



Appellant's attending physician, Dr. Cary Fechter, provided a report dated April 6, 2004, providing results on pulmonary testing and indicating that he had a Class 4 lung impairment of greater than 50 percent. The Office referred appellant to Dr. Robert Thomas, a pulmonary specialist, for a second opinion examination. In a report dated October 20, 2004, Dr. Thomas provided results on examination and pulmonary testing. He opined that appellant had a Class 3 (between 26 and 50 percent) lung impairment based on pulmonary test results. An Office medical adviser, in a report dated November 17, 2004, opined that a 30 percent impairment to the lungs was reasonable.

The Office found that a conflict in the medical evidence existed and the case was referred to Dr. Steven Sahn for a referee examination. In a report dated January 20, 2005, Dr. Sahn provided pulmonary results and diagnosed chronic obstructive pulmonary disease. The Office requested that he provide an opinion as to the degree of impairment; he provided a brief report dated February 7, 2005. Dr. Sahn stated that appellant had minimal restriction (four percent based on lung volumes) due to pleural fibrosis secondary to asbestos exposure, with a major impairment likely due to smoking. He did not provide further explanation.

Appellant was then referred to Dr. John Mitchell, a Board-certified pulmonary specialist, for a referee examination. In a report dated April 22, 2005, Dr. Mitchell provided a history and results on examination. He noted FEV<sub>1</sub> (forced expiratory volume in the first second) at 36 percent of predicted (with increase to 42 percent with a bronchodilator) and FVC (forced vital capacity) at 52 percent of predicted. Dr. Mitchell opined that appellant had Class 3 impairment, an impairment of 26 to 50 percent.

An Office medical adviser indicated, in a May 11, 2005 report, that a 30 percent impairment would be reasonable based on Dr. Mitchell's findings. He also stated that the date of maximum improvement was April 22, 2005 the date of Dr. Mitchell's report.

In a brief report dated May 24, 2005, Dr. Mitchell noted that Dco (diffusing capacity for carbon monoxide) testing was 35 percent of predicted, which would be Class 4 impairment, but there was a correction for alveolar volume. Based on the FEV<sub>1</sub> results, Dr. Mitchell found that appellant had Class 3 impairment. He reiterated his opinion in a brief report dated June 15, 2005.

By decision dated May 15, 2006, the Office issued a schedule award for 99.84 weeks of compensation commencing October 20, 2004. The decision stated that the impairment was 64 percent of the lungs.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act<sup>1</sup> and its implementing regulation<sup>2</sup> set 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

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<sup>1</sup> 5 U.S.C. § 8107.

<sup>2</sup> 20 C.F.R. § 10.404 (1999).

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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

Office procedures state that impairment to the lungs should be evaluated in accordance with the A.M.A., *Guides*, insofar as possible, noting that the percentage of whole man impairment will 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 will be based on the loss of use of both lungs.<sup>3</sup>

### ANALYSIS

The Office found a conflict between the attending physician, Dr. Fechter, a second opinion examiner, and Dr. Thomas, with respect to the degree of lung impairment.<sup>4</sup> The initial physician chosen as a referee examiner, Dr. Sahn, did not provide an opinion that addressed the issue. The Office then selected Dr. Mitchell who provided an April 22, 2005 report with pulmonary test results. Under the A.M.A., *Guides* lung impairments using pulmonary function tests are classified under Table 5-12.<sup>5</sup> Class 3 impairment (26 to 50 percent) is for FVC of between 51 to 59 percent, or FEV<sub>1</sub> of 41 to 59 percent of predicted.<sup>6</sup> Dr. Mitchell found an FVC at 52 percent of predicted and an FEV<sub>1</sub> of 42 percent of predicted.<sup>7</sup> He noted a Dco would be a Class 4 category (greater than 51 percent impairment), but explained there was a correction for alveolar volume and, therefore, Class 3 was more appropriate.

The referee examiner provided a reasoned medical opinion indicating that appellant had a Class 3 impairment of between 26 and 50 percent. The Office indicated that appellant was entitled to the maximum of 50 percent for Class 3 impairment. Since the maximum for lung impairment is 312 weeks of compensation, appellant was entitled to 156 weeks of compensation.

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<sup>3</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a)(1) (August 2002).

<sup>4</sup> The Act provides: If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination. 5 U.S.C. § 8123(a). The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

<sup>5</sup> A.M.A., *Guides* 107, Table 5-12.

<sup>6</sup> *Id.*

<sup>7</sup> The A.M.A., *Guides* indicate a bronchodialator may be used to determine FVC and FEV<sub>1</sub> impairments. A.M.A., *Guides* 93.

The record indicated that appellant had received 56.16 weeks in his prior schedule award dated September 15, 1997. Appellant was, therefore, entitled to 99.84 weeks of compensation.

On appeal, appellant noted that the Office stated, in the May 15, 2006 decision, that the impairment was a 64 percent impairment of the lungs. This apparently represented the impairment percentage to one lung (156 weeks), which is noted in the regulations.<sup>8</sup> It is not clear why the Office used this number, since Office procedures indicate the impairment is a percentage of 312 weeks. The number of weeks of compensation, however, was correct. Appellant had a 50 percent impairment to the lungs, had received 18 percent, therefore, was entitled to an additional 32 percent or 99.84 weeks.

A remaining issue, however, is the date of maximum medical improvement. It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from residuals of the employment injury.<sup>9</sup> The determination of maximum improvement depends primarily on the medical evidence.<sup>10</sup> The award in this case ran from October 20, 2004 which was the date of examination by the second opinion physician, Dr. Thomas. The referee examination was dated April 22, 2005 and the Office medical adviser opined that this was the date of maximum improvement. The Office provided no explanation for October 20, 2004 as the date of maximum medical improvement. The case will be remanded to the Office to make a determination as to the proper period of the award and the resulting pay rate for compensation purposes. After such further development as the Office deems necessary, it should issue an appropriate decision.

### CONCLUSION

Appellant properly received an additional 99.84 weeks of compensation for a 50 percent impairment to the lungs. The case will be remanded for further development as to the period of the award.

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<sup>8</sup> 20 C.F.R. § 10.404 (a) provides a maximum of 156 weeks of compensation for loss of use of one lung.

<sup>9</sup> *Albert Valverde*, 36 ECAB 233, 237 (1984).

<sup>10</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 15, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: January 16, 2007  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board