

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CARL J. SHIBBAL and DEPARTMENT OF THE NAVY,  
PORTSMOUTH NAVAL SHIPYARD, Portsmouth, NH

*Docket No. 02-2334; Submitted on the Record;  
Issued January 8, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether appellant is entitled to a schedule award for his work-related asbestosis.

The Office of Workers' Compensation Programs accepted appellant's claim for asbestosis or an asbestos-related disease. Appellant went on disability retirement on November 3, 1980.

In a report dated March 13, 2002, Dr. Donald T. Akey, a Board-certified internist with a specialty in pulmonary disease, considered appellant's history of injury, performed a physical examination, and reviewed an x-ray and pulmonary function study. He diagnosed advanced ischemic congestive cardiomyopathy with reduced ejection fractions, peripheral vascular disease with significant claudication, history of coronary artery disease and asbestosis. Dr. Akey opined that he did not believe that appellant's asbestosis was caused by asbestos exposure during appellant's federal employment at the shipyard. He stated that the x-ray supported a diagnosis of asbestosis but the pulmonary function testing showed a finding of normal forced vital capacity and appellant did not have a restrictive lung disease on that basis. Dr. Akey opined that there was no impairment due to asbestosis. He opined that appellant's symptoms of dyspnea on exertion and claudication "at this time" were predominantly related to a progressive and severe ischemic cardiomyopathy with a markedly reduced ejection fraction. Dr. Akey concluded that appellant's asbestosis would not disable him from his federal employment.

In a report dated March 30, 2002, Dr. Barry W. Levine, a Board-certified internist with a specialty in pulmonary disease reviewed the record for the Office. He considered appellant's history of injury and reviewed the chest x-ray and pulmonary function study. He stated that based on the pulmonary function study and presence of pleural plaques, appellant had pleural plaques secondary to asbestos exposure but he did not have asbestosis. Dr. Levine stated:

"Asbestosis indicates significant interstitial lung disease and based on the pulmonary function tests there is no evidence of this diagnosis. I feel that the cause of [appellant's] shortness of breath is secondary to an ischemic

cardiomyopathy based on the echocardiogram. Although there is evidence of asbestos exposure, the resultant plaques are not causing any impairment.”

By decision dated April 1, 2002, the Office found that appellant had “asbestos-related disease” but there was no evidence of impairment or disability due to that disease and therefore appellant was not entitled to a schedule award.

In an undated letter, appellant requested reconsideration of the Office’s decision. He submitted additional evidence consisting of an attending physician’s report and a narrative report dated May 30, 2002 from his treating physician, Paul Ernsting, an osteopath, a medical report dated May 16, 2002 from Dr. Thomas N. Decker, a Board-certified internist with a specialty in pulmonary disease, a letter from his daughter dated June 4, 2002 explaining that she was submitting additional evidence and appellant’s claim for a schedule award (Form CA-7) dated June 4, 2002. In his May 30, 2002 attending physician’s report, Dr. Ernsting diagnosed asbestosis and pulmonary fibrosis with history of exposure. In response to the question of whether appellant could resume his regular work or return to work he wrote “N/A.” In remarks, he noted that appellant had chronic fatigue, difficulty breathing especially with exertion, chronic cough, frequent respiratory and was at high risk of cancer.

In the May 30, 2002 narrative report, Dr. Ernsting stated that he had treated appellant since November 1993 and that appellant had a long history of asbestos exposure at the employing establishment from 1951 through 1980. He stated that appellant had resultant pulmonary fibrosis and a restrictive lung disease pattern on pulmonary function studies as well as chronic obstructive pulmonary disease (COPD). Dr. Ernsting stated that appellant had a chronic disability causing shortness of breath on exertion and fatigue “as a consequence.” He also stated that appellant had multiple comorbidities including chronic cigarette smoking causing his COPD, coronary artery disease and ischemic cardiomyopathy which also contributed to his difficulties. Dr. Ernsting opined, however, that appellant’s primary problem was the pulmonary fibrosis from the asbestosis.

In the May 16, 2002 report, Dr. Decker stated that appellant’s clinical history was consistent with asbestos-related pulmonary disease. He stated that appellant had a clear history of asbestos exposure at work and x-ray findings consistent with both pleural plaquing as well as interstitial pulmonary fibrosis. Dr. Decker opined that appellant’s symptoms were related to asbestosis, and that, as a result of his asbestos exposure, appellant was permanently disabled and was no longer able to work at any kind of job.

By decision dated August 21, 2002, the Office denied modification of its prior decision.

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

The schedule award provisions of the Federal Employees’ Compensation Act<sup>1</sup> and its implementing regulations<sup>2</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be

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<sup>1</sup> 5 U.S.C. § 8107 *et seq.*

<sup>2</sup> 20 C.F.R. § 10.404.

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* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>3</sup>

Section 8123(a) of the Act provides that, 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>4</sup>

In this case, a conflict exists between the opinion of appellant's treating physician, Dr. Ernsting, and the opinion of the referral physician, Dr. Akey. Both doctors relied on pulmonary function studies in their reports but Dr. Ernsting opined that appellant had restrictive lung disease and COPD whereas Dr. Akey opined that appellant had no impairment. Further, both doctors noted that appellant had many respiratory problems, but Dr. Ernsting opined that appellant's primary problem was the pulmonary fibrosis from asbestosis whereas Dr. Akey stated that appellant's asbestosis did not impair him at all.

To resolve the conflict in the evidence regarding whether appellant is disabled due to his asbestosis or asbestos-related disease, the Office should refer appellant with a statement of accepted facts and the case record to an impartial medical specialist for an evaluation. In making his or her determination, the impartial medical specialist should describe the diagnostic tests on which he or she relies, particularly the results of any pulmonary function studies. After any further development it deems necessary, the Office shall issue a *de novo* decision.

The August 21 and April 1, 2002 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case remanded for further action consistent with this decision.

Dated, Washington, DC  
January 8, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>3</sup> See *id.*; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

<sup>4</sup> *Henry W. Sheperd, III*, 48 ECAB 382, 385 n.6 (1997); *Wen Ling Chang*, 48 ECAB 272, 273-74 (1997).