United States Department of Labor
Employees' Compensation Appeals Board

JAMES E. BENDER, Appellant	)	
and	)	**Docket No. 04-997**
	)	**Issued: August 2, 2004**
GOVERNMENT PRINTING OFFICE, Washington, DC, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On February 29, 2004 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated February 23, 2004, in which the Office denied his claim for a schedule award. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he is entitled to a schedule award for his accepted employment injury of pulmonary asbestosis.

FACTUAL HISTORY

On October 8, 2001 appellant, then a 59-year-old printer proofreader, filed an occupational disease claim alleging that factors of employment caused asbestos-related injury to his lungs. He indicated that he was first aware of the disease and its relationship to his employment on October 25, 2000. Appellant had retired on disability on May 8, 1996. In support of his claim, appellant submitted a personal statement and medical evidence, including a

September 1, 2000 chest x-ray which was read by Dr. Orn Eliasson, Board-certified in internal medicine and pulmonary disease and certified as a B-reader, as demonstrating bilateral pleural plaques consistent with asbestos-related plaques. In a December 4, 2000 report, Dr. Eliasson noted that appellant had lung symptoms of difficulty breathing on exertion which he characterized as Grade 1 dyspnea and having to stop for breath when walking at his own pace on level ground, which he classified as Grade 3 dyspnea. The physician further noted that appellant awakened at night with difficulty breathing and discussed his work history, laboratory results and findings of the physical examination performed on October 25, 2000. Dr. Eliasson opined that the chest x-ray findings were caused by appellant's asbestos exposure at work and further noted that pulmonary function testing showed restrictive lung function with alteration of the air exchanging surfaces. Also on October 8, 2001 appellant filed a claim for a schedule award.

Following further development,[1] in a decision dated March 19, 2002, the Office denied the claim, finding that appellant's asbestos illness was not employment related. On April 9, 2002 appellant, through his attorney, requested a hearing that was held on November 21, 2002. At the hearing he testified regarding his employment history and exposure to asbestos. William Burgess, President of the Columbia Typographical Union, who worked at the employing establishment from the 1960s to 1997, also testified regarding the working conditions. Appellant thereafter submitted a June 5, 2002 chest x-ray read by Dr. Eliasson as demonstrating progression of the interstitial fibrosis and a June 10, 2002 report in which the physician reiterated his previous findings and conclusions. Appellant also submitted three statements from coworkers alleging asbestos exposure at the employing establishment[2] and a July 21, 1993 employing establishment memorandum describing asbestos abatement at the facility.

In a decision dated February 5, 2003, an Office hearing representative remanded the case for further medical development. Following remand, on March 17, 2003 the Office referred appellant, along with a statement of accepted facts, a set of questions and the medical record to Dr. Filomeno Tolentino Viloria, Board-certified in internal medicine and pulmonary disease, for a second opinion evaluation. In a reports dated July 21, 2003, he diagnosed progressive bilateral pulmonary asbestosis based on significant occupational exposure at the employing establishment. In an August 31, 2003 report, the physician additionally reported findings on pulmonary function testing which demonstrated mild ventilatory restriction with small airways obstruction and hyper-reactive upper airways with normal gas exchange data. He enclosed the reports dated August 29, 2003, which indicated a forced vital capacity (FVC) of 3.59 liters, a forced expiratory volume (FEV_1) of 2.67 liters, an FEV_1/FVC ratio of 74, and a diffusion of carbon monoxide in the blood (Dco) of 23.8.

[1] By letter dated February 19, 2002, the Office informed appellant that the evidence submitted was insufficient to establish his claim and asked that he furnish additional information to include a comprehensive medical report. Also on February 19, 2002 the Office requested that the employing establishment furnish information regarding asbestos exposure in the workplace. In a response dated March 14, 2002, Dannie Young, superintendent of the Environmental Protection Division at the employing establishment advised that he had no knowledge that appellant worked in an area of asbestos exposure and submitted a copy of his job description.

[2] The statements, submitted by Gerald E. Boock, Robert Eliff and Michael Fitzpatrick, were apparently made for a claim by one Patrick Norris and do not discuss specific exposure to appellant.

By letter dated September 30, 2003, the Office accepted that appellant sustained employment-related pulmonary asbestosis. In a report dated November 7, 2003, an Office medical adviser reviewed the August 29, 2003 pulmonary function tests and advised that, under Tables 5-2b, 5-4b and 5-6b of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[3] appellant had no ratable respiratory impairment and would, therefore, not be entitled to a schedule award.

In a decision dated November 10, 2003, the Office found that appellant was not entitled to a schedule award for his employment-related pulmonary asbestosis. On November 13, 2003 appellant, through counsel, requested a review of the written record. By decision dated February 23, 2004, an Office hearing representative affirmed the November 10, 2003 decision, finding that the Office medical adviser correctly interpreted the A.M.A., *Guides*.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act[4] and section 10.404 of the implementing federal regulation, schedule awards are payable for permanent impairment of specified body members, functions or organs.[5] The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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 A.M.A., *Guides* has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[6]

Chapter 5 of the fifth edition of the A.M.A., *Guides* provide that permanent impairment of the lungs is determined on the basis of pulmonary function tests, *i.e.*, the FVC and the in one second FEV_1, the ratio between FEV_1 and FVC and Dco. The values for predicted and observed normal values for FEV_1, FVC and Dco are found in Tables 5-2a through 5-7b.[7] Table 5-12 presents the criteria for estimating the impairment rating for respiratory conditions and describes the four classes of respiratory impairment.[8] If the FVC, FEV_1, FEV_1/FVC ratio and Dco are above the lower limit of normal pursuant to Tables 5-2b through 5-7b, then a claimant has a Class 1 impairment which is equivalent to no permanent impairment of the lungs. A claimant

[3] The A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ___ (Docket No. 01-1361, issued February 4, 2002).

[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8107. The Board notes that the lungs are not a specified body member under the Act. The Act was amended effective September 7, 1974, authorizing a schedule award for loss or loss of use of "any other important external or internal organ of the body as determined by the Secretary" and pursuant to regulation, the Office has provided for a schedule award for lung impairment. 20 C.F.R. § 10.404.

[6] *See Joseph Lawrence, Jr., supra* note 3; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[7] A.M.A., *Guides*, *supra* note 3 at 95-100.

[8] *Id*. at 107.

has Class 2 impairment, equaling 10 to 25 percent impairment, if the FVC, FEV_1 or Dco is above 60 percent of the predicted value and less than the lower limit of normal. A claimant has Class 3 impairment, equaling 26 to 50 percent impairment, if the FVC is between 51 and 59 percent of the predicted value or the FEV_1 or Dco is between 41 and 59 percent of the predicted value. A claimant has Class 4 impairment if the FVC is lower than 50 percent of the predicted value or the FEV_1 or Dco is lower than 40 percent.[9] Section 5.10 of the A.M.A., *Guides* advises that at least one of the criteria must be fulfilled to provide an individual with an impairment rating.[10]

Section 5.10 further states that, in limited cases, pulmonary impairment can occur that does not significantly impact pulmonary function and exercise test results but does impact the ability to perform activities of daily living. Section 5.10 then provides that the physician may assign an impairment rating based on the extent and severity of pulmonary dysfunction and the inability to perform activities of daily living described in Table 1-2 of the A.M.A., *Guides*. The physician should then provide a detailed description with supporting, objective documentation of the type of pulmonary impairment and its impact on the ability to perform activities of daily living.[11]

ANALYSIS

In the case at hand, the Office accepted that appellant sustained employment-related pulmonary asbestosis. In a report dated November 7, 2003, the Office medical adviser determined that appellant had no lung impairment based on the results of the August 29, 2003 pulmonary function tests performed by Dr. Viloria, a Board-certified internist specializing in pulmonary diseases who performed a second opinion evaluation for the Office. In these tests, the physician advised that appellant was a 61-year-old male with a height of 68 inches or 172.7 centimeter. The studies demonstrated an FVC of 3.59 liters, an FEV_1 of 2.67 liters, an FEV_1/FVC ratio of 74 and a Dco of 23.8. Utilizing these values, the Office medical adviser determined that, under Tables 5-2b, 5-4b and 5-6b, appellant's test measurements for a man of his age and height for FVC, FEV_1 and Dco respectively, were above the lower limits of normal.[12]

Initially the Board notes that to find Class 1 or no impairment under Table 5-12, in addition to demonstrating FEV_1, FVC and Dco readings that are above the lower limit of normal under Tables 5-2b through 5-7b, an individual's FEV_1/FVC ratio must also be greater than the lower limit of normal as found in values published in 1981.[13] The Board notes that the second

[9] *Id.*

[10] A.M.A., *Guides supra* note 3 at 107.

[11] *Id. See also* Table 1-2 at 4.

[12] Table 5-2b provides that the normal FVC value for a man 172 centimeter tall at 60 years is 3.275 liters and at 62 years is 3.225; Table 5-4b provides that the normal FEV_1 value for a man 172 centimeter tall at 60 years is 2.628 liters and at 62 years is 2.578; Table 5-6b provides that the normal Dco value for a man 172 centimeter tall at 60 years is 23.4 liters and at 62 years is 23.0. *Id.* at 95-100.

[13] The A.M.A., *Guides* reference the following: Crapo, R.O., Morris, A.H., Gardner, R.M. "Reference Spirometric Values Using Techniques and Equipment That Meet ATS Recommendations." *American Review of Respiratory Disease* 1981;123:659-664.

edition of the A.M.A., *Guides* provides charts of these values, which indicate that the normal FEV_1/FVC ratio for a man of appellant's age and height is approximately 79 percent.[14] Appellant's FEV_1/FVC ratio, as shown on the testing done on August 29, 2003, equaled 74 percent. This would seem to indicate that he has some degree of lung impairment. However, in order to find Class 2 impairment under Table 5-12, an individual's FVC, FEV_1 or Dco have to be less than the lower limit of normal. Appellant's test results for these values are above this level. He would, therefore, not qualify for Class 2 (or greater) impairment under Table 5-12.

In his December 4, 2000 report, Dr. Eliasson reported that pulmonary function testing demonstrated restrictive lung function with alteration of the air exchanging surfaces. He, however, did not provide specific readings for FVC, FEV_1 or Dco, as required under the A.M.A., *Guides*. Finally, while section 5.10 also provides that a lung impairment can be assessed if it impacts activities of daily living and Dr. Eliasson noted that appellant had some symptoms of dyspnea,[15] there is no probative medical evidence in this case to establish that appellant is incapable of performing the activities of daily living described in Table 1-2 of the A.M.A., *Guides*. The Board, therefore, finds that there is no evidence of record to indicate that appellant has a ratable lung impairment which would entitle him to a schedule award.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he has a ratable impairment of the lungs which would entitle him to a schedule award.[16]

[14] A.M.A., *Guides* (second edition 1984) at 93. These values do not appear in the fifth edition of the A.M.A., *Guides*.

[15] Section 5.2a of the A.M.A., *Guides* provides that, while dyspnea is a common symptom noted in individuals with pulmonary impairment, it is nonspecific and evaluation is best used in conjunction with more objective respiratory function measurements. A.M.A., *Guides*, *supra* note 3 at 89.

[16] The Board notes that appellant would be entitled to a schedule award if medical evidence establishes that he has a ratable impairment. *See Linda T. Brown*, 51 ECAB 115 (1999).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 23, 2004 is affirmed.

Issued: August 2, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member