

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM E. LOFGREN and DEPARTMENT OF THE NAVY,
SEA SYSTEMS COMMAND, Vallejo, CA

*Docket No. 02-436; Submitted on the Record;
Issued April 24, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant is entitled to a schedule award for permanent impairment of his lungs.

In January 2001 appellant, then a 53-year-old retired welder, filed a claim alleging that he sustained pleural plaque formation due to exposure to asbestos in the workplace. The Office of Workers' Compensation Programs accepted that appellant sustained asbestos-related bilateral pleural plaques. The Office referred appellant for pulmonary testing and arranged for an Office consultant to review the findings of the testing. By decision dated November 16, 2001, the Office determined that appellant was not entitled to a schedule award due to the accepted employment injury.

The Board finds that the case is not in posture for decision regarding whether appellant is entitled to a schedule award for permanent impairment of his lungs.

An employee seeking compensation under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,² including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.³

¹ 5 U.S.C. §§ 8101-8193.

² *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

³ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

The schedule award provisions of the Act⁴ and its implementing regulation⁵ set forth the number of weeks of compensation payable to employees sustaining permanent impairment of specified body members, functions or organs. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001) has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.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.⁷ For classes 2 through 4, the appropriate class of impairment is determined by whether the observed values fall alternatively within identified standards for forced vital capacity (FVC), forced expiratory volume in the first second (FEV₁), diffusing capacity for carbon dioxide (D_{co}), or maximum oxygen consumption (VO₂Max). For each of the FVC, FEV₁ and D_{co} results, an observed result will be placed within Class 2, 3, or 4 if it falls within a specified percentage of the predicted value for the observed person.⁸ For VO₂Max, an observed result will be placed within Class 2, 3, or 4 if it falls within a specified range of oxygen volume.⁹ A person will fall within Class 1 and be deemed to have no impairment, if the FVC, FEV₁, ratio of FEV₁ to FVC, and D_{co} are greater than or equal to the lower limit of normal; or the VO₂Max is greater than or equal to a specified oxygen volume.

In the present case, it remains unclear whether the Office applied the appropriate standards of the A.M.A., *Guides* in determining that appellant is not entitled to a schedule award for permanent impairment of his lungs. In its November 16, 2001 decision, the Office did not provide any explanation of how it reached its determination that appellant was not entitled to a schedule award. In determining whether a claimant has discharged his burden of proof and is entitled to compensation benefits such as schedule award compensation, the Office is required by statute and regulation to make findings of fact.¹⁰ Office procedure further specifies that a final

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404 (1999).

⁶ *Id.*

⁷ A.M.A., *Guides* 107, Table 5.10 (5th ed. 2001).

⁸ With respect to Class 2, the observed value must also be less than the lower limit of normal. The predicted normal values and the predicted lower limits of normal values for the FVC, FEV₁ and D_{co} tests are delineated in separate tables. A.M.A., *Guides* 95-100, Tables 5-2a through 5-7b.

⁹ The A.M.A., *Guides* provides alternate means for measuring such volumes.

¹⁰ 5 U.S.C. § 8124(a) provides: "The [Office] shall determine and make a finding of facts and make an award for or against payment of compensation." 20 C.F.R. § 10.130 provides in pertinent part that the final decision of the Office "shall contain findings of fact and a statement of reasons."

decision of the Office must include findings of fact and provide clear reasoning, which allows the claimant to “understand the precise defect of the claim and the kind of evidence which would tend to overcome it.”¹¹ These requirements are supported by Board precedent.¹²

The record contains August 14 and October 26, 2001 reports of Dr. Charles C. McDonald, a Board-certified internist specializing in pulmonary disease who served as an Office consultant. In his October 26, 2001 report, Dr. McDonald indicated that he had reviewed a July 20, 2001 report of Dr. Deppak Shrivastava, a Board-certified internist specializing in pulmonary disease who served as an Office referral physician and performed pulmonary testing in July 2001. Dr. McDonald made reference to various observed and predicted values of testing performed by Dr. Shrivastava and noted that the predicted values used seemed to be inconsistent. Dr. McDonald commented that there were no functional sequela of appellant’s pleural plaques and restrictive physiology would not be anticipated.

The Board notes the available medical evidence, including Dr. McDonald’s interpretation of Dr. Shrivastava’s pulmonary functions testing, does not provide any further clarification whether the appropriate standards of the A.M.A., *Guides* were properly applied in connection with the Office’s schedule award determination. For example, it is unclear whether the predicted values for various tests (mentioned by both Drs. McDonald and Shrivastava) were derived from the standards of the A.M.A., *Guides*. Nor do these reports make it clear whether all the relevant tests were performed as provided for by the above-noted procedures for evaluating pulmonary impairment.¹³ Although Dr. McDonald suggested that appellant’s pulmonary function was normal, it is unclear whether this apparent assessment was made under the standards of the A.M.A., *Guides*.¹⁴

Therefore, the case should be remanded to the Office for further evaluation of whether appellant is entitled to a schedule award for permanent impairment of his lungs. After such further development as the Office deems necessary, the Office should issue an appropriate decision.

¹¹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (July 1997).

¹² See *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

¹³ See *supra* notes 7 through 9 and accompanying text.

¹⁴ See *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant’s permanent impairment). The record also contains pulmonary testing from February 2001, but it is unclear whether this testing was conducted in accordance with the relevant standards of the A.M.A., *Guides*.

The November 16, 2001 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
April 24, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member