United States Department of Labor
Employees' Compensation Appeals Board

GARY R. TAYLOR, Appellant	)	
and	)	**Docket No. 04-1621**
	)	**Issued: November 29, 2004**
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Mt. Hope, WV, Employer	)	

Appearances:
Gary R. Taylor, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On June 10, 2004 appellant filed a timely appeal of the February 5 and May 17, 2004 merit decisions of the Office of Workers' Compensation Programs, which denied his claim for compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim.

ISSUE

The issue is whether appellant established entitlement to an increased schedule award for his April 10, 1996 employment injury.

FACTUAL HISTORY

Appellant, a 57-year-old supervisory coal mine safety and health inspector, has an accepted occupational disease claim for coal workers' pneumoconiosis arising on or about

April 10, 1996 (A11-0150131).[1] On March 6, 1997 the Office granted a schedule award for a 10 percent permanent impairment of both the left and right lung.

Appellant continued to work as a supervisory coal mine inspector and, on August 29, 2003, filed another claim for compensation alleging that he was required to work in dusty environments where the operator was out of compliance with dust standards. He listed his claimed condition as pneumoconiosis and identified November 7, 1991 as the date of injury. Appellant also noted that he had filed two prior claims for pneumoconiosis in 1991 and 1996. He stated that the first claim was denied while the second claim filed on April 10, 1996 had been accepted and resulted in a schedule award.[2]

The Office assigned appellant's August 29, 2003 claim number A11-2017566 with a date of injury of November 7, 1991. On October 22, 2003 the Office referred appellant for an evaluation by Dr. George L. Zaldivar, a Board-certified internist specializing in pulmonary disease. The Office provided Dr. Zaldivar an October 21, 2003 statement of accepted facts that indicated, among other things, that appellant had previously filed a claim in 1996 and his condition was accepted for pneumoconiosis.

In a report dated November 19, 2003, Dr. Zaldivar found that appellant did not have coal workers' pneumoconiosis or any dust disease of the lungs. He also stated that appellant did not have any pulmonary impairment at all. Dr. Zaldivar explained that appellant's measured forced vital capacity (FVC) on a November 19, 2003 pulmonary function study represented a zero percent impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).[3]

By decision dated February 5, 2004, the Office denied appellant's claim because the medical evidence failed to establish that his claimed condition was due to his accepted employment exposure. The Office explained that Dr. Zaldivar found that appellant did not have coal workers' pneumoconiosis or any dust disease of the lungs.

On April 15, 2004 appellant requested reconsideration. He explained that he filed for additional compensation because he believed his employment-related lung condition had worsened. Although he received a new claim number, appellant stated that the Office should have reopened his April 10, 1996 claim, which had been accepted for pneumoconiosis. Appellant added that it was well known that pneumoconiosis does not disappear.

The Office reviewed appellant's claim on the merits and denied modification in a decision dated May 17, 2004.

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[1] Appellant previously filed an occupational disease claim for pneumoconiosis on December 18, 1991, which the Office denied (A11-0114692). The 1991 and 1996 claim files were combined under master number A11-0150131.

[2] Appellant submitted his application online and the resulting computer-generated document was designated as a Form CA-2, notice of occupational disease and claim for compensation.

[3] Dr. Zaldivar, however, did not comment on whether appellant's November 19, 2003 forced expiratory volume $(FEV)_1$ value or FEV_1/FVC ratio demonstrated impairment under the A.M.A., *Guides* (5th ed. 2001).

LEGAL PRECEDENT

A claim for an increased schedule award may be based on new exposure or on medical evidence indicating the progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater permanent impairment than previously calculated.[4]

ANALYSIS

The Office erred in adjudicating appellant's August 29, 2003 application as a new claim for an occupational disease arising on or about November 7, 1991. Although the application was not designated as a claim for an increased schedule award, a proper review of the case record should have revealed this fact. Moreover, appellant's April 15, 2004 request for reconsideration made it clear that he was seeking an additional schedule award due to a worsening of his April 10, 1996 employment-related pneumoconiosis.

The Office did not purport to rescind acceptance of appellant's April 10, 1996 claim for employment-related pneumoconiosis. Therefore, a subsequent decision denying the August 29, 2003 claim because appellant purportedly does not have pneumoconiosis is inconsistent with the established record. Furthermore, Dr. Zaldivar's November 19, 2003 opinion that appellant does not have pneumoconiosis is contrary to the October 21, 2003 statement of accepted facts and failed to explain why he chose to disregard earlier x-ray evidence of pneumoconiosis. His report referenced positive x-ray interpretations from 1996 and 2003 yet he inexplicably concluded that there was "No radiographic evidence of pneumoconiosis."

The issue in the instant case is not whether appellant has radiographic evidence of pneumoconiosis. The proper question to be resolved is whether appellant is entitled to an increased schedule award based on his April 10, 1996 employment-related pneumoconiosis. Although Dr. Zaldivar addressed appellant's impairment with respect to FVC, his analysis does not appear to be thorough and complete. The case will be remanded to the Office for additional medical development to determine the extent of any permanent impairment arising from appellant's April 10, 1996 employment injury. Upon receipt of the additional medical evidence, the Office shall refer the case record to its medical adviser for review and a determination of whether appellant is entitled to an additional schedule award under the A.M.A., *Guides* (5th ed. 2001).[5]

CONCLUSION

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

[4] *Linda T. Brown*, 51 ECAB 115 (1999).

[5] The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses. 20 C.F.R. § 10.404 (1999). Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001). Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003); FECA Bulletin No. 01-05 (January 29, 2001).

ORDER

IT IS HEREBY ORDERED THAT the May 17 and February 5, 2004 decisions of the Office of Workers' Compensation Programs are set aside, and the case is remanded to the Office for further action consistent with this decision of the Board.

Issued: November 29, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member