United States Department of Labor
Employees' Compensation Appeals Board

H.N., Appellant	)	
and	)	**Docket No. 09-636**
	)	**Issued: September 30, 2009**
TENNESSEE VALLEY AUTHORITY, PARADISE FOSSIL PLANT, Drakesboro, KY, Employer	)	

Appearances:
Ronald K. Bruce, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 6, 2009 appellant, through his attorney, filed a timely appeal from an April 22, 2008 merit decision of the Office of Workers' Compensation Programs and a December 1, 2008 Office hearing representative's decision denying his claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

ISSUE

The issue is whether appellant has established that he is entitled to a schedule award for a permanent impairment of the lungs. On appeal his attorney contends that the Office failed to consider the diffusion capacity results of the September 19, 2008 pulmonary function study. The attorney further argues that the April 16, 2008 opinion of the Office medical adviser is not well reasoned.

FACTUAL HISTORY

On May 2, 2006 appellant, then a 74-year-old retired iron worker, filed an occupational disease claim alleging that he sustained pneumoconiosis and chronic obstructive disease due to factors of his federal employment. He related that he became aware of his disease on March 2, 2004. Appellant retired on May 23, 1984.

In a report dated March 27, 2004, Dr. Glen Baker, a Board-certified internist with a subspecialty in pulmonary disease, diagnosed occupational pneumoconiosis with probable pulmonary asbestosis. He performed a pulmonary function study (PFS) which revealed a forced vital capacity (FVC) of 89 percent of predicted prebronchodilator and 87 percent of predicted postbronchodilator. The study showed a forced expiratory volume in one second (FEV_1) of 79 percent of predicted prebronchodilator and 79 percent of predicted postbronchodilator. Citing the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5^{th} ed. 2001) (A.M.A., Guides), Dr. Baker found that appellant had a Class II pulmonary impairment based on the results of the PFS.[1]

On April 19, 2007 the Office referred appellant to Dr. H. Dale Haller, Jr., an internist, for a second opinion examination. In a report dated May 1, 2007, Dr. Haller related that he was unable to obtain acceptable PFS. He stated:

> "We tried repeatedly and could not get reproducible or even acceptable appearing flow volume loops with at least eight efforts. I talked with [appellant] about this and he states that he just cannot breath in or out any better and it causes him distress to try and do so.
>
> "I have reviewed the pulmonary functions done March 27, 2004 by Dr. Glen Baker's office. There are eight loops there and I would score none of these as acceptable by ATS [American Thoracic Society] criteria for interpretation or reproducibility. Therefore, I do not think that we have any valuable pulmonary function studies."

Dr. Haller expressed concern that appellant may have angina. In an addendum dated May 11, 2007, he reviewed a high density computerized tomography (CT) scan and diagnosed "interstitial changes, fibrotic in the bases bilaterally and some early probable bronchiectatic changes" constituent with asbestosis. Dr. Haller indicated that rating appellant's disability was difficult because of the lack of a valid PFS.

The Office accepted appellant's claim for coal workers' pneumoconiosis. On May 2, 2006 appellant filed a claim for a schedule award. An Office medical adviser reviewed the evidence and found that he was unable to calculate an impairment rating due to the lack of a valid PFS. He recommended against further testing until appellant was evaluated by a cardiologist.

[1] A.M.A., *Guides* 107, Table 5-12.

By decision dated August 1, 2007, the Office denied appellant's claim for a schedule award on the grounds that the evidence was insufficient to establish that he sustained a permanent impairment to a scheduled member due to his work injury. On August 9, 2007 appellant, through his attorney, requested an oral hearing. At the hearing, held on March 3, 2008, his attorney submitted a PFS performed on February 20, 2008 by Dr. Valentino Simpao, a pulmonologist.

In the February 20, 2008 PFS, Dr. Simpao measured FVC as 3.33 liters or 85 percent of predicted prebronchodilator and 3.18 liters or 81 percent of predicated post bronchodilator. He further measured FEV_1 as 2.21 liters prebronchodilator, or 74 percent of predicated, and 2.24 liters postbronchodilator, or 75 percent of predicted. Dr. Simpao found that appellant's effort was good and the data valid. He diagnosed a mild degree of obstructive airway disease.

By decision dated April 2, 2008, the hearing representative vacated the August 1, 2007 decision and remanded the case for an Office medical adviser to review the February 20, 2008 PFS.

On April 16, 2008 the Office medical adviser reviewed the February 20, 2008 PFS. He noted that the FVC was 3.33 liters or 85 percent of predicted and the FEV_1 was 2.21 liters or 74 percent of predicted. The Office medical adviser found these values were above the lower limit of normal for a 76-year-old male who was 170 centimeters tall according to Tables 5-2b and 5-4b on pages 95 and 97 of the A.M.A., *Guides*. Consequently, he found that appellant had no impairment pursuant to Table 5-2 on page 107 of the A.M.A., *Guides*.

By decision dated April 22, 2008, the Office denied appellant's claim for a schedule award on the grounds that the evidence did not establish that she had a permanent impairment of the lungs. On May 1, 2008 his attorney requested an oral hearing.

In a report dated June 12, 2008, Dr. Baker reviewed the February 20, 2008 PFS and found that an FEV_1 of 74 percent constituted a class 2 pulmonary impairment, or 10 to 25 percent of the whole person according to Table 5-12 on page 107 of the A.M.A., *Guides*.

A September 19, 2008 PFS performed for Dr. Baker measured appellant's FVC in liters as 3.06 prebronchodilator, or 81 percent of predicted, and 3.50 postbronchodilator, or 93 percent of predicted postbronchodilator. FEV_1 measured 2.20 liters prebronchodilator, or 76 percent of predicted and 2.34 postbronchodilator, or 81 percent of predicted. The diffusing capacity of carbon monoxide (DCLO) measured 14.7 or 55 percent of predicted. Dr. Baker found the PFS results valid and appellant's cooperation good. He diagnosed a mild obstructive defect by prebronchodilator study and noted that the diffusion study revealed a moderate impairment.

By decision dated December 1, 2008, the hearing representative affirmed the April 23, 2008 decision. He found that the September 19, 2008 revealed an FEV_1 more than the lower limit of normal and was thus insufficient to show that appellant had any ratable pulmonary impairment.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,[2] and its implementing federal regulations,[3] 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 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 for all claimants, the Office has adopted the A.M.A, *Guides* as the uniform standard applicable to all claimants.[4] Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.[5]

Chapter 5 of the fifth edition of the A.M.A., *Guides* provides that permanent impairment of the lungs is determined on the basis of pulmonary function tests, *i.e.*, the FVC and the one second FEV_1, the ratio between FEV_1 and FVC and Dco, or DLCO. The values for predicted and observed normal values for FEV_1, FVC and Dco are found in Tables 5-2a through 5-7b.[6] The A.M.A., *Guides* provides a table consisting of four classes of respiratory impairment based on a comparison of observed values for certain ventilatory function measures and their respective predicted values.[7] For Classes 2 through 4, the appropriate class of impairment is determined by whether the observed values fall alternatively within identified standards for FVC, FEV_1, Dco or maximum oxygen consumption (VO2Max). For each of the FVC, FEV_1 and Dco results, an observed result will be placed within Class 2, 3 or 4 if it falls within a specified percentage of the predicted value for the observed person.[8] For example, a person is within Class 2 impairment, equaling 10 to 25 percent impairment of the whole person, if the FVC, FEV_1 or Dco is above 60 percent of the predicted value and less than the lower limit of normal.[9] 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.[10]

ANALYSIS

The Office accepted appellant's claim for coal workers' pneumoconiosis. On May 2, 2006 appellant filed a claim for a schedule award. He submitted a March 27, 2004 PFS

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] *Id*. at § 10.404(a).

[5] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[6] A.M.A., *Guides* 95-100. The pulmonary function tables are based on gender, age and height.

[7] *Id*. at 107, Tables 5-12.

[8] The predicted normal values and the predicted lower limits of normal values for the FVC, FEV_1 and DLCO tests are delineated in Tables 5-2a through 5-7b.

[9] A.M.A., *Guides* 107, Table 5-12.

[10] *Id*. at 107.

performed by Dr. Baker. On May 1, 2007 Dr. Haller, an Office referral physician, found that the PFS he obtained on that date and Dr. Baker's March 27, 2004 PFS were both invalid as the loops were unacceptable according to ATS standards.

On February 20, 2008 appellant submitted a PFS performed by Dr. Simpao. Dr. Baker reviewed this study and found that it showed a Class II impairment as the FEV_1 was between 60 and 79 percent of predicted. An Office medical adviser found, however, that, as the results of the FEV_1 and FVC were above the lower limit of normal given appellant's age and height, he had no impairment.[11] Under Table 5-2 on page 107, the FEV_1 and FVC must be below the lower limit of normal for there to be a ratable impairment.

In a September 19, 2008 PFS, Dr. Baker measured appellant's FVC in liters as 3.06 prebronchodilator and 3.60 postbronchodilator. He further determined that the FEV_1 in liters was 2.20 prebronchodilator and 2.34 postbronchodilator. As noted by the hearing representative, these figures do not yield any impairment under the A.M.A., *Guides*.[12] The DCLO, however, measured 14.7 liters, or 55 percent of predicted. Under the A.M.A., *Guides* this would yield an impairment.[13] The Office did not refer the September 19, 2008 PFS to an Office medical adviser for review to determine whether it revealed a ratable pulmonary impairment. The case will be remanded for this purpose. Following this and any further development deemed necessary, the Office will issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

[11] *Id*. at 95, 97, 107, Tables 5-2b, 5-4b, 5-2.

[12] *Id*.

[13] *Id*. at 99, 107, Tables 5-6b, 5-12.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 1 and April 22, 2008 are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 30, 2009
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