U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GUY E. WOLFE and DEPARTMENT OF LABOR,
MINE SAFETY & HEALTH ADMINISTRATION, Pineville, VA

Docket No. 98-1993; Submitted on the Record;
Issued January 12, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant sustained greater than a 10 percent permanent impairment of both lungs, for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

On June 26, 1996 appellant, then a 58-year-old federal mine inspector, filed a notice of occupational disease and claim for compensation alleging that he developed pneumoconiosis in the performance of duty.[1] The Office accepted the claim for pneumoconiosis and chronic bronchitis. Appellant, thereafter, requested a schedule award.

In support of his claim appellant submitted a medical report from Dr. D.L. Rasmussen, a Board-certified internist specializing in pulmonary medicine, who provided a history of appellant's lung condition and findings on examination. Dr. Rasmussen opined that appellant suffered from coal workers' pneumoconiosis and chronic bronchitis with slight, irreversible obstructive ventilatory impairment and marked impairment in oxygen transfer during exercise. The etiology for appellant's lung condition was listed "CWP" -- coal mine dust exposure and chronic bronchitis-combination of coal dust exposure and cigarette smoking. He opined that appellant was totally disabled. Dr. Rasmussen's evaluation also included pulmonary function test which is discussed more thoroughly in the latter portion of this decision.

In a report dated September 22, 1996, Dr. Daniel Zimmerman, the Office's district medical Director, reviewed Dr. Rasmussen's report in conjunction with Table 8, page 162 of the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) in order to determine appellant's permanent impairment rating. Dr. Zimmerman noted the date of maximum medical improvement as November 13, 1995. He

[1] Appellant previously filed for a schedule award for his lung condition in June 1992. That claim was denied by the Office by decisions dated January 11, August 4 and September 15, 1993. Appellant stated on his July 26, 1996 CA-2 claim form that he returned to work in the mines as a safety inspector in 1995.

reviewed Dr. Rasmussen's pulmonary function study results and stated: "Of these parameters of assessment, the only one that causes him to just barely be classified in Class 2 of Table 8 is the FEV-1 at 77 [percent]. In Class 2 the FEV-1 must be between [60 and 70 percent]." Dr. Zimmerman concluded that since appellant "barely is in Class 2, it would be appropriate to offer a [10 percent] rating from Table 8."

By decision dated September 16, 1997, the Office issued a schedule award for 31.20 weeks based on a 10 percent permanent loss of use of both lungs. The period of the award was listed as November 13, 1995 to June 18, 1996.

In a letter dated March 12, 1998, appellant by counsel requested a review of the written record. In conjunction with his hearing request, appellant also resubmitted Dr. Rasmussen's report.

In a decision dated May 19, 1998, the Office denied appellant's hearing request as untimely filed. The Office further noted that the issue of the case could be equally well resolved by the process of reconsideration.

Under section 8107 of the Federal Employees' Compensation Act[2] and section 10.304 of the implementing federal regulations,[3] schedule awards are payable for permanent impairment of specified body members, functions or organs. 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 has adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[4]

With regard to respiratory or pulmonary impairment, the A.M.A., *Guides* provides a table consisting of four classes of respiratory impairment based on a comparison of observed values for certain ventilatory function measures and their respective predicted values. The appropriate class of impairment is determined by the observed values for either the forced vital capacity (FVC), forced expiratory volume in one second (FEV-1), or diffusing capacity (D-CO) measures by their respective predicted values. If one of the three ventilatory function measures, FVC, FEV-1, D-CO or the ratio of FEV-1 to FVC, stated in terms of the observed values, is abnormal to the degree described in Classes 2 to 4, then the individual is deemed to have an impairment which would fall into that particular class of impairments, either Class 2, 3 or 4, depending on the severity of the observed value.[5]

Under Class 1, the individual is deemed to have no impairment if the FVC, FEV-1 and D-CO observed values are greater than or equal to 80 percent of their respective predicted values

[2] 5 U.S.C. §§ 8101-8193, 8107.

[3] 20 C.F.R. § 10.304.

[4] *Francis John Kilcoyne*, 38 ECAB 168, 170 (1986).

[5] A.M.A., *Guides* at 162, Table 8.

and the ratio, FEV-1/FVC is greater than or equal to 70 percent of the predicted ratio. Under Class 2, the individual is deemed to have mild impairment (10 to 25 percent) if the FVC, FEV-1, or D-CO observed value is between 60 and 79 of its respective predicted value or the ratio, FEV-1/FVC is between 60 and 69 percent of the predicted value.[6]

Under Class 3, the individual is deemed to have moderate impairment (30 to 45 percent) if the FVC observed value is between 51 and 59 percent of its predicted value or the FEV-1 or D-CO observed value is between 41 and 59 percent of its respective predicted value or the FEV-1/FVC ratio is between 41 and 59 percent of the predicted ratio. Under Class 4, the individual is deemed to have severe impairment (50 to 100 percent) if the FVC observed value is less than or equal to 50 percent of its predicted value or the FEV-1 or D-CO observed value is less than or equal to 40 percent of its respective predicted value or the FEV-1/FVC ratio is less than or equal to 40 percent of the predicted ratio.[7]

In the instant case, Dr. Rasmussen performed a complete examination of appellant in accordance with the Office's requirements for possible pulmonary disability and submitted a report with the necessary findings including pulmonary functions studies. The pulmonary function studies revealed that the FVC observed value was 80 percent (predrug) and 87 percent (post-drug) of its predicted value, that the FEV-1 observed value was 75 percent (predrug) and 77 percent (post-drug) of its predicted value, that the D-CO was 89 percent of its predicted value, and that the FEV-1/FVC ratio was 93 percent (pre-drug) and 89 percent (postdrug) of the predicted ratio. The percentage comparisons for the FEV-1 of the November 13, 1995 pulmonary function test correspond to a Class 2 mild respiratory impairment (10 to 25 percent) of the whole person according to the A.M.A., *Guides*.[8]

Since Dr. Rasmussen did not provide an impairment rating in accordance with the A.M.A., *Guides*, the Office's district medical Director reviewed the results of Dr. Rasmussen's November 13, 1995 pulmonary function studies in conjunction with Table 8, page 162 of the fourth edition of the A.M.A., *Guides* and concluded that appellant had a 10 percent respiratory impairment of each lung. The record contains no medical evidence, which indicates that appellant sustained greater than an impairment percentage of greater than 10 percent. Therefore, the Board concurs with the Office's finding that appellant has 10 percent impairment of both lungs.

Title 20 section 10.304(b) of the Code of Federal Regulations provides that for total, or 100 percent loss of use of one lung, an employee shall receive 156 weeks of compensation.[9] Accordingly, the amount payable for 10 percent impairment of the lungs is, as the Office correctly determined, 31.20 weeks which is the product of 10 percent multiplied by 312 weeks

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] 20 C.F.R. § 10.304(b).

(twice the award for loss of function of one lung).[10] As explained by the procedure manual,[11] 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 particular 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. Therefore, as the medical evidence establishes that appellant has 10 percent impairment of the lungs and the Office multiplied this percentage by 312 (twice the award for loss of function of one lung) to find that appellant was entitled to 31.20 weeks of compensation, appellant has received all of the schedule award compensation to which he is entitled.

The Board also finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Act provides:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[12]

A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.[13] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[14] In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[15]

Appellant's request for a review of the written record was post-marked March 12, 1998, more than 30 days after the Office's September 16, 1997 decision.[16] For this reason, appellant is not entitled to a hearing as a matter of right. The Office properly found appellant's request to be untimely, but nonetheless considered the matter in relation to the issue involved and correctly advised appellant that he could pursue the issue involved through the reconsideration process. As appellant may in fact pursue his claim by submitting, to the appropriate regional Office, new

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[10] *See James C. Hall, Sr.*, 39 ECAB 342 (1988) (wherein appellant had a Class 3 impairment totaling 30 percent to both lungs and received an award of 93.6 weeks of compensation).

[11] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(c)(1) (August 1995).

[12] 5 U.S.C. § 8124(b)(1).

[13] 20 C.F.R. § 10.131(a)-(b).

[14] *Herbert C. Holley*, 33 ECAB 140 (1981).

[15] *Rudolph Bermann*, 26 ECAB 354 (1975).

[16] In an earlier letter post-marked October 20, 1997, appellant's counsel submitted additional evidence, but he did not request a review of the written record or a hearing. The October 20, 1997 letter was also submitted more than 30 days after the Office's September 16, 1997 decision.

and relevant medical evidence along with a request for reconsideration, the Board finds that the Office did not abuse its discretion in denying appellant's request for a hearing.[17]

The decisions of the Office of Workers' Compensation Program dated May 19, 1998 and September 16, 1997 are hereby affirmed.

Dated, Washington, D.C.
January 12, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[17] The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).