



often observe asbestos particles floating in the air when he worked on or around asbestos lined steam lines.

The record contains several reports, dated between 1986 and 2002 which detail the results of pulmonary testing. Beginning in 1999 x-ray testing showed pleural thickening of the left lung. In a report dated May 30, 2002, Dr. Hal Hughes, an attending Board-certified pulmonologist, noted that computerized tomography scan testing showed that appellant had "chronic scarring in the left costophrenic angle felt to be due to asbestosis with discoid atelectasis."

By decision dated December 31, 2003, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish that he sustained an employment-related pulmonary condition.

Appellant was evaluated in March 2004 by Dr. Antoin H. Mardini, an attending Board-certified pulmonologist, who determined that he had an asbestos-related left lung condition which was related to his exposure to asbestos at work.

By decision dated and finalized September 13, 2004, an Office hearing representative set aside the Office's December 31, 2003 decision and remanded the case to the Office for further development of the medical evidence.

In February 2005, the Office referred appellant for additional pulmonary testing to Dr. Kevin M. Martinolich, a Board-certified pulmonologist.

In reports dated April 29, 2005, Dr. Martinolich reported the findings of his pulmonary evaluation and indicated that appellant had asbestos-related lung disease which was likely related to his exposure to asbestos at work. He attached the findings of the pulmonary testing obtained on the same date which revealed that appellant had some pulmonary obstruction with a forced vital capacity (FVC) of 3.70, a forced expiratory volume in one second (FEV<sub>1</sub>) of 2.78, a FEV<sub>1</sub> to FVC ratio of 75 percent and a diffusing capacity of carbon monoxide (Dco) of 22.5.<sup>2</sup>

The Office accepted that appellant sustained employment-related asbestosis. He claimed entitlement to schedule award compensation due to his accepted employment injury.

On September 20, 2005 the Office's district medical adviser reviewed the April 29, 2005 findings of Dr. Martinolich and concluded that appellant had a 10 percent impairment of his lungs related to his employment injury. He indicated that, given the observed FVC value of 3.70, the predicted value of 4.58 and the lower limit of normal value of 3.47, appellant had an observed to predicted FVC ratio of 81 percent and fell within Class 2 for FVC.<sup>3</sup> The district

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<sup>2</sup> The FVC and FEV<sub>1</sub> values represent numbers of liters and the Dco values represent milliliters/minutes/milligram hectograms.

<sup>3</sup> To obtain the predicted and lower limit of normal values for FVC, the district medical adviser referred to Tables 5-2a and 5-2b on page 95 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. He selected the values for a man of 62 years who weighed 176 pounds. Appellant was actually 61 years old at the time of the evaluation but the tables do not have statistical columns for a 61-year-old man and the district medical adviser selected the appropriate values.

medical adviser stated that given the observed FEV<sub>1</sub> value of 2.78, the predicted value of 3.53 and the lower limit of normal value of 2.74, appellant had an observed to predicted FEV<sub>1</sub> ratio of 79 percent and fell within Class 2 for FEV<sub>1</sub>.<sup>4</sup> He noted that, given the observed Dco value of 22.5, the predicted value of 32.8 and the lower limit of normal value of 24.6, he had an observed to predicted Dco ratio of 69 percent and fell within Class 2 for Dco.<sup>5</sup>

By decision dated November 30, 2005, the Office granted appellant a schedule award for a 10 percent permanent impairment of his lungs. The award ran for 15.6 weeks from April 29, to August 16, 2005.<sup>6</sup>

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act<sup>7</sup> and its implementing regulation<sup>8</sup> sets 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 regulations as the appropriate standard for evaluating schedule losses.<sup>9</sup>

Chapter 5 of the A.M.A., *Guides* addresses the framework to be used for assessing respiratory impairments<sup>10</sup> 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 FVC, FEV<sub>1</sub>, or Dco, measured by their respective predicted values. If one of the three ventilatory function measures, FVC, FEV<sub>1</sub> or Dco or the ratio of FEV<sub>1</sub> 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.<sup>11</sup>

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<sup>4</sup> See A.M.A., *Guides* 97, Tables 5-4a and 5-4b. The FEV<sub>1</sub> value for appellant actually is 3.58 rather than 3.53 so the observed to predicted ratio would be 78 percent.

<sup>5</sup> See A.M.A., *Guides* 99, Tables 5-6a and 5-6b.

<sup>6</sup> The Office indicated that appellant's pay rate effective October 16, 2004, the date of his retirement, was \$729.23 per week.

<sup>7</sup> 5 U.S.C. § 8107.

<sup>8</sup> 20 C.F.R. § 10.404 (1999).

<sup>9</sup> *Id.*

<sup>10</sup> A.M.A., *Guides* at 87-115.

<sup>11</sup> *Id.* Table 5-12 at 107; see *Boyd Haupt*, 52 ECAB 326 (2001).

## ANALYSIS

The Office granted appellant a schedule award for a 10 percent impairment of his lungs. The Board finds that the Office properly determined that he was entitled to a schedule award for a 10 percent impairment of his lungs.

On September 20, 2005 the Office's district medical adviser reviewed the April 29, 2005 findings of Dr. Martinolich, a Board-certified pulmonologist, who served as a second opinion physician and correctly concluded that appellant had a 10 percent impairment of his lungs related to his employment injury. He properly applied the relevant standards of the A.M.A., *Guides* to determine that appellant's lung condition fell within the lower end of a Class 2 impairment. The district medical adviser indicated that, given the observed FVC value of 3.70, the predicted value of 4.58 and the lower limit of normal value of 3.47, appellant had an observed to predicted FVC ratio of 81 percent and fell within Class 2 for FVC.<sup>12</sup> He stated that, given the observed FEV<sub>1</sub> value of 2.78, the predicted value of 3.53 and the lower limit of normal value of 2.74, appellant had an observed to predicted FEV<sub>1</sub> ratio of 79 percent and fell within Class 2 for FEV<sub>1</sub>.<sup>13</sup> The district medical adviser noted that, given the observed Dco value of 22.5, the predicted value of 32.8 and the lower limit of normal value of 24.6, appellant had an observed to predicted Dco ratio of 69 percent and fell within Class 2 for Dco.<sup>14</sup> He properly concluded that none of the values for FVC, FEV<sub>1</sub> or Dco warranted a rating of higher than Class 2.<sup>15</sup>

For these reasons, appellant has not shown that he has more than a 10 percent permanent impairment of his lungs and the Office properly granted him a schedule award in this amount.<sup>16</sup> Therefore, the Board does not have jurisdiction over the merits of this case.

## CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a 10 percent impairment of his lungs for which he received a schedule award.

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<sup>12</sup> See A.M.A., *Guides* 95, Tables 5-2a and 5-2b. The district medical adviser selected values from the statistical columns for a man of 62 years who weighed 176 pounds. Although appellant was actually 61 years old at the time of the evaluation, the tables do not have statistical columns for a 61-year-old man and the district medical adviser selected the appropriate values.

<sup>13</sup> See A.M.A., *Guides* 97, Tables 5-4a and 5-4b. The FEV<sub>1</sub> value for appellant actually is 3.58 rather than 3.53 and the observed to predicted ratio would be 78 percent. This slightly lesser value would still fall within the parameters for a Class 2 impairment.

<sup>14</sup> See A.M.A., *Guides* 99, Tables 5-6a and 5-6b. Because appellant's impairment fell within the lower end of a Class 2 impairment it was appropriate to assign a total impairment value of 10 percent.

<sup>15</sup> As noted above, only one category would have to rate higher than Class 2 to warrant the award of a greater schedule award. However, the particulars of appellant's case do not warrant a greater schedule award. See *supra* note 11 and accompanying text.

<sup>16</sup> On appeal, appellant alleged that the Office used an improper pay rate in its November 30, 2005 schedule award. However, the record does not contain a final decision of the Office regarding this issue and the matter is not currently before the Board. See 20 C.F.R. § 501.2(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' November 30, 2005 decision is affirmed.

Issued: August 4, 2006  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board