his actual earnings met or exceeded those of his date-of-injury position, he had no loss of wage-earning capacity. Appellant requested a schedule award on July 9, 1999. By decision dated January 26, 2000, the Office denied appellant's claim for a schedule award on the grounds that he did not have a permanent functional loss of use of his lungs due to his March 27, 1998 employment injury. The Office denied modification of this decision on February 22, 2001 after further development of the medical evidence. By decision dated October 15, 2002, the Board affirmed the Office's February 22, 2001 decision finding that the weight of the medical evidence established that appellant had sustained only a temporary exacerbation of his preexisting and nonemployment-related asthma on March 27, 1998 and was not, therefore, entitled to a schedule award for permanent impairment of his lungs.¹ The facts and the circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

On May 21, 2002 appellant filed a notice of recurrence of disability alleging that his shortness of breath, nose bleeds, coughing, leg swelling, chest pain and sweating became worse each night and required that he use his asthma machine before going to bed. The Office denied this claim by decision dated January 23, 2003 and noted that appellant attributed his condition to additional employment exposures. Appellant filed a notice of occupational disease on January 28, 2003. The Office accepted his claim for temporary aggravation of rhino conjunctivitis on August 26, 2003.

Appellant filed claims for wage-loss compensation from January 3, 2002 through September 30, 2003. His attending physician, Dr. Otis Rounds, a Board-certified internist, completed reports on May 8 and 9, 2003 and diagnosed obstructive and restrictive lung diseases which were not caused by his work, but that the employing establishment did predispose appellant to develop severe symptoms triggered by his underlying hyperreactive airways disease. In a note dated October 3, 2003, Dr. Frederick J. Nachtwey, a Board-certified pulmonologist, reported that appellant could work four hours a day as long as he was not exposed to any irritants. He diagnosed asthma but stated that this condition currently seemed well controlled with no reactive airways disease on testing. Dr. Thomas E. Gamsky, an internist and physician at the Veterans Administration, completed a report on December 14, 2003 noting appellant's history of injury and diagnosing allergic and irritant rhino conjunctivitis associated with dyspnea likely aggravated by work. He recommended that appellant avoid solvents and chemical irritants at work.

¹ Docket No. 02-993 (issued October 15, 2002).

On October 7, 2003 the Office denied appellant's claim for temporary total disability for the period January 3, 2002 to September 30, 2003. Appellant retired on February 27, 2004. He requested an oral hearing. By decision dated April 12, 2005, the hearing representative set aside the Office's October 7, 2003 decision and remanded the case for additional development of the medical evidence. Appellant filed an additional claim for compensation on November 1, 2005 and requested wage-loss compensation from January 3, 2002 to February 14, 2004. He experienced intermittent disability resulting in leave usage or leave without pay beginning January 4, 2002. Appellant began working four hours a day on February 3, 2003.

In a report dated November 22, 2005, Dr. David S. Safianoff, a Board-certified pulmonologist and Office second opinion physician, reviewed the factual and medical evidence. He opined that appellant was only partially disabled from 2002 to 2003 on the grounds that he could not actually clean, if required to do so by staff shortages, but could work in his assigned supervisory position during this period. By decision dated May 5, 2006, the Office denied appellant's claim for disability for the period January 3, 2002 through February 14, 2004.

Appellant requested an oral hearing. He testified at the oral hearing on September 13, 2006. By decision dated November 27, 2006, the hearing representative found that appellant was entitled to compensation from January 2, 2002 to October 3, 2003. The hearing representative found that Dr. Nachtwey's October 3, 2003 note established that appellant's partial disability had ceased as of that date.

On January 18, 1997 appellant originally filed a claim for a schedule award. The Office referred him for a second opinion evaluation on March 13, 2007 with Dr. Weldon Havins, a Board-certified ophthalmologist. On March 16, 2007 the Office referred appellant for a second opinion with Dr. Naresh Singh, a Board-certified pulmonologist. Dr. Havins completed a report on May 3, 2007 and found no evidence of conjunctivitis. In reports dated April 10 and June 12, 2007, Dr. Singh stated that, under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), appellant's pulmonary function test revealed a class three impairment.

The Office medical adviser reviewed Dr. Singh's reports and the remainder of the medical record on July 20, 2007. He noted that appellant had mild underlying asthma and temporary aggravations of underlying asthma due to irritant exposure. The Office medical adviser concluded that appellant had no permanent respiratory impairment. By decision dated July 30, 2007, the Office denied appellant's claim for a schedule award.

LEGAL PRECEDENT -- ISSUE 1

A claimant for each period of disability claimed, has the burden of proving by a preponderance of the reliable, probative and substantial evidence that he is disabled for work as a result of his employment injury. Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be provide by preponderance of the reliable probative and substantial medical evidence.²

² *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work. The Board has stated that, when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurts too much to work, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.³

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained intermittent periods of disability from January 2, 2002 through October 2, 2003. However, the Office denied his claim for disability after October 2, 2003. Appellant retains the burden of proof in establishing that he was disabled due to his accepted employment injury on or after October 3, 2003.

The most recent medical evidence in the record does not discuss appellant's disability for work after October 2, 2003 due to the accepted employment-related aggravations of his underlying conditions. Dr. Nachtwey, a Board-certified pulmonologist, reported on October 3, 2003 that appellant could work four hours a day as long as he was not exposed to any irritants. He diagnosed asthma but stated that this condition currently seemed well controlled with no reactive airways disease on testing. Dr. Nachtwey did not offer an explanation for appellant's need to work only four hours a day and did not attribute his partial disability to appellant's accepted temporary aggravation of asthma or allergic rhino conjunctivitis. Without medical opinion evidence explaining why appellant was not able to perform the full duties of his modified position, this report is not sufficient to establish continuing disability due to appellant's accepted employment injuries.

On December 14, 2003 Dr. Gamsky, an internist and physician at the Veterans Administration, completed a report noting appellant's history of injury and diagnosing allergic and irritant rhino conjunctivitis associated with dyspnea likely aggravated by work. He recommended that appellant avoid solvents and chemical irritants at work. However, Dr. Gamsky did not address appellant's disability for work and did not offer any opinion whether he experienced any period of disability due to the diagnosed temporary aggravation. As there is no concurrent medical evidence addressing appellant's disability for work after October 2, 2003, appellant has not met his burden of proof. The Office properly denied his claim for compensation after that date.

LEGAL PRECEDENT -- ISSUE 2

The schedule award provision of the Federal Employees' Compensation Act⁴ and its implementing regulations⁵ 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

³ *Id.*

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

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.

ANALYSIS -- ISSUE 2

The Office accepted appellant's claim for single episode of acute asthma on June 8, 1998. In its October 15, 2002 decision, the Board found that appellant had sustained only a temporary exacerbation of his preexisting asthma and that he was not entitled to a schedule award due to this condition. The Office accepted the additional condition of temporary aggravation of rhino conjunctivitis. The Office has not accepted that appellant has sustained any permanent aggravation of either of his underlying conditions, asthma or rhino conjunctivitis. Appellant has not sustained an employment-related permanent impairment of a scheduled member and is not entitled to a schedule award.⁶

CONCLUSION

The Board finds that appellant has not submitted the necessary medical opinion evidence to establish disability after October 2, 2003 due to his accepted employment injuries. The Board further finds that appellant has only sustained temporary aggravations of his asthma and rhino conjunctivitis he is not entitled to a schedule award under the Act.

⁶ *Rosie Esquivias*, 41 ECAB 243, 255 (1989) (finding that, if appellant's employment-related aggravation was found to be a permanent aggravation rather than a temporary one, then and only then the Office should consider appellant's claim for schedule award purposes); *George Diamond*, (Docket No 06-335, issued June 2, 2006); *Hazel G. Johnson*, (Docket No. 06-174, issued March 14, 2006).

ORDER

IT IS HEREBY ORDERED THAT the July 30, 2007 and November 27, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 1, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board