United States Department of Labor
Employees' Compensation Appeals Board

ISAAC PETTWAY, Appellant	)	
and	)	**Docket No. 04-1867**
	)	**Issued: December 3, 2004**
DEPARTMENT OF THE NAVY, HUNTER POINT NAVAL SHIPYARD, San Francisco, CA, Employer	)	

Appearances:
Isaac Pettway, pro se
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
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On July 22, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated March 16, 2004 granting him a schedule award for a 30 percent impairment of each lung. The record also contains an Office decision dated June 3, 2004 denying his request for reconsideration pursuant to 5 U.S.C. § 8128(a). Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit schedule award decision and the nonmerit decision in this case.

ISSUES

The issues are: (1) whether appellant has more than a 30 percent impairment of each lung for which he received a schedule award; and (2) whether the Office abused its discretion by denying appellant's request for reconsideration of the merits.

FACTUAL HISTORY

On June 16, 2002 appellant, then a 64-year-old former helper boilermaker, filed an occupational disease claim, alleging that he developed asbestos-related lung disease due to exposures during his federal employment. Appellant stated that he first became aware of his condition and its relationship to his employment on August 3, 2001.

The Office requested additional factual and medical evidence by letter dated March 19, 2002. Appellant responded and stated that he stopped work at the employing establishment in November 1961.

The Office referred appellant for a second opinion evaluation with Dr. Michael L. Cohn, a Board-certified pulmonologist, on July 23, 2002.

On September 3, 2002 the Office received a form report from Dr. Linda Morse, a physician Board-certified in preventative medicine, noting appellant's employment duties and diagnosing pleural plaques from asbestos exposure.

On August 29, 2002 Dr. Cohen diagnosed chronic obstructive pulmonary disease and calcified plaques. Dr. Cohen concluded that appellant was capable of light-duty work and that his mild to moderate pulmonary impairment was due to his history of smoking not to his employment-related asbestos exposure.

The Office accepted appellant's claim for calcified plaques due to asbestos exposure.

Appellant requested a schedule award on November 22, 2002 and submitted a report from Dr. Morse dated February 25, 2003 diagnosing bilateral pleural plaques consistent with asbestos exposure. She opined that chronic bronchitis or obstructive chronic obstructive lung disease could be caused by asbestos fibers and that appellant's pulmonary impairment was in part due to his asbestos exposure.

Due to the conflict of medical opinion evidence between Drs. Morse and Cohen regarding the contribution of asbestos to appellant's chronic obstructive lung disease the Office referred appellant for an impartial medical examination with Dr. Gerald B. Levine, a Board-certified pulmonologist.

On May 5, 2003 Dr. Levine opined that appellant's overall impairment was equally due to asbestos, pulmonary restriction and tobacco usage. He relied on pulmonary testing which occurred on May 2, 2003.

The Office referred the medical evidence in the record to Dr. Charles C. McDonald, a Board-certified pulmonologist and Office medical consultant. In a June 30, 2003 report, he requested additional medical records. On September 25, 2003 Dr. McDonald reviewed the May 2, 2003 tests and found that total lung capacity was 5.79 or 74 percent of the predicted value and 6.24 or 80 percent on the second test. Diffusion was 18.81 or 65 percent of

predicted value. He found moderate to moderately severe airway obstruction and assigned an impairment rating of 30 percent. Dr. McDonald stated:

> "This is based upon the predicted values of Crapo corrected for race as outlined in the [American Medical Association, *Guides to the Evaluation of Permanent Impairment*]. His diffusing capacity is 66 percent of the predicted value, FEV_1 (forced expiratory volume in the first second) 63 percent and FVC (forced expiratory volume) 79 percent. The diffusing capacity rating is 30 percent, FEV_1 25 percent and FVC 0 percent. Applying the largest impairment rating would result in the use of the diffusing capacity to determine the impairment rating. The date of maximum improvement is May 2, 2003…."

He concluded that appellant's impairment was not related to asbestos exposure.

The Office requested a supplemental report from Dr. McDonald on February 25, 2004. He responded on March 3, 2004 and again opined that appellant's impairment due to asbestos-related disease was zero percent. The Office relied on Dr. Levine and concluded that appellant's lung impairment was employment related.

By decision dated May 16, 2004, the Office granted appellant a schedule award for 30 percent impairment of each lung to run from May 2, 2003 to February 15, 2005.

Appellant requested reconsideration on May 22, 2004 and asked that the Office continue his benefits for medical treatment. In support of his claim, appellant submitted a report from Dr. Horton C. Hinshaw, Jr., a Board-certified internist, dated March 22, 1997, diagnosed bilateral pleural thickening typical of pleural disease due to asbestos. Appellant also submitted diagnostic studies dated April 15 and March 16, 2004, May 2, 2003 and August 14, 2002 finding pleural plaques and over inflation. By decision dated June 3, 2004, the Office declined to reopen the March 16, 2004 decision for review of the merits as he failed to submit relevant new evidence or argument in support of the reconsideration request.[1]

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulation[3] 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 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 A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

[1] Following the June 3, 2004 decision, appellant submitted additional new evidence to the Office. As the Office did not review this evidence in reaching a final decision, the Board may not consider it for the first time on appeal. 20 C.F.R. § 501.2(c).

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

Under the A.M.A., *Guides*, permanent impairment of the lungs is determined on the basis of pulmonary function tests, the FVC and the FEV_1, the ratio between FEV_1 and FVC and diffusion of carbon monoxide in the blood (Dco).[4] The A.M.A., *Guides* provides for four classes of respiratory impairment. If the FVC, FEV_1, FEV_1/FVC ratio, and Dco are above the lower limit of normal according 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 has a Class 2 impairment, equaling 10 to 25 percent impairment, if the FVC, FEV_1, FEV_1/FVC ratio, or Dco is above 60 percent of the predicted value and less than the lower limit of normal. A claimant has a 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 a 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 of the predicted value.[5]

ANALYSIS -- ISSUE 1

The results of pulmonary function testing for appellant, a 65-year-old black male, who is 73.5 inches or 186.69 centimeters, on May 2, 2003, the date of maximum medical improvement, revealed that his best FVC effort[6] was 69 percent of predicted, his FEV_1 was 56 percent of predicted, his FEV_1/FEC ratio was 81 percent of predicted and his Dco was 65 percent of predicted. In accordance with the A.M.A., *Guides* appellant has a Class 3 impairment based on his FEV_1 of 56 percent of predicted entitling him to 26 to 50 percent impairment of the lungs. Dr. McDonald determined that appellant had 30 percent impairment of his lungs. There is no medical evidence of any additional lung impairment.

LEGAL PRECEDENT -- ISSUE 2

The Act provides in section 8128(a) that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.[7] The Office's regulations provide that a timely request for reconsideration in writing may be reviewed on its merits if the employee has submitted evidence or argument which shows that the Office erroneously applied or interpreted a specific point of law; advances a relevant legal argument not previously considered by the Office, or constitutes relevant and pertinent new evidence not previously considered by the Office.[8]

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[4] A.M.A., *Guides* 107.

[5] *Id.* at 107, Table 5-12.

[6] The A.M.A., *Guides* provide that tests results indicating best effort, before or after administration of a bronchodilator, are used to determine the FVC and FEV_1 for impairment assessment. A.M.A., *Guides* 93.

[7] 5 U.S.C. § 8128(a).

[8] 5 U.S.C. §§ 10.609(a) and 10.606(b).

ANALYSIS -- ISSUE 2

Appellant requested reconsideration of the Office's March 16, 2004 decision on March 22, 2004 and submitted medical documentation supporting his diagnosis of pleural plaques and asbestos-related pulmonary disease. None of this medical documentation is relevant to the issue decided in the Office's March 16, 2002 decision, the extent of appellant's permanent impairment due to his accepted condition of calcified plaques due to asbestos exposure. As appellant did not submit any relevant new evidence, or new legal argument, the Office properly declined to reopen his claim for consideration of the merits.

CONCLUSION

The Board finds that the medical evidence of record establishes that appellant has a 30 percent permanent impairment of his lungs for which he received a schedule award. The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits on June 3, 2004.

ORDER

IT IS HEREBY ORDERED THAT the June 3 and March 16, 2004 decision of the Office of Workers' Compensation Programs are affirmed.

Issued: December 3, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member