United States Department of Labor
Employees' Compensation Appeals Board

HARRISON R. BOSTON, Appellant	)	
and	)	**Docket No. 06-936**
	)	**Issued: July 17, 2006**
OCCUPATIONAL HEALTH & SAFETY ADMINISTRATION, Jacksboro, TN, Employer	)	

Appearances:
Harrison R. Boston, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 15, 2006 appellant filed a timely appeal from a February 24, 2006 Office of Workers' Compensation Programs' merit decision denying an additional schedule award. Under 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 51 percent bilateral lung impairment.

FACTUAL HISTORY

Appellant, a 65-year-old inspection supervisor, filed a Form CA-2 claim for benefits on January 10, 2002 alleging that he developed pneumoconiosis in both lungs causally related to employment factors. His claim was accepted for pneumoconiosis.

This is the second appeal before the Board in this case. By decision dated December 8, 2005,[1] the Board set aside the Office's April 25, 2005 decision granting appellant a schedule

[1] Docket No. 05-1550 (issued December 8, 2005).

award for bilateral lung impairment (51 percent right, 51 percent left), which ran from January 1, 2004 to January 18, 2007, for a total of 159.12 weeks of compensation. The Board remanded the case to the Office for further development and to obtain a rationalized explanation from the Office medical adviser as to the percentage of bilateral lung impairment. The law and the facts of the case as set forth in the Board's prior decision are hereby incorporated by reference.

On January 18, 2006 the Office submitted the case file, along with a statement of accepted facts, to the district medical adviser. The Office asked the medical adviser to explain why he had rated appellant at the mildest impairment percentage classification for Class 4 impairment when his Diffusing capacity of the lungs for carbon monoxide (DLco) value was not at the mildest range of predicted values.

In a February 12, 2006 report, the medical adviser explained how he arrived at the impairment rating for appellant's bilateral lung condition (51 percent right, 51 percent left). He stated that the diffusion capacity is just one of the assessment parameters discussed in Table 5-12 on page 107 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* which requires consideration of: forced vital (FVC); forced expiratory vital capacity (FEV); FEV/FVC; DLco; and Vo_2max. The medical adviser indicated that the values reported for these pulmonary function tests performed on April 26, 2002 were "vastly better than the values that would be needed to place the results of such tests in Class 4 from Table 5-12." The medical adviser noted that Dr. Jamal Isber, Board-certified in internal medicine and specialist in pulmonary medicine, had reported that appellant had developed dyspnea after walking one half mile on a plain level; after climbing stairs; and after walking uphill after 25 yards. He opined that the history and examination findings reported by Dr. Isber suggested "no more than a moderate respiratory condition -- not a condition of respiratory insufficiency of such severity as to allow the claimant to be rated at greater than 51 percent body as a whole, using Table 5-12."

By decision dated February 24, 2006, the Office denied modification of its April 25, 2005 decision, finding that the medical adviser's opinion was well rationalized and represented the weight of the medical evidence.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] 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.[3] Where the loss of use is less than 100 percent, the

[2] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[3] 5 U.S.C. § 8107(a)(c). With respect to the loss of use of a lung, the applicable regulation provides that, for a total or 100 percent loss of use of a single lung, an employee shall receive 156 weeks of compensation. 20 C.F.R. § 10.404(a). Regarding loss of use due to lung impairments, as in the instant case, the Office has determined that the percentage of impairment will be multiplied by 312 weeks (twice the award for loss of function of one lung) to obtain the number of weeks payable. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4 (November 1998). Schedule awards are not payable for whole person impairment, but rather are converted to impairment values for single or bilateral lung impairment. The maximum allowable award for a bilateral lung impairment is 312 weeks.

amount of compensation is paid in proportion to the percentage loss of use.[4] However, the Act does not specify the manner in which the percentage of loss of use, of a member is to be determined. For consistent results and to insure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (5th ed.) as the standard to be used for evaluating schedule losses.[5]

ANALYSIS

In its December 8, 2005 decision, the Board found that the Office medical adviser had not adequately explained why he rated appellant at the mildest impairment percentage classification for Class 4 impairment when his DLco predicted value of 27 percent was not at the mildest range of predicted values. The Board set aside the Office's April 25, 2005 decision and remanded the case for further development to obtain a rationalized medical explanation as to the percentage of impairment classification, between 51 and 100 percent, to which appellant was entitled for his Class 4 impairment. In accordance with the Board's directive, the Office referred the case to its medical adviser for clarification of his report.

In a February 12, 2006 report, the medical adviser explained how he arrived at the impairment rating for appellant's bilateral lung condition (51 percent right, 51 percent left). He noted that the diffusion capacity was just one of the assessment parameters discussed in Table 5-12 on page 107 of the fifth edition of the A.M.A., *Guides*, which required consideration of: FVC; FEV; FEV/FVC; DLco; and Vo_2max.[6] The medical adviser indicated that the values reported for these pulmonary function tests performed on April 26, 2002 were "vastly better than the values that would be needed to place the results of such tests in Class 4 from Table 5-12." He noted that Dr. Isber had reported that appellant had developed dyspnea after walking one half mile on a plain level; after climbing stairs; and after walking uphill after 25 yards. The Office medical adviser opined that the history and examination findings reported by Dr. Isber suggested "no more than a moderate respiratory condition -- not a condition of respiratory insufficiency of such severity as to allow the claimant to be rated at greater than 51 percent body as a whole, using Table 5-12."

The Board finds that the Office properly relied on the Office medical adviser's opinion in granting appellant a schedule award. The Office medical adviser adopted Dr. Isber's findings and impairment rating of both lungs. Dr. Isber reported that appellant's Class 4 impairment was between 51 percent and 100 percent of the whole person. The Office medical adviser fully explained his rationale for rating appellant at the mildest percentage classification for Class 4

[4] 5 U.S.C. § 8107(c)(19).

[5] 20 C.F.R. § 10.404.

[6] 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 FVC, FEV_1 or DLco measures by their respective predicted values. If one of the three ventilatory function measures -- FVC, FEV_1, DLco or the ratio of FEV_1 to FVC, stated in terms of observed values, is abnormal to the degree described in classes two to four, then the individual is deemed to have an impairment which would fall into that particular class of impairments, either class two, three or four, depending upon the severity of the observed value. A.M.A., *Guides* at 107, Table 5-12.

impairment, even though his DLco predicted value was 27 percent. Dr. Isber's rationale did not include an analysis of all assessment parameters provided in Table 5-12 of the A.M.A., *Guides*. Rather, he based his conclusion solely on appellant's DLco findings. Therefore, Dr. Isber's opinion is of reduced probative value. On the other hand, the medical adviser's supplemental report was well rationalized and provided sound reasoning in support of his conclusions. Relying on findings rendered by Dr. Isber, the medical adviser determined an impairment rating which was in conformance with the applicable tables and figures of the A.M.A., *Guides*. Accordingly, the Office properly found that the medical adviser's opinion constituted the weight of the medical evidence.

The Board found in its December 8, 2005 decision that the Office had applied the proper methodology for calculation of appellant's bilateral lung impairment.[7] Title 20 of 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.[8] Accordingly, the amount payable for 51 percent impairment of both lungs is, as the Office correctly determined, 159.12 weeks which is the product of 51 percent multiplied by 312 weeks, (twice the award for loss of function of one lung).[9] As explained in the 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 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.[10] Therefore, as the medical evidence establishes that appellant has 51 percent impairment of both 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 159.12 weeks of compensation, he has received all of the schedule award compensation to which he is entitled.[11]

CONCLUSION

The Board finds that appellant has not established that he has more than a 51 percent bilateral lung impairment, pursuant to the A.M.A., *Guides*.

[7] Docket No. 05-1550, issued December 8, 2005.

[8] 20 C.F.R. § 10.304(b).

[9] *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).

[10] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(c)(1) (November 1998).

[11] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 17, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board