

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of HUBERT L. MARTIN and TENNESSEE VALLEY AUTHORITY,  
PARADISE STEAMPLANT, Drakesboro, KY

*Docket No. 02-141; Submitted on the Record;  
Issued September 11, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether appellant has established that he has a permanent pulmonary impairment due to employment-related coal workers' pneumoconiosis entitling him to a schedule award.

On January 31, 2000 the Office of Workers' Compensation Programs received appellant's<sup>1</sup> claims for an occupational disease and a schedule award.<sup>2</sup>

In a report dated January 7, 1998, Dr. Robert J. Karman, appellant's treating physician, Board-certified in pulmonary disease, initially examined appellant after open-heart surgery and found probable fibrosis from occupational exposure.

In a report dated February 26, 1998, Dr. Karman noted that, upon examination, appellant's total lung capacity was approximately 72 percent, diffusion capacity was corrected to 75 percent with alveolar volume which was "significant for a mild to moderate restrictive lung disease." Dr. Karman noted that appellant had pneumoconiosis and black lung disease established by pulmonary function tests, a chest x-ray and examination.

In a report dated May 28, 1998, Dr. Karman noted that appellant's pulmonary function tests revealed FEV<sub>1</sub> of approximately 50 percent and FVC ratio of 64 percent. He again found that appellant had pneumoconiosis established radiographically.

In a report dated October 5, 1998, Dr. Glen R. Baker, Jr., Board-certified in pulmonary disease, noted that he had examined appellant on September 23, 1998, and noted the following

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<sup>1</sup> Appellant retired from the federal service on September 22, 1997.

<sup>2</sup> The employing establishment received appellant's claim on January 28, 1999; the Office noted receipt on January 31, 2000. The employing establishment received appellant's schedule award claim on August 16, 1999, which the Office also received on January 31, 2000.

findings: FVC prebronchodilator test results for a 59-year-old male, 167 centimeters in height was 3.08 against 4.15 of predicted amount, or 78 percent; FVC postbronchodilator test, the actual amount was 3.24 or 78 percent of predicted amount. For FEV<sub>1</sub> prebronchodilator test results, 2.00 actual against 3.51 of predicted, or 56.9 percent; FEV<sub>1</sub> postbronchodilator test, the actual amount was 2.16 or 61.5 percent of predicted amount. Dr. Baker stated that appellant's pulmonary function tests and x-rays revealed occupational pneumoconiosis, Class 2 impairment based on Table 8, page 162 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.<sup>3</sup> He noted that appellant's condition was causally related to his employment, and that his pulmonary impairment was caused by exposure to coal dust at work. Based on his examination, Dr. Baker noted that his impairment made him 100 percent disabled.<sup>4</sup>

In a report dated March 30, 2000, Dr. Brent D. Bergen, a second opinion physician, Board-certified in pulmonary disease, examined appellant and noted findings. He stated that x-rays reveal small opacities, significant pleural abnormalities, and chronic obstructive pulmonary disease evidenced by flattening of the hemidiaphragm and hyperexpansion of the lung fields. Dr. Bergen noted no acute processes. His test results were: FVC prebronchodilator test results for a 59-year-old male, 167 centimeters in height was 2.93 against 3.42 of predicted amount, or 86 percent; for postbronchodilator the actual amount was 2.95 or 86 percent of predicted amount. For FEV<sub>1</sub> prebronchodilator test results, 1.97 actual against 2.53 of predicted, or 78 percent; for FEV<sub>1</sub> postbronchodilator, the actual amount was 2.01 or 92 percent of predicted amount. Dr. Bergen further noted that appellant's total lung capacity and gas exchanges were normal. He diagnosed coal workers pneumoconiosis, chronic obstructive pulmonary disease, and found that appellant's pneumoconiosis was work related.

In a report dated July 5, 2000, Dr. Bergen noted that appellant attained maximum medical improvement on March 30, 2000, and that he had a 10 to 25 percent whole person impairment.

In a report dated August 8, 2000, the Office medical adviser reviewed Dr. Bergen's data and determined that appellant had a Class 1 impairment and a zero impairment rating for his work-related pneumoconiosis based on Table 8 of the A.M.A., *Guides*.<sup>5</sup>

In a decision dated September 25, 2000, the Office determined that appellant had a zero percent impairment for his work-related pneumoconiosis.

By letter dated October 6, 2000, appellant, through counsel, requested an oral hearing.

A hearing was held on April 26, 2001. By decision dated July 27, 2001, the hearing representative affirmed the Office's September 25, 2000 decision denying a schedule award.

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

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<sup>3</sup> A.M.A., *Guides* 162, Table 8.

<sup>4</sup> *Id.* at 164, Table 10.

<sup>5</sup> *Id.* See *supra* note 3.

The schedule award provisions of the Federal Employees' Compensation Act<sup>6</sup> and its implementing regulation<sup>7</sup> provide for compensation to employees sustaining impairment from loss, or loss of use of, specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides*, has been adopted by the Office as a standard for evaluation of schedule losses and the Board has concurred in such adoption.<sup>8</sup>

Dr. Baker determined that appellant had a Class 2 impairment. On the other hand, the Office medical adviser, relying on the data from the second opinion physician, determined that appellant had a Class 1 impairment and thus was not entitled to a schedule award.<sup>9</sup>

In the instant case, appellant's treating physician, Dr. Baker, provided spirometric data in his report of October 5, 1995 that revealed that appellant had a Class 2 impairment. He opined that appellant was 100 percent disabled from his job. However, the Office medical adviser reviewed only the data from the second opinion physician and did not review the spirometric data from Dr. Karman dated February 26, 1998 or Dr. Baker dated October 5, 1998. The Office medical adviser's review of Dr. Bergen's March 30, 2000 report resulted in his determination that appellant had a Class 1 respiratory impairment and thus had a zero percent total impairment. Because the medical reports of Drs. Baker and Karman show a Class 2 impairment under the A.M.A., *Guides* which conflicts with the medical report of Dr. Bergen and the Office medical adviser showing a Class 1, zero percent impairment, a conflict in medical evidence exists in the record.

The Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "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."<sup>10</sup>

Therefore, appellant, the case record, together with a statement of accepted facts must be referred to an impartial pulmonary specialist to resolve the conflict as to whether appellant has employment-related coal workers' pneumoconiosis, and if so, whether he has a pulmonary impairment under the fifth edition of the A.M.A., *Guides* entitling him to a schedule award.

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<sup>6</sup> 5 U.S.C. §§ 8101-8193.

<sup>7</sup> 20 C.F.R. § 10.404 (1999).

<sup>8</sup> *John L. McClenic*, 48 ECAB 552 (1997).

<sup>9</sup> The Board notes that the Office medical adviser was not provided Dr. Baker's reports to review.

<sup>10</sup> 5 U.S.C. § 8123(a).

The decision of the Office of Workers' Compensation Programs dated July 27, 2001 is set aside and the case is remanded to the Office for further development in accordance with this decision.

Dated, Washington, DC  
September 11, 2002

Alec J. Koromilas  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member