United States Department of Labor
Employees' Compensation Appeals Board

P.N., Appellant	)	
and	)	**Docket No. 06-516**
	)	**Issued: October 2, 2006**
GOVERNMENT PRINTING OFFICE, Washington, DC, Employer	)	

Appearances:
Jeffrey P. Zeelander, 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 January 3, 2006 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated December 22, 2005, granting his claim for 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.

ISSUE

The issue is whether appellant has more than a 10 percent permanent impairment of his lungs.

FACTUAL HISTORY

On July 1, 1999 appellant, then a 58-year-old sheet metal journeyman, filed an occupational disease claim alleging that, beginning on January 11, 1999, he developed asbestosis due to his job. The Office accepted his claim for asbestosis in both lungs. Appellant stopped working at the employing establishment effective July 12, 2002. On February 27, 2004 he filed a claim for a schedule award.

In a March 24, 1999 report, Dr. Steven T. Kariya, a Board-certified internist specializing in pulmonary medicine, stated that appellant's pulmonary tests were nearly normal. A March 19, 1999 pulmonary function laboratory report revealed normal test results with good patient effort. The test results revealed a post-bronchodilator forced vital capacity (FVC) of 5.10 liters or 103 percent of the predicted value, a forced expiratory volume in one second (FEV_1) of 3.91 liters or 99 percent of the predicted value, an FEV_1/FVC ratio of 77 percent, and a diffusing capacity for carbon monoxide in the blood (Dco) of 24.58 or 89 percent of the predicted value. In a June 15, 1999 report, Dr. Kariya stated, "Although [appellant] has asbestosis, he has a normal physical exam[ination] and normal pulmonary function tests." A June 15, 1999 pulmonary function laboratory report indicated an essentially normal study with good patient effort. The test results revealed a post bronchodilator FVC of 5.55 liters or 113 percent of the predicted value, an FEV_1 of 3.99 liters or 101 percent of the predicted value, an FEV_1/FVC ratio of 76 percent, and a Dco of 24.58 or 89 percent of predicted. A March 12, 1999 computerized tomography (CT) scan report of appellant's chest indicated stable bilateral pleural plaques. A September 30, 1999 CT scan report indicated no change from the March 12, 1999 CT scan.

In a February 2, 2000 report, Dr. Michael A. Tolino, a Board-certified internist specializing in pulmonary medicine and an Office referral physician, stated that a physical examination of appellant's lungs revealed a normal respiratory pattern. He stated:

> "[Appellant's] chest x-ray demonstrates significant amount of pleural plaques from previous asbestos exposure. There is no evidence of asbestosis by high resolution chest CT or pulmonary function test."
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> * * *
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> "Although [appellant] has clear evidence of previous asbestos exposure, there does not seem to be any degree of pulmonary impairment based on static pulmonary function tests."

Dr. Tolino provided the results of pulmonary function tests. However, there is only one set of test results for each lung function, indicating that the test was not administered both before and after the use of a bronchodilator.

A December 19, 2000 CT scan report indicated a slight interval decrease in the size of the right lower lobe mass but otherwise no significant change as compared to the September 30, 1999 CT scan. An August 7, 2002 CT scan report indicated a stable examination. A September 22, 2003 CT scan report indicated no significant interval change as compared to the August 7, 2002 CT scan.

Pulmonary function test results dated April 30, 2003 revealed a post bronchodilator FVC of 4.78 liters or 95 percent of the predicted value, an FEV_1 of 3.61 liters or 104 percent of the predicted value, an FEV_1/FVC ratio of 78 percent, and a Dco of 24.97 or 92 percent of the predicted value. The test report indicated a very good patient effort.

In a July 14, 2004 report, Dr. Natvarlal K. Rajpara, a Board-certified internist specializing in pulmonary medicine and an Office referral physician, provided the results of pulmonary function tests.[1] He stated:

> "Based on resting pulmonary function testing, [appellant] does have normal diffusion capacity and normal resting ventilatory capacity. Mild reduction in subcomponent of lung volumes could be due to obesity or could be due to mild degree of pulmonary fibrosis induced by asbestos. This means that either [appellant] has mild respiratory impairment due to obesity or due to asbestos. Development of hypoxemia with exercise may also indicate mild degree of pulmonary fibrosis from asbestosis or it could be related to obesity."

A November 3, 2004 CT scan report indicated a stable examination.

In a November 13, 2005 report, Dr. Samuel V. Spagnolo, a Board-certified pulmonologist of professorial rank and an Office medical adviser, provided an analysis of appellant's pulmonary function test results from May 9, 1986 to July 14, 2004. He determined that appellant had a Class 2 impairment of 10 percent of his lungs based on the results of pulmonary function tests performed between 1999 and 2003 and the American Medical Association, *Guides to the Evaluation of Permanent Impairment.*[2] He had reached maximum improvement as of July 2004. Dr. Spagnolo indicated that the FVC, FEV_1 and FEV_1/FVC test result values for March and June 1999 and April 2003 were within normal limits based on the A.M.A., *Guides.* However, the Dco values for these tests, although greater than 60 percent of predicted, were below the lower limit of normal. He stated:

> "[Appellant's] case was accepted for work-related asbestosis of both lungs. He has been examined on numerous occasions and had minimal respiratory symptoms and complaints. [Appellant] had no abnormal lung findings by physical examination. His lung function, including spirometry, lung volumes, diffusion, and blood gas values have remained stable during a four-year period (1999 to 2003). The most recent test from July 2004 shows … poor effort during the forced vital capacity trial and only one FVC tracing is submitted for review. I would consider the July 14, 2004 spirometry values to be invalid and inconsistent with his prior lung testing and clinical findings. In addition, since tracings are not available, I cannot determine the validity of the reported DLCO [Dco] value from July 2004. Finally, multiple CT scans during this same period have remained stable with no evidence of interstitial fibrosis.
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> "After reviewing all the available evidence, including [appellant's] exposure history, physical examinations, chest radiographs and lung function tests during the four-year period (1999 to 2003), there is no evidence of either an obstructive or restrictive lung impairment. I believe [appellant's] respiratory complaints are

[1] The tests were administered only pre-bronchodilator, not post-bronchodilator.

[2] The A.M.A., *Guides* (5th ed. 2001).

secondary to his obesity (Body Mass Index = 30.7) and general deconditioning. The reduced expiratory reserved volume reported on lung testing from July 2004 is also secondary to obesity."

By decision dated December 22, 2005, the Office granted appellant a schedule award for 31.2 weeks, for the period July 1, 2004 to February 4, 2005, based on a 10 percent permanent impairment of his lungs. The schedule award was based on a two-thirds rate of pay.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulation,[4] sets 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 the body.[5] 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 under the implementing regulations as the appropriate standard for evaluating claims of schedule losses.[6] For decisions issued after February 1, 2001, Office procedures direct the use of the fifth edition of the A.M.A., *Guides.*[7]

Chapter 5 of the fifth edition of the A.M.A., *Guides* provides that permanent impairment of the lungs is determined on the basis of pulmonary function tests, *i.e.,* the FVC, or forced vital capacity, the $FEV_{1,}$ or forced expiratory volume in one second, the ratio between FVC and FEV_1 and the Dco, or the diffusing capacity for carbon monoxide in the blood.[8] The values for predicted and observed normal values for FVC, FEV_1 and Dco are found in Tables 5-2a through 5-7b.[9] The A.M.A., *Guides* provides a table consisting of four classes of respiratory impairments based on a comparison of observed values for certain ventilatory function measures and their respective predicted values.[10] For Classes 2 through 4, the appropriate class of impairment is determined by whether the observed values fall alternatively within identified standards for FVC,

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] The Board notes that the lungs are not a specified body member under the Act. The Act was amended effective September 7, 1974, authorizing a schedule award for loss or loss of use of any important external or internal organ of the body not specified in the Act, as determined by the Secretary of Labor. Pursuant to regulation, the Office has provided for a schedule award for lung impairment. 20 C.F.R. § 10.404; *see Eugene Van Dyke*, 53 ECAB 706 (2002).

[6] *See Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

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

[8] A.M.A., *Guides* 93-94.

[9] *Id.* at 95-100. These pulmonary function tables are based on gender, age and height.

[10] *Id.* at 107, Table 5-12.

FEV_1, Dco or maximum oxygen consumption (VO2Max). For each of the FVC, FEV_1 and Dco results, an observed result will be placed within Class 2, 3 or 4 if it falls within a specified percentage of the predicted value for the observed person.[11] For example, a person is within a Class 2 impairment, equaling 10 to 25 percent impairment of the whole person, if the FVC, FEV_1 or Dco is above 60 percent of the predicted value and less than the lower limit of normal.[12] Section 5.10 of the A.M.A., *Guides* advises that at least one of the criteria must be fulfilled to provide an individual with an impairment rating.[13]

As explained in the Office's procedure manual, all claims involving impairment of the lungs will be evaluated by first establishing the class of respiratory impairment, following the A.M.A., *Guides* as far as possible. Awards are based on the loss of use of both lungs and the percentage for the applicable class of whole person respiratory impairment will be multiplied by 312 weeks (twice the award for loss of function of one lung) to obtain the number of weeks payable in the schedule award.[14]

ANALYSIS

In a March 24, 1999 report, Dr. Kariya stated that appellant's pulmonary tests were nearly normal. A March 19, 1999 pulmonary function laboratory report reported normal test results with good patient effort. The test results revealed a post bronchodilator FVC of 5.10 liters or 103 percent of the predicted value, an FEV_1 of 3.91 liters or 99 percent of the predicted value, an FEV_1/FVC ratio of 77 percent, and a Dco of 24.58 or 89 percent of the predicted value but below the lower limit of normal which is 28.7. In a June 15, 1999 report, Dr. Kariya stated, "Although [appellant] has asbestosis, he has a normal physical exam[ination] and normal pulmonary function tests." A June 15, 1999 pulmonary function laboratory report indicated an essentially normal study with good patient effort. The test results revealed a post bronchodilator FVC of 5.55 liters or 113 percent of the predicted value, an FEV_1 of 3.99 liters or 101 percent of the predicted value, an FEV_1/FVC ratio of 76 percent, and a Dco of 24.58 or 89 percent of the predicted value but below the lower limit of normal which is 28.7. Pulmonary function test results dated April 30, 2003 revealed a post bronchodilator FVC of 4.78 liters or 95 percent of the predicted value, an FEV_1 of 3.61 liters or 104 percent of the predicted value, an FEV_1/FVC ratio of 78 percent, and a Dco of 24.97 or 92 percent of the predicted value but below the lower limit of normal which is 27.9. The 2003 test report indicated a very good effort.

On November 13, 2005 the Office's medical adviser reviewed the medical evidence, including the pulmonary function test results, and correctly concluded that appellant has a 10 percent impairment of his lungs related to his employment injury. He properly applied the A.M.A., *Guides* to determine that appellant's lung condition fell within the lower end of a Class

[11] The predicted normal values and the predicted lower limits of normal values for the FVC, FEV_1 and DLCO tests are delineated in Tables 5-2a-5-7b.

[12] *See* A.M.A., *Guides* 107, Table 5-12.

[13] *Id.* at 107.

[14] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700(4)(c)(1) (November 1998).

2 impairment. The FVC and FEV_1 test results for the tests administered in March and June 1999 and April 2003 were within normal limits based on Tables 5-2 a and b, 5-4 a and b, and 5-6 a and b at pages 95, 97 and 99 (the pulmonary function tables for men based on age and height) and Table 5-12 (the table listing impairment classification for respiratory disorders using pulmonary function tests) of the A.M.A., *Guides*. However, the Dco values in appellant's March and June 1999 and April 2003 test results fell below the lower limit of normal, indicating a Class 2 impairment based on Table 5-12. Dr. Spagnolo properly concluded that appellant had a 10 percent impairment of his lungs based on his pulmonary function tests and the A.M.A., *Guides*.

The February 4, 2000 and July 14, 2004 pulmonary test results for appellant did not provide both the pre and post bronchodilator results, only the pre bronchodilator results. As noted, the A.M.A., *Guides* provides that the test results indicating the best effort, before or after the administration of a bronchodilator, are used to determine the FVC and FEV_1 for impairment assessment.[15] Also, Dr. Spagnolo stated that the July 14, 2004 test results indicated less than optimal effort by appellant. Due to these deficiencies, the February 2000 and July 2004 pulmonary function test results were insufficient to determine appellant's lung impairment for schedule award purposes.

The Board finds that the Office properly determined that appellant was entitled to a schedule award for a 10 percent impairment of his lungs. Appellant has not shown that he has more than a 10 percent impairment. However, the Board finds that the schedule award granted to appellant on December 22, 2005 is not based on the correct rate of pay. The record shows that appellant has a dependent, his wife, to whom he has been married since at least September 26, 2000 the date he filed his claim for a schedule award. Therefore, he is entitled to compensation based on three-fourths of his pay, rather than two-thirds.[16]

CONCLUSION

The Board finds that appellant has no more than a 10 percent impairment of the lungs for which he received a schedule award. The Board further finds that appellant is entitled to the three-fourths augmented rate of pay for his schedule award because he has a dependent. On remand of the case, the Office should calculate the additional amount of compensation to which appellant is entitled (the difference between the two-thirds previously paid and the correct three-fourths rate of pay).

[15] A.M.A., *Guides* 93.

[16] *See* 5 U.S.C. § 8107(a), 8110(b)(1) (basic compensation of 66 2/3 percent, added to augmented compensation of 8 1/3 percent for employees with dependents, equals 75 percent).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 22, 2005 is affirmed as modified.

Issued: October 2, 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