

an asbestos-related illness.¹ He also filed a schedule award claim. In September 2002, the Office referred appellant to Dr. Steven Goldberg, a Board-certified internist and based on the physician's opinion,² in a December 10, 2002 decision, found that he was not entitled to a schedule award. Through his attorney, he requested a review of the written record and in an April 4, 2003 decision, an Office hearing representative remanded the case to the Office because Dr. Goldberg had not been furnished with a statement of accepted facts and a set of questions. Appellant was to be reexamined.

The Office provided Dr. Goldberg with a statement of accepted facts and a set of questions but did not refer appellant for reexamination. In a May 6, 2003 report, Dr. Goldberg advised that his opinion had not changed. In September 2003, the Office referred appellant to Dr. Edward Schulman, also Board-certified in internal medicine. Based on his report which included pulmonary function studies, on November 5, 2003, the Office accepted that appellant sustained an asbestos-related disease but found that he sustained no impairment. Appellant, through his attorney, requested a review of the written record and in a May 20, 2005 decision, an Office hearing representative remanded the case to the Office for an Office medical adviser to review Dr. Schulman's September 25, 2003 report.

In a September 25, 2005 report, an Office medical adviser noted his review of Dr. Schulman's report. He advised that maximum medical improvement was reached on September 25, 2003 and noted that the pulmonary function studies dated September 22, 2003 reported by Dr. Schulman showed that forced expiratory vital capacity (FVC) was 71 percent predicted, forced expiratory volume in one second (FEV₁) 75 percent predicted, the FVC/FEV₁ ratio normal and diffusing capacity of carbon monoxide (Dco) 45 percent of predicted. The Office medical adviser stated that, in accordance with Table 5-12 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),³ if any of the FVC, FEV₁ or Dco results were abnormal, a schedule award was appropriate. He found that appellant's FVC and FEV₁ results would yield a Class 2 impairment but that the Dco result yielded a Class 3 impairment and concluded that appellant had a "low" Class 3 impairment or 26 percent of the whole person bilaterally.

On October 5, 2005 appellant was granted an award for a 52 percent impairment of both lungs, for a total of 81.12 weeks, to run from September 23, 2003 to April 12, 2005. The award was based on a pay rate of \$654.19 weekly. On October 14, 2005 appellant, through his attorney, requested reconsideration, questioning whether the 52 percent was for each or both

¹ Appellant stated that he was first aware of the condition and its relationship to his employment in August 1978 when he began participation in an employing establishment asbestos monitoring program. The record contains medical reports, including x-rays, regarding this monitoring program. Appellant retired on October 3, 1995 and received a retirement incentive of \$25,000.00. His basic pay at that time was \$16.30 an hour or \$652.00 a week.

² Dr. Goldberg concluded that appellant had no evidence of pleural or lung parenchymal involvement and no pulmonary impairment related to asbestos exposure.

³ A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

lungs and argued that the pay rate was incorrect because it did not include night or Sunday pay.⁴ By decision dated January 26, 2006, the Office denied appellant's reconsideration request. The Office noted that the 52 percent impairment paid for the schedule award was for 26 percent for each lung and found that appellant submitted no evidence that the pay rate was incorrect.

LEGAL PRECEDENT -- ISSUE 1

Under section 8107 of the Federal Employees' Compensation Act⁵ and section 10.404 of the implementing federal regulation,⁶ schedule awards are payable for permanent impairment of specified body members, functions or organs. 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*⁷ has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.⁸

Chapter 5 addresses the framework to be used for assessing respiratory impairments⁹ and provides a table which describes four classes of respiratory impairment based on a comparison of observed values for certain ventilatory function measures and their respective predicted values. The appropriate class of impairment is determined by the observed values for either the FVC, FEV₁ or Dco, measured by their respective predicted values. If one of the three ventilatory function measures, FVC, FEV₁ or Dco or the ratio of FEV₁ to FVC, stated in terms of the observed values, is abnormal to the degree described in Classes 2 to 4, then the individual is deemed to have an impairment which would fall into that particular class of impairments, either Class 2, 3 or 4, depending on the severity of the observed value.¹⁰

ANALYSIS -- ISSUE 1

The record in this case includes pulmonary function studies dated September 22, 2003, which demonstrated an FVC at 71 percent of predicted, FEV₁, at 75 percent of predicted, a normal FEV₁/FVC ratio and Dco at 45 percent of predicted. As noted by the Office medical adviser, appellant's FEV₁/FVC ratio was normal. Under Table 5-12, his reported predicted

⁴ On October 7, 2005 appellant submitted a Form CA-7 claim for compensation for the period April 13, 2005 forward. The record before the Board does not contain a final decision on this claim and its jurisdiction is limited to reviewing final decisions of the Office. 20 C.F.R. § 501.2(c); see *Karen L. Yaeger*, 54 ECAB 323 (2003).

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ A.M.A., *Guides*, *supra* note 3.

⁸ 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).

⁹ A.M.A., *Guides*, *supra* note 3 at 87-115.

¹⁰ *Id.* Table 5-12 at 107; see *Boyd Haupt*, 52 ECAB 326 (2001).

values for FVC of 71 percent and FEV₁ of 75 percent would each yield a Class 2 impairment. His Dco of 45 percent of predicted, however, would yield a Class 3 impairment category.¹¹ Under Table 5-12, a Class 3 impairment can be rated between 26 and 50 percent of the whole person.¹² As appellant's FEV₁ and FVC results placed him in the Class 2 impairment category and only the Dco results placed him in Class 3,¹³ the Board finds that it was reasonable for the Office medical adviser to find a 26 percent bilateral lung impairment, for which appellant received a schedule award.¹⁴

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Office regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.¹⁵ Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁶ Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.¹⁷ Likewise, evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁸

ANALYSIS -- ISSUE 2

The Board finds that the Office properly denied appellant's October 14, 2005 reconsideration request. In his letter requesting reconsideration, appellant questioned whether the schedule award was for 26 percent or 52 percent for each lung and argued that the schedule award pay rate was incorrect as he was entitled to Sunday and night pay. In its January 26, 2006 decision denying merit review, the Office explained that appellant's schedule award was for 26 percent for each lung, to total 52 percent and noted that appellant submitted no evidence to show that he was entitled to Sunday or night pay.

¹¹ A.M.A., *Guides*, *supra* note 3, Table 5-12 at 107.

¹² *Id.*

¹³ Dco results between 41 and 59 percent of predicted yield a Class 3 impairment. *Id.*

¹⁴ Office procedures provide that impairment to the lungs should be evaluated in accordance with the A.M.A., *Guides* insofar as possible. The percentage of "whole man" impairment is to be multiplied by 312 weeks (twice the award for loss of function of one lung) to obtain the number of weeks payable. All such awards are to be based on the loss of use of both lungs. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a)(1) (August 2002).

¹⁵ 20 C.F.R. § 10.606(b)(2).

¹⁶ 20 C.F.R. § 10.608(b).

¹⁷ *Helen E. Paglinawan*, 51 ECAB 591 (2000).

¹⁸ *Kevin M. Fatzner*, 51 ECAB 407 (2000).

The record indicates that the Office based the pay rate for appellant's schedule award on the weekly pay rate he was earning in October 1995 when he retired with appropriate cost-of-living increases or \$654.19.¹⁹ Appellant submitted no evidence to show that he was entitled to Sunday or night pay and the employing establishment advised that he worked a regular 7:00 a.m. to 3:30 p.m., Monday through Friday, schedule. Consequently, appellant is not entitled to a review of the merits of his claim based on the requirements of section 10.606(b)(2)²⁰ and the Office properly denied his reconsideration request.

CONCLUSION

The Board finds that appellant has failed to establish that he is entitled to a schedule award greater than the 52 percent bilateral lung impairment previously awarded. The Board further finds that the Office properly refused to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 26, 2006 and October 5, 2005 be affirmed.

Issued: August 1, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

¹⁹ Under section 8101(2) of the Act, "monthly pay" means the monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater. 5 U.S.C. § 8101(2); *see Cynthia A. Barnes*, 54 ECAB 414 (2003).

²⁰ *Supra* note 15.