

**United States Department of Labor
Employees' Compensation Appeals Board**

R.N., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Salem, VA, Employer**

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**Docket No. 07-459
Issued: May 8, 2007**

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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 16, 2007 appellant filed a timely appeal of the November 24, 2006 merit decision of the Office of Workers' Compensation Programs which modified a prior schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim for a schedule award.

ISSUE

The issue is whether appellant has greater than 50 percent impairment of the lungs.

FACTUAL HISTORY

Appellant, a 68-year-old retired plasterer, has an accepted occupational disease claim for lung cancer and severe restrictive and obstructive lung disease which arose on or about January 16, 1998. He filed a claim for a schedule award on March 31, 2005. Dr. Samuel V. Spagnolo, a district medical adviser, reviewed the case record. In a report dated September 17, 2005, he found that appellant had a Class 4 respiratory impairment, for which he assigned 50

percent impairment of the whole person.¹ Dr. Spagnolo also indicated that appellant reached maximum medical improvement in February 2005.

On April 14, 2006 the Office granted appellant a schedule award for “100 [percent] bilateral lung.” The April 14, 2006 decision further indicated that the schedule award was for 312 weeks’ compensation and the period of the award covered February 1, 2005 to January 28, 2008.

On June 16, 2006 appellant, with the assistance of counsel, requested reconsideration. Counsel noted that, while the award purported to be for a period of 312 weeks (6 years), the payout period of February 1, 2005 to June 28, 2008 covered only three years.

On November 24, 2006 the Office issued another schedule award decision which superceded the April 14, 2006 award.² The November 24, 2006 decision identified a “*Class 4, 50 [percent] whole person*” impairment of the lungs. The decision also indicated that appellant was entitled to only 156 weeks of compensation (50 [percent] x 312 weeks).

LEGAL PRECEDENT

The Federal Employees’ Compensation Act and the implementing regulation set forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.³ The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.⁴ Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).⁵

ANALYSIS

Appellant’s counsel correctly argues that a Class 4 respiratory disorder, which Dr. Spagnolo found, represents impairment in excess of 50 percent. According to Table 5-12 of

¹ Dr. Spagnolo is Board-certified in internal medicine, with a subspecialty in pulmonary disease.

² In the interim period, the Office erroneously issued a November 7, 2006 decision, which it appropriately set aside in the November 24, 2006 schedule award decision.

³ 5 U.S.C. § 8107(c) (2000); 20 C.F.R. § 10.404 (2006). For total, or 100 percent loss of use of a lung, an employee shall receive 156 weeks of compensation. 20 C.F.R. § 10.404(a). However, schedule awards for respiratory impairment 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. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(c)(1) (March 2005).

⁴ 20 C.F.R. § 10.404.

⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

the A.M.A., *Guides* 107, a Class 4 respiratory disorder represents a “51 [percent [to] 100 [percent]]” impairment of the whole person. A Class 4 rating is appropriate where pulmonary function testing reveals a forced vital capacity (FVC) that is less than or equal to (\leq) 50 percent of the predicted value. Alternatively, a measured forced expiratory volume (FEV₁) that is less than or equal to (\leq) 40 percent of predicted also qualifies as a Class 4 respiratory disorder.⁶

Dr. Spagnolo found a Class 4 respiratory impairment based on a qualifying pulmonary function study administered on October 15, 2004. Both the FVC and FEV₁ values fall within the applicable range for a Class 4 respiratory disorder under Table 5-12.⁷ While Dr. Spagnolo correctly found a “Class 4” respiratory disorder, he mistakenly assigned only “50 [percent] impairment of the whole person.” Because the Office medical adviser’s impairment rating is not entirely consistent with the A.M.A., *Guides* (5th ed. 2001), it cannot form the basis of a schedule award. Accordingly, the case is remanded to the Office to obtain clarification from the district medical adviser regarding where appellant’s particular Class 4 respiratory disorder falls within the “51 [percent to] 00 [percent]” whole person impairment range identified under Table 5-12.⁸ After such further development of the record the Office shall issue a *de novo* decision concerning appellant’s entitlement to a schedule award.

CONCLUSION

The Board finds the case is not in posture for decision.

⁶ A.M.A., *Guides* 107, Table 5-12.

⁷ The measured FVC of 2.32 was 42 percent of the predicted value under Table 5-2a, A.M.A., *Guides* 95. The FEV₁ value of 1.23 was 30 percent of the predicted value under Table 5-4a, A.M.A., *Guides* 97.

⁸ Table 5-12, A.M.A., *Guides* 107. The district medical adviser’s supplemental report should include appropriate rationale justifying the percentage impairment assigned.

ORDER

IT IS HEREBY ORDERED THAT the November 24, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: May 8, 2007
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board