U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KAREN YOUNG and DEPARTMENT OF THE NAVY, NAVAL AIR WARFARE CENTER, Indianapolis, IN

Docket No. 98-1222; Submitted on the Record;
Issued December 29, 1999

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT, A. PETER KANJORSKI

The issue is whether appellant has more than a five percent permanent impairment of her lungs for which she received a schedule award.

On February 7, 1990 appellant, then a 38-year-old painter's helper, was exposed to a chemical spill while in the performance of duty. The Office of Workers' Compensation Programs accepted appellant's claim for "chemical exposure on February 7, 1990." Appellant filed a claim for a schedule award for a lung condition allegedly aggravated by her accepted chemical exposure. On December 19, 1997 appellant received a schedule award for a five percent permanent impairment of the lung. The award covered a period of 7.8 weeks from September 15 to November 8, 1997.[1]

By letter dated January 20, 1998, appellant requested that the Office explain how it reached its determination regarding the percentage of impairment and the number of weeks of compensation awarded. Appellant noted that her doctor had assessed a 30 percent impairment in contrast to the Office's award of a 5 percent impairment. She also argued that since both lungs were involved, the number of weeks of compensation should be doubled. However, prior to receiving a response to her request, appellant filed an appeal with the Board on February 25, 1998. The Office subsequently modified appellant's prior schedule award on March 6, 1998. In accordance with appellant's argument that she was entitled to at least twice the amount of the prior award due to the fact that both lungs were involved, the Office awarded appellant an additional 7.8 weeks of compensation.

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[1] Appellant received an award of $1,354.08 based on a weekly pay rate of $231.46. The Office explained that the pay rate was calculated based on a proviso formula and that upon receipt of actual pay rate information from the employing establishment, the award would be adjusted accordingly. On February 24, 1998 the Office adjusted appellant's schedule award to reflect a weekly pay rate of $433.20 in accordance with the pay rate in effect at the time of appellant's accepted exposure on February 7, 1990. Consequently, the Office awarded appellant an additional $1,180.14.

The Board finds that the Office did not have the authority to issue its March 6, 1998 modified schedule award. The Board and the Office may not simultaneously exercise jurisdiction over the same issue in a case.[2] At the time the Office issued its March 6, 1998 decision, appellant had already filed an appeal with the Board regarding the Office's December 19, 1997 schedule award. Inasmuch as the Board had obtained jurisdiction over the case on February 25, 1998, the Office lacked the authority to issue the March 6, 1998 decision, modifying the prior schedule award. Accordingly, the Office's March 6, 1998 decision is set aside as null and void.

The Board further finds that appellant did not meet her burden of proof to establish that she has more than a five percent permanent impairment of both lungs.

Section 8107 of the Federal Employees' Compensation Act[3] sets forth the number of weeks' compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[4] 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 Office has adopted the American Medical Association, (A.M.A.,) *Guides to the Evaluation of Permanent Impairment* (fourth edition 1993) as an appropriate standard for evaluating schedule losses and the Board has concurred in such adoption.[5]

In order to meet her burden of proof, appellant must submit sufficient medical evidence to show a permanent impairment causally related to employment that is ratable under the A.M.A., *Guides.* Under the procedures promulgated by the Office, the evidence must show that the impairment has reached a permanent and fixed state and indicate the date this occurred, describe the impairment in detail and contain an evaluation of the impairment under the A.M.A., *Guides*.[6]

On appeal, appellant argues that she is entitled to an award for a 30 percent permanent impairment of both lungs. Appellant bases her contention on the November 11, 1993 impairment rating provided by Dr. Joe G.N. Garcia, a Board-certified internist specializing in pulmonary diseases, who diagnosed bronchial hyperactivity secondary to a chemical spill and

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[2] *Arlonia B. Taylor*, 44 ECAB 591 (1993).

[3] 5 U.S.C. § 8107.

[4] 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' compensation. 20 C.F.R. § 10.304(b). 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 2 -- *Claims, Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a)(1) (March 1995).

[5] *James J. Hjort*, 45 ECAB 595 (1994).

[6] Federal (FECA) Procedure Manual, Part 2 -- *Claims, Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (March 1995).

found a "30 [percent] moderate whole person impairment." He attributed three-quarters of appellant's impairment to "cardiovascular deconditioning" and one quarter to her employment-related bronchial hyperactivity. Dr. Garcia's opinion is of limited probative value in determining the extent of appellant's respiratory impairment inasmuch as he did not provide a specific evaluation of the impairment under the A.M.A., *Guides* (fourth edition, 1993). Furthermore, contrary to appellant's belief, Dr. Garcia did not attribute her entire impairment to the accepted employment exposure of February 7, 1990. Assuming *arguendo*, that Dr. Garcia's opinion was of sufficient probative value to support an increased rating this evidence would establish no more than a 7.5 percent impairment due to appellant's accepted occupational exposure. The doctor clearly indicated that three-quarters of the reported 30 percent respiratory impairment was attributable to "cardiovascular deconditioning," which was unrelated to any accepted employment factor.

In the instant case, the December 19, 1997 schedule award was based on the November 25, 1997 report of the Office's medical adviser, who reviewed the entire record which included, among other things, various pulmonary function studies and the reports of Dr. Garcia and Dr. Mitchell A. Pfeiffer, a Board-certified internist specializing in pulmonary diseases and an office referral physician.[7] The Office medical adviser concluded that appellant had a 5 percent respiratory impairment in accordance with Tables 8 and 10 at Chapter 5 of the A.M.A, *Guides* (fourth edition, 1993). He explained that the results of appellant's pulmonary function studies placed her within the range of a Class I and Class II respiratory impairment according to Table 8 at page 162 of the A.M.A., *Guides*.[8] Inasmuch as appellant only occasionally tested at a low-level, Class II respiratory impairment, the doctor concluded that appellant had a minimal, but definitely measurable respiratory impairment. Consequently, the Office medical adviser found that appellant had a five percent respiratory impairment.

The Office medical adviser's calculation of appellant's respiratory impairment conforms to the A.M.A., *Guides* (fourth edition 1993) and, therefore, constitutes the weight of the medical evidence.[9] Appellant has failed to provide any probative medical evidence that she has greater than a five percent impairment of both lungs. While the Office properly relied on the impairment rating provided by its medical adviser, the Office erred in determining the number of weeks of compensation appellant was entitled to receive. The Office awarded appellant 7.8 weeks of compensation based on her 5 percent impairment rating. The 7.8 weeks of compensation awarded represents 5 percent of 15.6 weeks of compensation, which is the maximum allowable for the total loss of use of a single lung.[10] However, since appellant's respiratory impairment involves both lungs, she is entitled to a 10 percent rating and 15.6 weeks

[7] Dr. Pfeiffer initially examined appellant at the request of the Office on August 25, 1995 and subsequently on September 5, 1995. Although Dr. Pfeiffer ultimately concluded that appellant had a ten percent impairment, he did not provide a specific evaluation of the impairment under the A.M.A., *Guides* (fourth edition, 1993).

[8] Under Table 8, a Class I respiratory impairment corresponds to a 0 percent impairment of the whole person. A Class II respiratory impairment is defined as a "mild impairment" and corresponds to a 10 to 25 percent impairment of the whole person. A.M.A., *Guides* at 162 (fourth edition, 1993).

[9] *See Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

[10] 20 C.F.R. § 10.304(b).

of compensation.[11] Accordingly, the Office's decision will be modified to reflect an award of 15.6 weeks of compensation.

The decision of the Office of Workers' Compensation Programs dated December 19, 1997 is hereby affirmed as modified.

Dated, Washington, D.C.
December 29, 1999

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[11] *See supra* note 4.