

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

A.V., claiming as the personal representative of S.V., Appellant)	
)	
and)	Docket No. 06-481
)	Issued: October 24, 2006
DEPARTMENT OF COMMERCE, NATIONAL INSTITUTE OF STANDARDS, Boulder, CO, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On December 22, 2005 appellant filed a timely appeal from a November 7, 2005 merit decision of the Office of Workers' Compensation Programs, granting the employee a schedule award for a 50 percent impairment of the right lung and modifying the period of entitlement to compensation and a November 25, 2005 merit decision, which denied the employee's widow a schedule award for impairment of the employee's extremities. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award case.

ISSUES

The issues are: (1) whether appellant established that the employee had more than a 50 percent impairment of the right lung, for which he received a schedule award; and (2) whether she established that the employee's widow was entitled to a schedule award for impairment of the employee's extremities due to his employment-related metastatic brain cancer.

FACTUAL HISTORY

This case has twice been on appeal before the Board. In a September 2, 2003 decision, the Board set aside the Office's August 6 and November 18, 2002 decisions which found that the employee did not sustain an injury while in the performance of duty and remanded the case to the Office. The Board found that the employee was exposed to asbestos and radiation during his federal employment and that, although an Office medical adviser's opinion was not sufficiently rationalized to establish that his lung cancer was causally related to such exposure, it raised an inference in favor of the employee's claim. On remand, the Board instructed the Office to refer the employee, together with the case record and a statement of accepted facts, to a Board-certified physician to resolve the issue of causal relationship.¹ In an order dated May 16, 2005, the Board dismissed appellant's second appeal from the Office's September 24, 2004 decision, which denied her request for reconsideration. The Board found that she failed to submit authorization to act on behalf of the employee's estate in accordance with the Board's *Rules of Procedure* at 20 C.F.R. § 501.3(a) and the Board's case law.² The facts and circumstances of the case as set forth in the Board's prior decision and are hereby incorporated by reference.³ The facts and the circumstances relevant to the current appeal are set forth below.

In accordance with the Board's September 2, 2003 decision, the Office, by letter dated December 2, 2003, had referred the employee to Dr. Jeffrey S. Schwartz, a Board-certified internist, for a second opinion medical examination. In a January 23, 2004 medical report, he opined that the employee's lung cancer was caused by his work-related exposure to asbestos and radiation.

By letter dated January 27, 2004, the Office accepted the employee's claim for small cell carcinoma of the right lung based on Dr. Schwartz' opinion.

On January 15, 2004 the employee filed a claim for a schedule award (Form CA-7). He submitted a January 29, 2004 medical report of Dr. John E. Buckley, a Board-certified internist, which found that he suffered from bronchogenic carcinoma based on a July 2001 biopsy. Dr. Buckley noted the employee's symptoms and found that he was 100 percent disabled. He stated that the employee was not a candidate for rehabilitation, that there was no possibility for a cure and that he was unlikely suitable for any form of employment.

In a letter dated February 10, 2004, the Office advised the employee that his schedule award claim could not be processed at that time because no impairment rating had been submitted and the CA-7 form was not filled out completely. The Office addressed the information he needed to provide to properly complete the CA-7 form and to establish his schedule award claim.

¹ Docket No. 03-1647 (issued September 2, 2003).

² Docket No. 05-175 (issued May 16, 2005).

³ On March 11, 2002 the employee, then a 71-year-old maintenance worker, filed an occupational disease claim alleging that on June 1, 2001 he first realized that his lung cancer was related to factors of his federal employment. The employee voluntarily retired from the employing establishment on July 3, 1986.

In an undated letter received by the Office on February 11, 2004, appellant provided a history of the employee's employment and described his work duties at the employing establishment. She also described the development of his lung cancer and stated that his attending physician did not have access to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), (5th ed. 2001). Appellant noted that the employee refused to go to another referral physician. She submitted a completed Form CA-7. On February 11, 2004 appellant advised the Office that, since the employee's physician was not capable of providing an impairment rating, she would try to obtain a referral to a physician who could provide one.

On March 4, 2004 a magnetic resonance imaging scan was performed on the employee's brain by Dr. Leo J. Rothbarth, a Board-certified radiologist and approved by Dr. Janice J. Ugale, a Board-certified radiologist, who stated that the findings were most consistent with cystic long metastases in the cerebellum and occipital lobes producing effacement of the ventricles without hydrocephalitis. Early transformainal and transtentorial herniation was noted. A large racernose cyst related to neurocysticercolas was remotely possible but seemed unlikely given the fact that no lesions were visible on a prior computerized tomography scan.

In a March 8, 2004 report, Dr. Lawrence H. Repsher, a Board-certified internist, reviewed Dr. Ugale's March 4, 2004 findings and stated that they appeared to indicate that the employee had multiple intracerebral and intracerebellar metastases associated with mass effect on the brain stem and multiple neurologic symptoms including, decreased mental status and ataxia. Dr. Repsher opined that based on the A.M.A., *Guides*, the employee sustained a Class 4 disability which resulted in him being 100 percent disabled. He concluded that he did not anticipate any lasting improvement even if the employee underwent additional radiation therapy.

In an April 7, 2004 report, Dr. Repsher stated that a February 7, 2002 spirometry test revealed a forced expiratory vital capacity of 1.92 liters, which was 72 percent of the mean predicted value. The employee's diffusing capacity was 67 percent of the mean predicted value. Based on the A.M.A., *Guides* 102, Table 5-12, Dr. Repsher determined that the employee had a Class 2 impairment resulting in a 5 percent impairment rating.

In an April 21, 2004 report, Dr. Repsher reviewed the results of an April 14, 2004 spirometry test which found a forced vital capacity (FVC) of 2.11 liters, which was 58 percent of the mean predicted value and a diffusing capacity that was only 22 percent of the mean predicted value. Utilizing the A.M.A., *Guides* 107, Table 5-12, he determined that the employee had a Class 4 impairment resulting in a 100 percent impairment of the whole body.

On April 21, 2004 an Office medical adviser reviewed Dr. Repsher's spirometry findings. He found that the FVC finding of 2.11 liters, which was 58 percent of the mean predicted value, constituted a Class 3 impairment and the diffusing capacity was 22 percent of the mean predicted value which constituted a Class 4 impairment. The Office medical adviser stated that, given the disparity between the 2 categories, the employee belonged in the high end of Class 3 and the low end of Class 4, resulting in a 50 percent pulmonary impairment of the body.

By decision dated April 26, 2004, the Office granted the employee a schedule award for a 50 percent impairment of the right lung for the period January 23, 2004 to July 21, 2005, for a

total of 78 weeks based on the Office medical adviser's opinion. On May 7, 2004 the employee accepted a lump-sum payment of his schedule award in the amount of \$19,768.44 for the period May 16, 2004 through July 21, 2005.

On June 1, 2004 the employee requested a review of the written record before an Office hearing representative. In a decision dated July 15, 2004, the Office's Branch of Hearings and Review denied the employee's request. It determined that he was not entitled to a review of the written record as a matter of right because his request was untimely. The Office stated that it had exercised its discretion and denied the employee's request for a review of the written record on the basis that his claim could be addressed through a reconsideration application.

By letters dated August 19 and 23, 2004, the Office expanded the acceptance of the employee's claim to include metastatic brain tumors based on the receipt of medical evidence indicating that his lung cancer had metastasized to the brain.

On September 3, 2004 the Office received a death certificate which indicated that the employee died on August 28, 2004 due to metastatic lung cancer.

In an undated letter, received by the Office on September 7, 2004, appellant requested reconsideration of the Office's April 26, 2004 decision.

On September 8, 2004 she filed a Form CA-7, signed by the employee on August 20, 2004 for metastatic brain tumors which caused dysfunction of his extremities.

By decision dated September 24, 2004, the Office denied appellant's request for reconsideration. It found that the claim was not in posture for decision pursuant to Chapter 2.808 of its procedure manual which provided that, if a claimant died from a cause related to an injury, death benefits may be paid in accordance with 5 U.S.C. § 8133, but the balance of the award was not payable to survivors. The Office further found that schedule award benefits were not payable following the employee's death on August 28, 2004 and any payments received after would be declared an overpayment. It stated that pursuant to 5 U.S.C. § 8119, an eligible beneficiary specified in section 8133 or someone acting on his behalf must give notice of death by filing a survivor's claim (Form CA-5 or CA-5b). The Office noted that no survivor's claim had been received in the case.

Following the Board's May 16, 2005 order dismissing her appeal, appellant submitted a court document establishing that she had been appointed the personal representative of the employee's estate.

By decision dated August 3, 2005, the Office accepted the employee's widow's claim for survivor's benefits.

By letter dated August 18, 2005, the Office requested that appellant submit a medical report from the employee's treating physician which provided, among other things, the date the employee reached maximum medical improvement and an assessment of his impairment based on the A.M.A., *Guides* in support of his claim for a schedule award for permanent impairment of the extremities affected by the employment-related metastatic brain cancer.

On September 19, 2005 the Office received an undated letter from appellant requesting reconsideration of the April 26, 2004 decision. By decision dated November 7, 2005, the Office found that, although the reconsideration request was untimely filed, it established clear evidence of error. It found that the employee was only entitled to a schedule award for a 50 percent impairment of the right lung but that an error had been made with regard to the period of his entitlement to compensation. The Office determined that payment of the schedule award for 78 weeks was incorrect. Instead, the period should have been for 156 weeks from January 23, 2004 through January 19, 2007. The Office found, however, that no additional compensation was payable due to the employee's death on August 28, 2004, which was causally related to the accepted employment-related lung condition pursuant to 5 U.S.C. § 8109(a)(3).

On November 25, 2005 the Office issued a decision, denying the employee's claim for a schedule award for impairment of his extremities. It found that pursuant to 5 U.S.C. § 8107(c)(20), claims for separate members or body parts under the same claim number must be paid consecutively. The Office stated that since a schedule award for the employee's lung impairment ran from January 23, 2004 to July 21, 2005, an award for impairment to the extremities could not be paid until after July 21, 2005. Pursuant to Chapter 2.808.7 of its procedure manual, the Office further found that since the employee died from a cause related to his accepted employment injury, no further entitlement to a schedule award could be allowed or paid to the survivors after his death on August 28, 2004.

LEGAL PRECEDENT -- ISSUES 1 & 2

The schedule award provision of the Federal Employees' Compensation Act⁴ and its implementing regulation⁵ sets forth the number of weeks of compensation to be paid for permanent loss or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.⁶ However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.⁷

Before the A.M.A., *Guides* can be utilized, a description of appellant's impairment must be obtained from appellant's physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or

⁴ 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

⁵ 20 C.F.R. § 10.404.

⁶ 5 U.S.C. § 8107(c)(19).

⁷ *See supra* note 5.

disturbance of sensation or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.⁸

Section 8107(c)(20) of the Act provides that, in the case of loss of use of more than one member or parts of more than one member as enumerated by this schedule, the compensation is for loss of use of each member or part thereof and the awards run consecutively.⁹

The Office's procedures provide that "If the claimant dies of a cause related to the injury, death benefits may be paid to survivors in accordance with 5 U.S.C. § 8133, but the balance of the [schedule] award is not payable to the survivors."¹⁰

ANALYSIS -- ISSUE 1

Appellant contends that the employee is entitled to greater than a 50 percent impairment of the right lung for which he already received a schedule award. Appellant has the burden of proof to submit medical evidence establishing that the employee sustained a greater permanent impairment of his right lung according to the pages, tables and grading schemes of the A.M.A., *Guides*.

Dr. Buckley opined that the employee suffered from bronchogenic carcinoma based on a July 2001 biopsy and found that he was 100 percent disabled. However, he did not provide an impairment rating based on the A.M.A., *Guides*. Dr. Buckley failed to identify the pages, tables and grading schemes of the A.M.A., *Guides* he used in determining appellant's impairment rating. Therefore, the Board finds that his opinion is insufficient to establish that the employee had more than a 50 percent impairment of the right lung.

In an April 21, 2004 report, Dr. Repsher noted the results of an April 14, 2004 spirometry test and determined that a FVC of 2.11 liters constituted 58 percent of the mean predicted value and a diffusing capacity that constituted 22 percent of the mean predicted value resulting in a Class 4 impairment which constituted a 100 percent impairment of the whole body based on the A.M.A., *Guides* 107, Table 5-12. Dr. Repsher's FVC finding of 58 percent of the mean predicted value constitutes a Class 3 impairment rather than a Class 4 impairment. The Board, therefore, finds that Dr. Repsher's report is insufficient to establish that the employee had more than a 50 percent impairment of the right lung.

The Board precedent is well settled that, when an attending physician's report gives an estimate of impairment, but does not indicate that the estimate is based upon the application of the A.M.A., *Guides* or improperly applies the A.M.A., *Guides*, the Office is correct to follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A.,

⁸ *Robert B. Rozelle*, 44 ECAB 616, 618 (1993).

⁹ 5 U.S.C. § 8107(c)(20); see *Cleo R. Hatch*, 49 ECAB 636 (1998).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, 2.808.7(a)(6).

Guides.¹¹ An Office medical adviser reviewed Dr. Repsher's April 21, 2004 report and correctly noted that his FVC finding constituted a Class 3 impairment and not a Class 4 impairment based on the A.M.A., *Guides* 107, Table 5-12. Further, utilizing this same table of the A.M.A., *Guides*, the Office medical adviser determined that Dr. Repsher's diffusing capacity of 22 percent of the mean predicted value constituted a Class 3 impairment. He stated that in light of a discrepancy between the two classes, the employee belonged in the high end of Class 3 and the low end of Class 4, resulting in a 50 percent impairment of the right lung. As the Office medical adviser provided a reasoned opinion that appellant had a 50 percent impairment based on the proper table of the A.M.A., *Guides*, the Board finds that the weight of the medical evidence with regard to the degree of permanent impairment to the right lung is represented by the Office medical adviser's opinion.

The Board notes that, pursuant to the Office's implementing regulation, the total loss of use of both lungs entitles an employee to 312 weeks of compensation.¹² Multiplying an employee's percentage of lung impairment by 312 will produce the number of weeks for which he is entitled to receive a schedule award. Since the employee had a 50 percent right lung impairment, he was entitled to 50 percent of 312 weeks or 156 weeks of compensation from January 23, 2004 to January 19, 2007. However, since the employee died on August 28, 2004 due to his accepted employment-related metastatic lung cancer, the Board finds that the Office properly determined that the balance of the schedule award is not payable to the employee's survivors.¹³

ANALYSIS -- ISSUE 2

Appellant contends that the employee's widow is entitled to a schedule award for permanent impairment of the employee's extremities due to his employment-related metastatic brain cancer. The employee's compensation for a schedule award of the right lung ran from January 23, 2004 through January 19, 2007. An award for impairment to the employee's extremities could not begin until January 20, 2007, which is nearly 2½ years after the employee's death. As the employee died from a work-related lung condition, which was the basis for the schedule award claim for his extremities, the Board finds that the employee's widow is not entitled to a schedule award after his death.¹⁴

¹¹ See *Ronald J. Pavlik*, 33 ECAB 1596 (1982); *Robert R. Snow*, 33 ECAB 656 (1982); *Quincy E. Malone*, 31 ECAB 846 (1980).

¹² 20 C.F.R. § 10.404(a) (1999).

¹³ See *supra* note 10.

¹⁴ *Id.*

CONCLUSION

The Board finds that appellant has failed to establish that the employee had more than a 50 percent impairment of the right lung, for which he received a schedule award. The Board further finds that appellant has failed to establish that the employee's widow is entitled to a schedule award for impairment of the employee's extremities due to his employment-related metastatic brain cancer.

ORDER

IT IS HEREBY ORDERED THAT the November 25 and 7, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 24, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board