United States Department of Labor
Employees' Compensation Appeals Board

L.D., Appellant	)	
and	)	**Docket No. 08-827**
	)	**Issued: September 10, 2008**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Hines, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 24, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' October 19, 2007 and January 9, 2008 decisions that denied modification of a December 19, 2006 schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award issue.

ISSUE

The issue is whether appellant has met her burden of proof in establishing that she sustained any permanent impairment related to her accepted injury.

FACTUAL HISTORY

On September 15, 2005 appellant, then a 47-year-old program support clerk, sustained traumatic injury when she entered a bathroom stall and her eyes, mouth, face and tongue became swollen due to an allergic reaction to dust or mold. She stopped work on that date and did not

return. On April 28, 2006 the Office accepted appellant's claim for laryngeal spasm due to dust exposure, resolved. Appellant received appropriate compensation benefits.

On October 2, 2006 appellant filed a claim for a schedule award. By letter dated October 11, 2006, the Office requested that she provide a report from her physician addressing any permanent impairment. It advised appellant that the physician needed to utilize the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* (5th ed. 2001) (hereinafter A.M.A., *Guides*) and provide an opinion regarding whether she sustained permanent impairment, and if so, the percentage of impairment with an explanation of how the calculation was derived.

The Office received a response from Dr. Lillian DeLeon, Board-certified in internal medicine, who opined that appellant reached maximum medical improvement on May 11, 2005. However, Dr. DeLeon noted only that appellant did not have any objective findings or subjective complaints and was to avoid exposure to dust.

By letter dated October 30, 2006, the Office advised appellant that the information submitted with her claim was insufficient to establish her entitlement to a schedule award. Appellant was advised that additional medical evidence was needed.

In a December 14, 2006 report, an Office medical adviser noted appellant's history of injury and treatment. He determined that appellant currently had no symptoms resulting from her allergic reaction and resultant laryngospasm. The Office medical adviser stated that no pulmonary function tests were submitted and appellant was not currently taking medications. Appellant returned to work and was advised to avoid areas of heavy dust. The Office medical adviser noted that the A.M.A., *Guides* did not provide a permanent partial impairment rating for the larynx alone but for the person as a whole. He noted that appellant had an asthma severity rating score of zero pursuant to Table 5-10.[1] The Office medical adviser also determined that appellant had an air passage defect rating of a Class 1 according to Table 11-6.[2] He also indicated that appellant had a voice/speech impairment Class 1 of a 0 percent whole person impairment according to Table 11-8.[3] The Office medical adviser determined that appellant had no ratable impairment related to her accepted condition. He indicated that appellant reached maximum medical improvement on September 22, 2005.

In a December 19, 2006 decision, the Office denied appellant's claim for a schedule award.

On July 18, 2007 appellant requested reconsideration. She alleged that the effects from her injury were permanent and she feared another allergic reaction. Appellant noted that she was currently taking medications which included inhalers and inhalation capsules. Treatment notes from Dr. DeLeon dated September 29, 2005 included findings that appellant was in no acute distress. She also noted that the chest was "resonant to percussion normal breath sounds

[1] A.M.A., *Guides* 104.

[2] *Id*. at 260.

[3] *Id*. at 265.

bilaterally" and there was "good excursion of the chest wall. There are no wheezes or rales." A June 29, 2007 pulmonary function study by Dr. DeLeon noted test results but did not address any permanent impairment of a scheduled member of the body.

In a September 11, 2007 report, an Office medical adviser noted appellant's history of injury and treatment. He indicated that appellant did not have any symptoms resulting from the allergic reaction and resultant laryngospasm and related that appellant was not currently taking fexofenadine on a daily basis. The Office medical adviser reviewed the June 29, 2007 pulmonary function test and related that it revealed that appellant had "no dyspnea at rest or with exercise." He also noted that appellant "has been a smoker for 21 years so interpretation of the data is difficult." The Office medical adviser explained that the A.M.A., *Guides* did not provide a permanent partial rating for the larynx alone but for the person as a whole. He provided an asthma rating and referred to Table 5-9.[4] The Office medical adviser determined that appellant would warrant an asthma severity score of 0, or 0 percent impairment according to Table 5-10.[5] He also provided an air passage defect rating utilizing Table 11-6.[6] The Office medical adviser determined that appellant would be entitled to an air passage deficit of Class 1, which would equate to 0 percent impairment. The Office medical adviser also provided a rating under voice and speech impairment and referred to Table 11-8.[7] He concluded that appellant was not entitled to impairment under Class 1. The Office medical adviser explained that he had utilized multiple approaches to calculate impairment; however, she had no ratable impairment.

By decision dated October 19, 2007, the Office denied modification of the December 19, 2006 decision.

On November 27, 2007 appellant requested reconsideration. She noted that she was currently taking fexofenandine daily and using an epipen. Appellant contended that she had permanent effects from her injury and she did not understand how she could be found to have no impairment when she lived daily with the stress of a future reaction. She acknowledged that she was "an occasional smoker in the past" and that she did not currently smoke. In a November 8, 2007 attending physician's report, Dr. DeLeon did not address whether appellant had any permanent impairment under the A.M.A., *Guides*. In a December 4, 2007 report, Dr. Lisa Polsby, a psychiatrist, noted the history of appellant's September 15, 2005 work injury. She did not evaluate appellant's current condition or whether she had permanent impairment of the larynx.

In a December 31, 2007 report, the Office medical adviser utilized the A.M.A., *Guides* and noted appellant's history of injury and treatment. He advised that the resubmitted PFT testing now indicated that appellant had no dyspnea at rest, with or without exercise, while the previously submitted copy noted no dyspnea. The Office medical adviser noted that there was no explanation for the change from the original report. He indicated that even with this change,

[4] *Id.*

[5] *Id.*

[6] *Id*. at 260.

[7] *Id*. at 265.

other clinical notes from Dr. DeLeon indicated that appellant had a normal lung examination. The Office medical adviser concluded that appellant was not entitled to a schedule award.

By decision dated January 9, 2008, the Office denied modification of its previous decisions.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[8] 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.[9] 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 for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.[10] The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[11]

The larynx is a scheduled member of the body for which an award is payable for 160 weeks for a total impairment.[12] Under the A.M.A., *Guides*, impairment to the larynx is determined by impairment of a claimant's ability to speak.[13] For voice and/or speech impairments, the classifications in Table 11-8 and Table 11-9 should be used. The impairment ratings for speech and/or voice impairments are not evaluated separately. The degree of impairment of speech and/or voice is equivalent to the greatest percentage of impairment recorded in any one of the three sections (audibility, intelligibility, or functional efficiency) of the classification chart (Table 11-8).[14]

ANALYSIS

The Office accepted appellant's claim for laryngeal spasm due to dust exposure, resolved.

After appellant claimed a schedule award, the Office received an undated report from Dr. DeLeon, a treating physician, who advised that appellant had reached maximum medical improvement on May 11, 2005. However, Dr. DeLeon noted that appellant did not have any objective findings or subjective complaints and should avoid exposure to dust. On December 14, 2006 an Office medical adviser determined that medical evidence did not establish any

[8] 5 U.S.C. §§ 8101-8193.

[9] 5 U.S.C. § 8107.

[10] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[11] 20 C.F.R. § 10.404.

[12] 20 C.F.R. § 10.304(b). *See* 5 U.S.C. § 8107(c)(22).

[13] A.M.A., *Guides*, 264-71. *See also Martin J. Epp*, 38 ECAB 855, 858-59 (1987); *K.O.*, Docket No. 06-984 issued November 3, 2006).

[14] A.M.A., *Guides* 265.

permanent impairment. Subsequently, Dr. DeLeon provided treatment notes dated September 29, 2005 indicating that appellant was in no acute distress and that the chest was resonant to percussion normal breath sounds bilaterally with good excursion of the chest wall and no wheezes or rales. She also provided a June 29, 2007 pulmonary function study but offered no opinion on permanent impairment.

On September 11, 2007 the Office medical adviser again reviewed the reports from Dr. DeLeon. He noted that appellant did not have any current symptoms resulting from the allergic reaction and resultant laryngospasm and noted that she was not currently taking fexofenadine on a daily basis. The Office medical adviser indicated that appellant "has been a smoker for 21 years so interpretation of the data is difficult." Under Table 5-9, pertaining to asthma ratings, appellant had an asthma severity score of 0, or no impairment for asthma according to Table 5-10.[15] The Office medical adviser then provided an air pass defect rating utilizing Table 11-6[16] and determined that appellant fell into a Class 1 category, or 0 percent impairment, as she had no dyspnea at rest or with exercise. He also referred to the category for voice and speech impairment under Table 11-8[17] and concluded that she had no impairment under Class 1. The Office medical adviser determined that based on multiple different approaches for calculating impairment appellant had no ratable impairment.

Similarly, in a December 31, 2007 report, the Office medical adviser again found no basis for impairment of the larynx under the A.M.A., *Guides.* He reviewed the new evidence submitted by appellant as well as another copy of pulmonary function test results dated June 29, 2007, which was inconsistent with the previous submission as it indicated that appellant had dyspnea. The Office medical adviser indicated that there was no explanation for this discrepancy. In any event, he advised that clinical notes from Dr. DeLeon indicated that appellant had a normal lung examination. The Board also notes that, even if the finding of dyspnea on most recently submitted version of the June 29, 2007 is credible, no physician has explained how this has resulted in ratable impairment to the larynx.[18] There is no medical evidence of record establishing that appellant has any ratable impairment of the larynx due to her accepted claim.

As noted the Office evaluates schedule award claims pursuant to the standards set forth in the A.M.A., *Guides*. Appellant has the burden of proof to submit medical evidence supporting that she has permanent impairment of a scheduled member of the body.[19] She has not established entitlement to a schedule award.

[15] A.M.A., *Guides* 104.

[16] *Id.* at 260. The Board notes that the only condition accepted by the Office is a resolved laryngeal spasm. Even if application of the asthma table, id., or the table for air passage defects revealed a ratable whole person impairment, the medical adviser did not explain how this would result in impairment to appellant's larynx.

[17] A.M.A., *Guides* 265.

[18] *See supra* note 13 (impairment to the larynx is determined by impairment of a claimant's ability to speak).

[19] *See Annette M. Dent*, 44 ECAB 403 (1993).

CONCLUSION

The Board finds that appellant has not established any permanent impairment warranting a schedule award.[20]

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 9, 2008 and October 19, 2007 are affirmed.

Issued: September 10, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[20] On appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. § 501.2(c).