

In a February 13, 1986 letter, the Office accepted appellant's claim for pleural thickening. The Office issued a schedule award for 31.20 weeks for a 10 percent permanent impairment of loss of use of the lungs effective December 2, 1985.¹ In an October 3, 2001 decision, the Office awarded appellant an additional schedule award for 156 weeks for a 50 percent permanent impairment for loss of use of both lungs. The period of the award ran from October 26, 2000 to October 22, 2003.

On December 2, 2003 appellant filed a Form CA-7 claim for compensation for an increased schedule award. In a letter dated January 23, 2004, the Office informed appellant that medical evidence from his attending physician establishing a material worsening of his accepted condition was necessary for consideration of an increased schedule award.

In a February 6, 2004 report, Dr. Richard L. Rutherford, a Board-certified family practitioner, set forth his examination findings and diagnosed pulmonary asbestosis in addition to other medical conditions. He indicated that a spirometry would be obtained to assess appellant's lung function. A copy of a February 13, 2004 chest study which indicated the calcification of diffuse bilateral pleural changes consistent with prior asbestos exposure was included.

The Office referred the medical evidence to an Office medical adviser. In a June 18, 2004 report, the Office medical adviser advised that Dr. Rutherford's spirometry or pulmonary function studies were necessary for a schedule award determination and should include measurements of forced vital capacity (FVC), forced one-second expiratory volume (FEV₁) and diffusion capacity (Dco). In a letter dated June 21, 2004, the Office informed Dr. Rutherford of the additional medical information required to quantify appellant's degree of impairment.

In a June 8, 2004 report, Dr. Rutherford noted that appellant has had known asbestosis. Based on a comparison of pulmonary function studies from February 2004 to those done four years ago, Dr. Rutherford opined that appellant's lung disease appeared to be stable over the last four years with an FEV₁ and FVC remaining at about 50 percent. He stated that appellant's bigger long-term health concern was that of his vascular disease and cardiac disease.

In a July 12, 2004 report, Dr. Rutherford stated that appellant underwent basic pulmonary function tests on March 8, 2004. His FVC was 1.79 liters or 50 percent of the predicted value and the FEV₁ was 1.45 liters or 51 percent of predicted value. He stated that a diffusion capacity test was not done as part of this spirometry.

In a December 3, 2004 report, the Office medical adviser stated that appellant reached maximum medical improvement on March 8, 2004. The Office medical adviser reviewed the March 8, 2004 pulmonary function tests and advised that, under Table 5-12, p. 107 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,² appellant's FVC and FEV₁ values were consistent with a Class 3, 26 to 50 percent

¹ The record before the Board does not contain the actual decision of appellant's schedule award which was awarded on April 3, 1985 for a 10 percent permanent impairment for use of both lungs.

² The A.M.A., *Guides* (5th ed. 2001).

impairment of the whole person, and that appellant had a 35 percent impairment of the whole person.

In a letter dated February 4, 2005, the Office advised appellant that he had previously been granted schedule awards for 60 percent impairment and the evidence did not support any greater impairment beyond that awarded. The Office stated that evidence documenting a permanent impairment exceeding 60 percent was necessary to process an additional schedule award and afforded appellant 30 days in which to submit such information.

In a February 22, 2005 letter, Dr. Rutherford advised that appellant's study would indicate that an impairment rating of 60 percent was appropriate for his level of lung function.

By decision dated April 7, 2005, the Office found that appellant was not entitled to an additional schedule award for his accepted condition.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act³ and section 10.404 of the implementing federal regulation, schedule awards are payable for permanent impairment of specified body members, functions or organs.⁴ 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.⁵

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 one second FEV₁, the ratio between FEV₁ and FVC and Dco. The values for predicted and observed normal values for FEV₁, FVC and Dco are found in Tables 5-2a through 5-7b.⁶ Table 5-12 presents the criteria for estimating the impairment rating for respiratory conditions and describes the four classes of respiratory impairment.⁷ If the FVC, FEV₁, FEV₁/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 has Class 2 impairment, equaling 10 to 25 percent impairment, if the FVC, FEV₁ or Dco is above

³ 5 U.S.C. § 8107.

⁴ 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; *Eugene Van Dyk*, 53 ECAB 706 (2002).

⁵ See *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002); *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

⁶ A.M.A., *Guides*, *supra* 2 at 95-100.

⁷ *Id.* at 107.

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 FEV₁ 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 FEV₁ or Dco is lower than 40 percent.⁸ 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.⁹

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.¹⁰

ANALYSIS

The Office accepted that appellant sustained employment-related pulmonary asbestosis and granted two schedule awards for a total of a 60 percent impairment to both lungs. In support of an increased award, appellant submitted reports from Dr. Rutherford who advised that appellant underwent a spirometry on March 8, 2004 and opined that such values obtained from the spirometry indicated an impairment rating of 60 percent. He did not support that appellant had any impairment greater than that previously accepted by the Office.

The Office medical adviser applied the findings noted by Dr. Rutherford from the March 8, 2004 spirometry and opined that the results indicated that appellant had a Class 3 or 35 percent impairment of the whole person. The range of a Class 3 impairment is from 26 to 50 percent whole person impairment.¹¹ Even had the medical adviser indicated the maximum impairment for Class 3, 50 percent, this would have been below the 60 percent previously accepted by the Office. Thus, the record contains no medical evidence conforming with the A.M.A., *Guides*, which indicates that appellant sustained greater than an impairment percentage of greater than the 60 percent already awarded.

Title 20 of section 10.304(b) of the Code of Federal Regulations provides that, for total, or 100 percent loss of use of one lung, an employee shall receive 156 weeks of compensation.¹² Accordingly, the amount payable for 60 percent impairment of both lungs is, as the Office correctly determined, 187.20 weeks which is the product of 60 percent multiplied by 312 weeks

⁸ *Id.*

⁹ A.M.A., *Guides supra* note 3 at 107.

¹⁰ *Id.* See also Table 1-2 at 4.

¹¹ *Id.* at Table 5-12, at 107.

¹² 20 C.F.R. § 10.304(b).

(twice the award for loss of function of one lung).¹³ As explained by the procedure manual,¹⁴ all claims involving impairment of the lungs will be evaluated by first establishing the class of respiratory impairment, following the A.M.A., *Guides* as far as possible. Awards are based on the loss of use of both lungs and the percentage for the particular class of whole person respiratory impairment will be multiplied by 312 weeks (twice the award for loss of function of one lung) to obtain the number of weeks payable. Therefore, as the medical evidence establishes that appellant has 60 percent impairment of the lungs and the Office multiplied this percentage by 312 (twice the award for loss of function of one lung) to find that appellant was entitled to 187.20 weeks of compensation, appellant has received all of the schedule award compensation to which he is entitled.

CONCLUSION

The Board finds that appellant has no more than a 60 percent permanent impairment of the use of both lungs for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 7, 2005 is affirmed.

Issued: September 19, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹³ See *James C. Hall, Sr.*, 39 ECAB 342 (1988) (wherein appellant had a Class 3 impairment totaling 30 percent to both lungs and received an award of 93.6 weeks of compensation).

¹⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(c)(1) (August 1995).