United States Department of Labor
Employees' Compensation Appeals Board

HARRY T. KENNEY, Appellant	)	
and	)	**Docket No. 05-522**
	)	**Issued: July 7, 2005**
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, DC, Employer	)	

Appearances:
Harry T. Kenney, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On December 27, 2004 appellant filed a timely appeal of the October 6, 2004 merit decision of the Office of Workers' Compensation Programs, which denied an additional schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d) the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has more than a 30 percent respiratory impairment, for which he received a schedule award.

FACTUAL HISTORY

Appellant, an 88-year-old former administrative officer has an accepted occupational disease claim for temporary aggravation of preexisting allergy to mold spore arising on or about

March 12, 1977.[1] In a decision dated November 20, 1987, the Office granted appellant a schedule award for 30 percent respiratory impairment. The award covered a period of 93.6 weeks, from April 1, 1986 to January 16, 1988.[2]

Appellant later requested an additional schedule award. He submitted an October 26, 2000 report from his treating physician, Dr. Harvey M. Richey, III, an osteopath, Board-certified in internal medicine and pulmonary diseases, who commented on a pulmonary function study administered July 12, 2000. Appellant also submitted an October 2, 2001 arterial blood gas study. In June 2003 the Office referred the claim file to its medical adviser, who recommended that appellant be referred for a complete pulmonary evaluation.

Dr. Peter A. Petroff, a Board-certified internist and Office referral physician, examined appellant on May 3, 2004 and diagnosed asthma. He indicated that appellant continued to suffer residuals of the accepted employment-related condition. Dr. Petroff rated appellant's asthma as a Class 3 respiratory impairment, which represented a 37.5 percent impairment of the whole body.[3] Additionally, he noted that appellant reached maximum medical improvement when he stopped working in January 1987.

The Office again referred the record to its medical adviser, who found that appellant had a 30 percent impairment of the whole person under the A.M.A., *Guides* (5th ed. 2001). In his September 12, 2004 report, the Office medical adviser explained that appellant's current condition represented a 30 percent loss of overall lung function. He identified May 2004 as the date of maximal medical improvement.

In an October 6, 2004 decision, the Office denied appellant's claim for an additional schedule award. The Office explained that appellant had previously received a schedule award for a 30 percent respiratory impairment and the recent medical evidence did not support an increased award.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions

[1] At the time of his employment injury appellant had preexisting bronchial asthma. The Office also accepted intraocular eye pressure and bilateral inguinal hernia as consequential injuries. Appellant was removed from federal service effective January 5, 1987.

[2] Appellant requested reconsideration of the schedule award, which the Office denied as untimely in a decision dated January 14, 1992. By decision dated June 18, 1993, the Board affirmed the Office's January 14, 1992 nonmerit decision. Docket No. 92-1473.

[3] Dr. Petroff based his May 3, 2004 impairment rating on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (3rd ed. 1991).

and organs of the body.[4] 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 under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[5] Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).[6]

A claim for an increased schedule award may be based on new employment exposure; however, additional occupational exposure is not a prerequisite. Absent additional employment exposure, an increased schedule award may also be based on medical evidence demonstrating that the progression of an employment-related condition has resulted in a greater permanent impairment than previously calculated.[7]

ANALYSIS

Dr. Harvey did not provide an impairment rating in his October 26, 2000 report. He only commented on appellant's July 12, 2000 pulmonary function study. Therefore, his report was of limited probative value.[8] The Office properly referred the claim to its medical adviser, who recommended further evaluation by a pulmonary specialist. Dr. Petroff, the Office referral physician, examined appellant on May 3, 2004 and found that appellant's asthma represented 37.5 percent impairment of the whole person. However, he incorrectly based his rating on an earlier edition of the A.M.A., *Guides* (3rd ed. 1991) rather than the appropriate fifth edition of the A.M.A., *Guides* (5th ed. 2001).

The Office medical adviser reviewed the record, including Dr. Petroff's May 3, 2004 evaluation, and applied the correct version of the A.M.A., *Guides*. As noted, Dr. Petroff diagnosed asthma. If the pulmonary impairment in question is due to asthma, Table 5-9, "Impairment Classification for Asthma Severity" and Table 5-10, "Impairment Rating for

[4] 5 U.S.C. § 8107(a), (c). With respect to the loss of use of a lung, the applicable regulation provides that, for a total, or 100 percent loss of use of a single lung, an employee shall receive 156 weeks of compensation. 20 C.F.R. § 10.404(a). Regarding loss of use due to lung impairments, as in the instant case, the Office has determined that the percentage of impairment will be multiplied by 312 weeks (twice the award for loss of function of one lung) to obtain the number of weeks payable. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4 (November 1998).

[5] 20 C.F.R. § 10.404 (1999).

[6] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003); FECA Bulletin No. 01-05 (issued January 29, 2001).

[7] *Linda T. Brown*, 51 ECAB 115 (1999).

[8] *See* 20 C.F.R. § 10.333 (1999); *Mary L. Henninger*, 52 ECAB 408, 409 (2001).

Asthma," should be used to determine the extent of the respiratory impairment.[9] The whole person impairment rating obtained is then converted to an impairment of the lungs.[10]

The Office medical adviser noted that, based on the available medical information, including the most recent pulmonary function study administered on May 3, 2004, appellant appeared to have a moderate obstructive impairment. Considering appellant's age, objective studies and medication usage, the Office medical adviser calculated a total asthma score of six under Table 5-10, A.M.A., *Guides* 104. An asthma score between 6 and 9 corresponds to an impairment of the whole person within the range of 26 to 50 percent. The Office medical adviser found that appellant's total asthma score of 6 represented a whole person impairment of 30 percent. When converted to an impairment of the affected organ, the Office medical adviser correctly noted that appellant's condition represented a 30 percent loss of total lung function. Inasmuch as the Office medical adviser's September 12, 2004 impairment rating conforms to the A.M.A., *Guides* (5th ed. 2001); his finding constitutes the weight of the medical evidence.[11] Appellant has not provided any probative medical evidence that he has more than 30 percent respiratory impairment. As he previously received compensation for 30 percent respiratory impairment, the Office properly denied appellant's claim for an additional schedule award.[12]

CONCLUSION

The Board finds that appellant failed to establish that he has more than 30 percent respiratory impairment.

[9] FECA Bulletin No. 01-05 (issued January 29, 2001).

[10] *Id.*; *see* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4 (August 2002).

[11] *Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

[12] *Mike E. Reid*, 51 ECAB 543, 547-48 (2000).

ORDER

IT IS HEREBY ORDERED THAT the October 6, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 7, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member