

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARDO A. BARTOLOME and DEPARTMENT OF THE NAVY,
CINC PACIFIC FLEET, San Diego, CA

*Docket No. 99-648; Submitted on the Record;
Issued September 7, 2000*

DECISION and ORDER

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

The issue is whether appellant is entitled to a schedule award for a ratable impairment, causally related to his accepted condition of bilateral calcification due to asbestos exposure.

On August 4, 1997 appellant, then a 63-year-old retired¹ environmental protection specialist, filed a claim for asbestosis. The Office of Workers' Compensation Programs accepted appellant's claim for bilateral pleural calcification due to asbestos exposure.

On January 6, 1998 the Office referred appellant to a second opinion specialist, Dr. Jerome Brown, a Board-certified pulmonary disease specialist, for evaluation of injury-related residuals. By report dated March 10, 1998, Dr. Brown reviewed appellant's symptoms, conducted an evaluation and performed chest x-rays, pulmonary function tests, screening spirometry, arterial blood gas and an electrocardiogram to validate his examination findings. Dr. Brown noted that the chest x-rays showed no evidence of a pulmonary parenchymal abnormality, but there was definite calcification of the diaphragmatic pleura on both the right and left sides and there was a calcified pleural plaque in the mid thoracic area on the left. He noted that appellant's arterial blood gas analysis was within normal limits and that the electrocardiogram was suggestive of a true posterior infarction, which was not acute. Dr. Brown noted that appellant's spirometry was totally within normal limits, that diffusing capacity was normal and that all flow rates were normal. He opined that appellant has radiologic changes, which are attributable to asbestos exposure, namely, the bilateral diaphragmatic pleural calcification and the left mid thoracic calcified pleural plaque. Regarding appellant's episodes of respiratory tract infections, Dr. Brown stated that this could not be attributed to the pleural calcification change, which were observed on x-ray and historically do not seem severe enough to be considered a cause for disability for appellant. He further stated that despite appellant's statement that he is short of breath when walking, there was no evidence to suggest that there

¹ Appellant retired March 29, 1997.

was any pulmonary impairment resulting from the pleural calcification. Dr. Brown stated that this was in keeping with the generally accepted information that though this is caused by asbestos exposure, in the absence of pulmonary fibrosis, there is no associated pulmonary functional abnormality. Dr. Brown opined that appellant was able to perform his date-of-injury job and that there was no functional disability resulting from the pleural changes from asbestos exposure.

On May 4, 1998 an Office medical adviser reviewed the previous testing results of February 5, 1998 along with the most recent testing results dated March 9, 1998 performed by Dr. Brown. He noted the pulmonary function report dated March 9, 1998 showed normal mechanics, volume and diffusion. Dr. Brown noted that the pulmonary function report dated February 5, 1998 only performed a diffusing capacity, which was within normal limits. Upon review of the medical records, including the chest x-ray results, the Office medical adviser concluded that the condition of pleural plaques was consistent with previous asbestos exposure but that appellant was not disabled from his position due to the disease resulting from exposure to asbestos. The Office medical adviser noted that the date of maximum medical improvement was March 9, 1998 and found that the degree of respiratory impairment secondary to asbestos-related disease, utilizing the fourth edition of the American Medical Association (A.M.A.,) *Guides to the Evaluation of Permanent Impairment*, was zero percent. He noted that asbestos related pleural plaques do not cause functional impairment and no sequela of this finding was anticipated.

By decision dated July 17, 1998, the Office accepted that appellant sustained pulmonary injury consistent with exposure to asbestos but denied appellant's claim for a schedule award, finding that he had no ratable permanent impairment according to the A.M.A., *Guides*. It noted, however, that, since appellant had sustained an asbestos-related disease, he was authorized to receive periodic medical examinations at the Office expense for clinical, radiologic and pulmonary function monitoring.

On appeal appellant argues that he has had progressive respiratory impairments and pneumonia conditions since 1996.

The Board, however, finds that appellant is not entitled to a schedule award for a ratable impairment causally related to his accepted condition of pleural calcification due to asbestos exposure.

Section 8107 of Title 5 of the U.S.C. provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.²

Under section 8107 of the Act³ and section 10.304 of the implementing federal regulation,⁴ schedule awards are payable for the permanent impairment of specified bodily members, function, 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.⁵

In this case, the Office medical adviser used Dr. Brown's testing results of March 9, 1998 to determine that appellant fell within Class one, or zero percent impairment of the whole person. Dr. Brown's test results of March 9, 1998 noted that appellant's prebroncholator FVC was 113 percent of predicted, that his forced expiratory volume (FEV¹) was 112 percent of predicted, that his FEV¹/FVC was 79 percent of predicted and that his diffusion of carbon monoxide was 102 percent of predicted. The A.M.A., *Guides*, fourth edition (1993), page 162, Table 8, which addresses the classes of respiratory impairment, is consistent with the Office medical adviser determination that, with appellant's testing results, he fell within Class one, or zero percent impairment of the whole person. The Board notes that, according to the applicable section of the A.M.A., *Guides*, Class 1 requires that a claimant's FVC be equal to or greater than 80 percent of predicted, his FEV¹ be equal to or greater than 80 percent of predicted, his FEV¹/FVC be equal to or greater than 70 percent of predicted and his DCO be equal to or greater than 70 percent of predicted and that all of appellant's most recent testing values clearly fell within that category, being greater than the minimum levels required, as noted above. The Board finds that this was a correct application of the A.M.A., *Guides* and consequently demonstrates that, based upon the current medical evidence of record before the Board at this adjudication, appellant does not qualify for a schedule award as he falls within Class one, which has a zero percent impairment rating.

The Board further notes that there is no other probative medical evidence of record, which demonstrates any impairment greater than that found by Dr. Brown. The record contains another pulmonary function test dated February 5, 1998, which notes that appellant's FVC was 92 percent of predicted, that his forced expiratory volume (FEV¹) was 103 percent of predicted and that his FEV¹/FVC was 77 percent of predicted. Appellant's diffusion of carbon monoxide was 86 percent. The Board notes that, according to the applicable section of the A.M.A.,

² 5 U.S.C. § 8107(a). It is thus the claimant's burden of establishing that he sustained a permanent impairment of a scheduled member or function as a result of his employment injury; see *Raymond E. Gwynn*, 35 ECAB 247 (1983) (addressing schedule awards for members of the body that sustained an employment-related permanent impairment); *Philip N.G. Barr*, 33 ECAB 948 (1982) (indicating that the Act provides that a schedule award be payable for a permanent impairment resulting from an employment injury).

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.304.

⁵ See, e.g., *Francis John Kilcoyne*, 38 ECAB 168 (1987).

Guides, appellant's February 5, 1998 testing clearly fell within the Class one, or zero percent impairment of the whole person, category as his testing values were greater than the minimum levels required, as noted above. Consequently, Dr. Brown's testing of March 9, 1998 is the most recent testing and as he provided a thorough and complete evaluation, his testing constitutes the weight of the medical opinion evidence and indicates that appellant has no ratable impairment, which would entitle him to a schedule award. As, however, appellant bears the burden of proof to establish a greater degree of impairment and as his accepted condition of pleural calcification due to asbestos exposure entitles him to future pulmonary functioning testing and clinical and radiologic monitoring, any subsequently obtained evidence demonstrating a greater degree of permanent impairment may be submitted to the Office with a request for reconsideration of his entitlement to a schedule award.

Accordingly, the decision of the Office of Workers' Compensation Programs dated July 17, 1998 is hereby affirmed.

Dated, Washington, DC
September 7, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member