United States Department of Labor
Employees' Compensation Appeals Board

THOMAS P. LAVIN, Appellant	)	
and	)	**Docket No. 05-1229**
	)	**Issued: February 3, 2006**
DEPARTMENT OF THE NAVY, NAVAL SHIPYARD, Philadelphia, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 16, 2005 appellant filed for review of a May 9, 2005 decision of an Office of Workers' Compensation Programs' hearing representative which affirmed the denial of a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

ISSUE

The issue is whether appellant is entitled to a schedule award for his accepted lung condition.

FACTUAL HISTORY

On September 21, 2001 appellant, a retired electrician, filed an occupational disease claim for asbestos-related disease while in the performance of duty. The Office accepted his claim for pleural plaques. It advised appellant that his claim for a schedule award was under consideration and requested a copy of his pathology report.

The case record contains medical evidence from Dr. Francis D. Cianciulli, an attending internist, who noted progressive chronic obstructive pulmonary disease with asbestos exposure

and recommended pulmonary function studies. In a December 5, 2001 report, he found that pulmonary testing revealed an element of hyperinflation suggestive of emphysema.[1] The Office referred appellant for examination to Dr. Steven Goldberg, Board-certified in pulmonary disease. In a February 3, 2003 report, he noted that appellant had a significant occupational history of asbestos exposure and a long-standing history of asthma, with a prior thoracotomy in 1997 for a solitary pulmonary nodule. Dr. Goldberg noted changes involving the left pleura which were suggestive of asbestos exposure. He obtained a pulmonary function study on January 15, 2003 which revealed a moderate obstructive ventilatory defect and a significant response to bronchodilator therapy. Appellant's diffusing capacity, arterial blood gas analysis and muscle pressures were reported as normal. Dr. Goldberg described the recent testing as essentially unchanged from prior studies obtained in November 2001. In February 24, 2003 report, Dr. Goldberg stated that a computerized tomography (CT) scan documented the presence of pleural plaques consistent with asbestos exposure and asbestos-related pleural disease. He noted that a 2.5 milliliter nodule was detected in the right upper lobe and recommended a follow-up examination.

On April 11, 2003 appellant submitted a February 20, 1997 pathology report from Dr. I. Donald Stuard, a Board-certified pathologist, who noted that a specimen was obtained from a nodule in appellant's left upper lobe which revealed a benign nodule of organized pneumonia with chronic inflammation and mild pulmonary anthracosis.

On April 21, 2003 an Office medical adviser reviewed the record and stated that appellant had obstructive lung disease with no spirometric evidence or a restrictive component which would be attributable to asbestosis. He noted the pulmonary nodule was from anthracosis which was not the result of asbestos exposure but exposure to coal dust or carbon monoxide, as from cigarettes or car exhaust. He stated that appellant had asbestos-related pleural plaques but that Dr. Goldberg did not find any impairment due to asbestosis.

By decision dated June 9, 2003, the Office denied appellant's schedule award claim, noting that Dr. Goldberg did not find any impairment of the lungs due to asbestosis.

Appellant, through counsel, requested a review of the written record before an Office hearing representative. In a February 24, 2004 decision, the Office hearing representative set aside the June 9, 2003 decision and remanded the case for further medical development. She directed that the Office obtain an impairment rating from Dr. Goldberg.

By letter dated April 12, 2004, the Office inquired as to whether Dr. Goldberg could make any impairment rating based on his evaluation of appellant and the pulmonary function studies. The record reflects that the Office was unable to obtain an opinion from Dr. Goldberg.

The Office prepared a statement of accepted facts and referred appellant, together with the medical evidence of record, for examination by Dr. Edward Schulman, Board-certified in pulmonary disease. The Office noted that it had accepted appellant's claim for pleural plaques and inquired as to whether he sustained any permanent impairment of the lungs.

[1] The record reflects that appellant has a 32-pack-year smoking history, which stopped in 1987.

Dr. Schulman examined appellant on June 16, 2004 and provided an undated medical report. He reviewed appellant's history of asthma since childhood, with multiple exacerbations requiring hospitalization, and his history of asbestos exposure in his employment as an electrician. Dr. Schulman reviewed the pulmonary function studies of January 15, 2003, which he noted showed severe obstructive airways disease. He stated that the CT scan provided evidence of pleural plaques consistent with asbestos exposure, however, no mention was made of interstitial disease consistent with asbestosis. Dr. Schulman reviewed the 1997 pathology report and noted that it showed moderate pan lobular emphysema, mild pulmonary antracosis, chronic inflammation and focal nodular organizing pneumonia with no mention of interstitial fibrosis. He listed findings on physical examination of appellant. He stated:

> "This patient has a long history of asthma and pulmonary function tests consistent with severe obstruction. Interestingly, the diffusion capacity is minimally affected. Though this is usually consistent more with a nonemphysematous pattern. I do note that his lung biopsy was consistent with elements of panlobular emphysema. The patient's CT scan shows clear evidence of pleural plaques, but no mention on the CT scan or on biopsy of interstitial fibrosis and asbestosis. The patient's physical examination does not display the typical crackles of asbestosis. He clearly needs more evaluation for allergic disease, particularly with respect to his allergies and asthma which, in my opinion, could be better controlled."

Dr. Schulman responded that the accepted pleural plaques did not play a role in appellant's dyspnea, which was more likely due to the history of cigarette smoking, allergies and suboptimal control of asthma. He stated that appellant did not have any permanent impairment as a result of his asbestos exposure. Dr. Schulman stated that asbestosis caused restrictive disease and not obstruction and that he could not account for appellant's dyspnea on the basis of asbestos-related lung disease.

By decision dated July 23, 2004, the Office denied appellant's claim for a schedule award, finding that the weight of medical opinion was represented by Dr. Schulman's report.

Appellant, through counsel, requested a review of the written record by an Office hearing representative. In a May 9, 2005 decision, the Office hearing representative affirmed the July 23, 2004 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulation,[3] 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

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment*, have been adopted under the implementing regulations as the appropriate standard for evaluating claims of schedule losses.[4] With regard to decisions made after February 1, 2001, Office procedures direct the use of the fifth edition of the A.M.A. *Guides.*[5]

ANALYSIS

The Office accepted that appellant was exposed to asbestos during his federal employment and that he sustained pleural plaques, as documented on CT scan of the lungs. Appellant contends that he sustained permanent impairment and is entitled to a schedule award for loss of use of his lungs based on the accepted condition. The Board finds, however, that the weight of medical opinion does not establish that the accepted pleural plaques have resulted in any impairment to appellant's lungs.

Dr. Schulman examined appellant and addressed the symptoms of dyspnea. Based on his review of appellant's medical records and history, he attributed this condition to severe chronic obstructive disease of the lungs which was related to appellant's history of cigarette smoking, allergies and suboptimal control of asthma. Dr. Schulman reviewed the diagnostic studies of record and noted that the pathology report and CT scan report made no mention of any interstitial lung disease or fibrosis, which would have been consistent with the accepted history of asbestos exposure. He noted that appellant's physical examination was negative for respiratory crackles typical of asbestosis and that the accepted pleural plaques did not cause or contribute to any impairment to the lungs. Dr. Schulman distinguished appellant's obstructive disease process from restrictive lung disease which would be found with asbestosis. The Board finds that the report of Dr. Schulman is based on a complete and accurate factual and medical history. The physician provided rationale for his conclusion that appellant's accepted pleural plaques did not result in permanent impairment to appellant's lungs.

The medical reports of Dr. Goldberg similarly noted that appellant's pulmonary function studies demonstrated a moderate obstructive ventilatory defect. He addressed appellant's history of asthma and upper respiratory infections, stating that dust, cold air, passive cigarette smoking exposure and perfumes appeared to provoke appellant's symptoms. Dr. Goldberg described appellant's exertional dyspnea as a reflection of his asthmatic respiratory condition and noted the reversible bronchodilator component for which he recommended continuing medication. Dr. Goldberg stated that pleural plaques were present upon diagnostic testing, which he described as consistent with appellant's history of asbestos exposure.

On appeal, appellant contends that Dr. Schulman's report is inconsistent with the facts and not based on the evidence of record. The medical evidence, as noted, does not support these contentions. Not all medical conditions accepted by the Office result in permanent impairment to a schedule member. With respect to the accepted condition of pleural plaques, this fact is addressed at Chapter 5 of the A.M.A. *Guides* at page 88, which provides that respiratory

[4] *See id.*

[5] *See* FECA Bulletin No. 01-05 (issued January 29, 2001).

impairments that produce a decrement of lung function and affect the ability to perform activities of daily living are assigned an impairment rating. It is noted that anatomical changes, such as a circumscribed pleural plaque, represent an abnormality in the anatomic structure of the lung. However, if there is no abnormality in lung function, the individual does not have any respiratory impairment. The medical evidence from the physicians of record does not demonstrate that appellant's accepted pleural plaques have caused or contributed to any permanent impairment of his lungs.[6]

CONCLUSION

The Board finds that appellant has not established entitlement to a schedule award as the medical evidence does not support permanent impairment to his lungs caused by his accepted pleural plaques.

ORDER

IT IS HEREBY ORDERED THAT the May 9, 2005 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: February 3, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[6] As appellant has not demonstrated any permanent impairment of the lungs caused by his accepted occupational exposure, the claim is not ripe for consideration of any preexisting impairment. *See, e.g., Michael C. Milner*, 53 ECAB 446 (2002).