

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSS W. KIRK and DEPARTMENT OF THE NAVY,
AIR SYSTEMS COMMAND, San Diego, CA

*Docket No. 99-2443; Submitted on the Record;
Issued December 4, 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 work-related condition of pleural thickening.

On May 26, 1997 appellant, then a 51-year-old heat treater and temper, filed a claim for asbestosis.

In an October 11, 1997 report, Dr. Jeffrey M. Applestein, a Board-certified pulmonary disease specialist and an Office of Workers' Compensation Programs' referral physician, reviewed appellant's symptoms including yearly x-rays and pulmonary function studies up to 1997 and conducted an evaluation. He diagnosed possible pleural asbestos by radiological report and found no evidence of significant airway disease or chronic obstructive pulmonary disease. In an October 30, 1997 report, Dr. Applestein stated that review of chest x-rays from 1994, March 1996 and March 1997 revealed evidence of some minimal lateral pleural thickening in the right axillary pleural area consistent with mild pleural asbestosis. He opined that this abnormality dates back to 1994 but was unchanged. In a supplemental report dated March 18, 1998, Dr. Applestein performed chest x-rays, pulmonary function tests, arterial blood gas studies and an electrocardiogram to validate his examination findings. He noted that there was no evidence of pleural thickening on x-ray; the electrocardiogram was consistent with nonspecific ST-T wave abnormalities; the arterial blood gas study was normal; and the pulmonary function tests revealed normal flow rates, normal lung volumes by flow analysis by questionably low FRC by lung volumes, no evidence of diffusion abnormality and possible mild restriction but no evidence of airway obstruction.

On April 21, 1998 the Office accepted appellant's claim for pleural thickening due to asbestos exposure.

The Office referred the case record to an Office medical consultant, Dr. Charles C. McDonald, a Board-certified internist specializing in pulmonary diseases. By report dated

June 17, 1998, he reviewed the medical records to determine the permanent functional loss of use of the lungs and the date of maximum improvement. Dr. McDonald opined: there was no condition which was related to the accepted conditions of employment; the diagnosis was history of asbestos exposure, without abnormalities; appellant was not disabled from his position due to disease resulting from exposure to asbestos while in federal employment; and the degree of respiratory impairment secondary to asbestos-related diseases, utilizing the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, was zero percent.

By decision dated February 24, 1999, the Office noted that appellant sustained an asbestos-related disease arising out of his federal employment, 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 Office expense for clinical, radiologic and pulmonary function monitoring.

On appeal appellant argues that he should be compensated for his accepted condition.

The Board, however, finds that appellant is not entitled to a schedule award for a ratable impairment causally related to his accepted condition of asbestosis-related pleural thickening.

Section 8107 of Title 5 of the U.S. Code 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.¹

Under section 8107 of the Federal Employees' Compensation Act² and section 10.304 of the implementing federal regulation,³ 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.⁴

In this case, Dr. Applestein interpreted a January 15, 1998 pulmonary function test study to show normal flow rates, lung volumes and diffusion. He opined that appellant had possible mild restriction, but no evidence of airways obstruction. As Dr. Applestein offered an equivocal

¹ 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).

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.304.

⁴ See, e.g., *Francis John Kilcoyne*, 38 ECAB 168 (1987).

opinion as to the possibility of mild restriction, his report is of diminished probative value and is insufficient to support appellant's claim that he is entitled to a schedule award.⁵ Moreover, the Board notes that Dr. McDonald used Dr. Applestein's testing results of January 15, 1998 to determine that appellant had a zero percent impairment under the A.M.A., *Guides*. Dr. Applestein's test results of January 15, 1998 noted that appellant's prebroncholator FVC was 100 percent of predicted, that his forced expiratory volume (FEV1) was 96 percent of predicted, that his FEV1/FVC was 96 percent of predicted and that his diffusion of carbon monoxide was 92 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 Dr. McDonald's determination that, with appellant's testing results, he fell within Class 1, 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 FE1/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 1 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. McDonald. The record contains another pulmonary function test dated April 15, 1997 which notes that appellant's FVC was 121 percent of predicted, that his forced expiratory volume (FEV1) was 118 percent of predicted and that his FEV1/FVC was 95 percent of predicted. Appellant's diffusion of carbon monoxide was not noted. The Board notes that, according to the applicable section of the A.M.A., *Guides*, appellant's April 15, 1997 testing clearly fell within the Class I, 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. Applestein's testing of January 15, 1998 is the most recent testing and this 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 thickening 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.

⁵ See generally *James Mack*, 43 ECAB 321 (1991).

Accordingly, the decision of the Office of Workers' Compensation Programs dated February 24, 1999 is hereby affirmed.

Dated, Washington, DC
December 4, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member