

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NORRIS W. FURGERSON and DEPARTMENT OF LABOR,
MINE SAFETY & HEALTH ADMINISTRATION, Barbourville, KY

*Docket No. 03-1565; Submitted on the Record;
Issued November 21, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant is entitled to a schedule award for a permanent impairment of his lungs.

This case is before the Board for the second time. In the first appeal, the Board reversed the Office of Workers' Compensation Programs' April 14, 1999 decision, rescinding acceptance of appellant's claim for pneumoconiosis, chronic bronchitis and obstructive lung disease.¹ The Board found that the record contained an unresolved conflict in medical opinion and that, consequently, the Office had not met its burden of proof to rescind acceptance of appellant's claim. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

By letter dated January 24, 2001, the Office referred appellant to Dr. Subramanian Paranthaman, a Board-certified internist, for an impartial medical evaluation. In a report dated February 27, 2001, he diagnosed chronic obstructive pulmonary disease secondary to cigarette smoking, simple coal workers' pneumoconiosis and "[f]ibrocalcific densities in the right upper lobe consistent with healed pulmonary tuberculosis." In a supplemental report dated March 2, 2001, Dr. Paranthaman diagnosed simple coal workers' pneumoconiosis and opined that appellant's work exposure was "of sufficient duration to cause coal workers' pneumoconiosis in a susceptible person." He noted that the result of pulmonary function tests were inconsistent, "probably related to [appellant's] cooperation and effort." Dr. Paranthaman stated:

"In any event, from the history it appears that [appellant] has chronic bronchitis and, in spirometry, there appears to be mild airway obstruction consistent with [chronic obstructive pulmonary disease] during [the] current evaluation. I would classify his respiratory impairment as Class II impairment and place him at 25 [percent] impairment for the whole person as per Table 8, fourth edition [of the

¹ *Norris W. Furgerson*, Docket No. 99-1961 (issued September 19, 2000).

American Medical Association, *Guides to the Evaluation of Permanent Impairment.*”

On May 30, 2001 an Office medical adviser reviewed Dr. Paranthaman’s February 27, 2001 report. The Office medical adviser noted that pursuant to the fifth edition of the A.M.A., *Guides* an impairment rating “must be based on the claimant’s best possible effort in participating in the testing process.” He found that as appellant had provided submaximum effort Dr. Paranthaman’s findings “cannot be the basis of processing a schedule award.”

On September 10, 2001 the Office referred appellant to Dr. Glen R. Baker, Jr., a Board-certified internist, for another impairment evaluation. He obtained pulmonary function studies, blood gas studies and an x-ray of appellant’s chest. Dr. Daniel Powers, a B-reader, read appellant’s November 9, 2001 x-ray and found that he had no parenchyma abnormalities consistent with pneumoconiosis, but had pleural abnormalities consistent with pneumoconiosis. In a report dated November 9, 2001, Dr. Baker diagnosed coal workers’ pneumoconiosis, healed granulomatous disease and chronic obstructive airways disease with significant reversibility post bronchodilators.

An Office medical adviser reviewed Dr. Baker’s November 9, 2001 report and concluded that as Dr. Powers, the B-reader, interpreted the x-ray that Dr. Baker relied upon for diagnosing pneumoconiosis as negative, appellant was not entitled to a schedule award.

In a letter dated April 23, 2002, the Office again referred appellant to Dr. Paranthaman to resolve a conflict in medical opinion.² He obtained a pulmonary function study dated May 16, 2002, in which he classified appellant’s effort and cooperation as “good.” In an accompanying report dated June 10, 2002, Dr. Paranthaman diagnosed simple coal workers’ pneumoconiosis, reactive airways disease and chronic low back pain. He noted that appellant had parenchyma dust disease, “which is the common radiological pattern seen in coal workers’ pneumoconiosis.” Dr. Paranthaman opined that appellant’s “coal mine employment could have been causally related to or could have precipitated an asthmatic condition.” He concluded:

“Disability related to asthma is not based solely on pulmonary function test results because of its fluctuating character. [Appellant’s] condition is best described as severe persistent asthma since he is symptomatic in spite of adequate therapy with large amount[s] of both long and short acting bronchodilator medication as well as inhaled steroids. Since his pulmonary function testing in post bronchodilator study is normal, the condition is totally reversible. So I classify [appellant] as Class II with 25 [percent] impairment of the whole person.”

An Office medical adviser reviewed Dr. Paranthaman’s June 10, 2002 report and noted that the Office had not accepted appellant’s claim for asthma. He found that appellant did not have a ratable respiratory impairment under the A.M.A., *Guides*.

² In an accompanying memorandum of referral to specialist form, the Office noted that “additional explanation is necessary to clarify Dr. Paranthaman’s prior report.”

By decision dated April 16, 2003, the Office indicated that it had accepted appellant's claim for pneumoconiosis, obstructive airways disease and chronic bronchitis. The Office denied appellant's claim for a schedule award on the grounds that his pulmonary impairment was not severe enough to be ratable.

The Board finds that this case is not in posture for a decision.

In this case, in order to resolve a conflict in opinion regarding appellant's pulmonary condition, the Office referred him to Dr. Paranthaman for an impartial medical examination. In his report, he diagnosed chronic obstructive pulmonary disease, due to smoking and simple coal workers' pneumoconiosis. Dr. Paranthaman further found, based on the fourth edition of the A.M.A., *Guides*, that appellant had a 25 percent permanent impairment of the whole person due to his respiratory impairment. An Office medical adviser reviewed Dr. Paranthaman's February 27, 2001 report and found that it was insufficient to allow for adjudication of a schedule award because the pulmonary function study was not based on optimal effort. The Office, therefore, referred appellant for a second opinion evaluation.

When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report.³ If the impartial medical specialist's statement of clarification or elaboration is not forthcoming; or if the specialist is unable to clarify or elaborate on the original report; or if the specialist's supplemental report is also vague, speculative or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts to a second impartial medical specialist for a rationalized medical opinion on the issue in question.⁴ Unless this procedure is carried out by the Office, the intent of section 8123(a) of the Act⁵ will be circumvented, when the impartial medical specialist's report is insufficient to resolve the conflict in medical evidence.⁶

Instead of obtaining a clarifying opinion from Dr. Paranthaman regarding the extent of appellant's permanent impairment, the Office referred appellant for a second opinion evaluation. The Office found that the second opinion physician's report was insufficient to support a schedule award because a B-reader had not interpreted the x-ray as showing pneumoconiosis. The Office, consequently, referred appellant back to Dr. Paranthaman for another impartial medical examination. However, the Board has held that the physician serving as the impartial medical specialist should be one who is wholly free to make a completely independent

³ *Elmer K. Kroggel*, 47 ECAB 557-58 (1996).

⁴ *Talmadge Miller*, 47 ECAB 673 (1996).

⁵ 5 U.S.C. § 8123(a) provides in relevant part as follows: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

⁶ *Harold Travis*, 30 ECAB 1071 (1979).

evaluation and judgment, untrammled by a conclusion rendered on a prior occasion.⁷ The impartial medical specialist must be a physician who has not examined appellant previously for any condition. Any prior examination may affect the opinion of an impartial medical specialist depending on the circumstances of the examination, including whether a claimant had complained about the manner in which the prior examination was conducted or whether the physician was appropriately compensated for the prior examination.⁸ The Board cannot allow the opinion of the impartial medical specialist to potentially be influenced by factors unrelated to the issue that the impartial medical specialist is asked to address. In this case, Dr. Paranthaman previously examined appellant and provided an impairment determination which an Office medical adviser found was insufficient to support a schedule award under the A.M.A., *Guides*. The Office should, at that time, have requested clarification from Dr. Paranthaman instead of referring appellant for a second opinion evaluation. The Office did not attempt to obtain an additional report from Dr. Paranthaman until after the report from the second opinion physician was also rejected as insufficient to support a schedule award. The Office's actions give the appearance of impropriety of shopping for a medical opinion in order to justify denying appellant's claim. Dr. Paranthaman, therefore, cannot be considered an appropriate impartial specialist in this case. Consequently, the case must be remanded for referral of appellant for another impartial medical examination on the issue of the extent of his permanent impairment.

The decision of the Office of Workers' Compensation Programs dated April 16, 2003 is set aside on the issue of appellant's entitlement to a schedule award and the case is remanded for further proceedings consistent with this opinion of the Board.

Dated, Washington, DC
November 21, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁷ *Raymond E. Heathcock*, 32 ECAB 2004 (1981).

⁸ *Timothy J. Keating*, Docket No. 02-275 (issued September 18, 2002).