United States Department of Labor
Employees' Compensation Appeals Board

G.W., Appellant	)	
	)	
and	)	**Docket No. 10-1**
	)	**Issued: July 2, 2010**
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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On September 30, 2009 appellant, through his representative, filed a timely appeal from the June 26, 2009 merit decision of the Office of Workers' Compensation Programs, which denied his claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant has a ratable lung impairment causally related to his employment-related coal workers' pneumoconiosis.

FACTUAL HISTORY

On the last appeal,[1] the Board found that clarification was warranted from the impartial medical specialist, Dr. Robert W. Powell, a Board-certified specialist in pulmonary disease. The Office selected Dr. Powell under 5 U.S.C. § 8123(a) to resolve a conflict in medical opinion.[2]

Appellant's attending pulmonologist, Dr. William C. Houser, had diagnosed pneumoconiosis, category 1/0, due to occupational mixed dust exposure. He reported a moderately reduced forced vital capacity, and taking into account appellant's previous stroke, he concluded that the restrictive impairment was due to pneumoconiosis. The Office referral pulmonologist, Dr. Kenneth Anderson, had reported a chest x-ray abnormality of 1/0 profusion secondary to exposure in federal employment. However, he noted that appellant was unable to complete pulmonary function tests due to inactivity from a previous stroke. Dr. Anderson found that the early pneumoconiosis suggested by chest x-ray should not be physically disabling and that appellant's main pulmonary function test abnormality was related to his previous cerebrovascular accident (CVA).

On September 21, 2005 an Office hearing representative found that appellant met his burden to establish a medical condition causally related to factors of his federal employment. However, he found a conflict between Dr. Houser and Dr. Anderson on the issue of impairment resulting from the work-related pneumoconiosis.

The Office referred appellant to Dr. Powell to resolve the issue. Dr. Powell reported that x-rays showed no pleural abnormalities that would suggest pneumoconiosis. Further, he reported that appellant's pulmonary functions were normal. He concluded that appellant had no impairment due to pneumoconiosis.

The Board remanded the case for a supplemental report from Dr. Powell because the Board could not obtain the predicted values he reported. The Board found that Dr. Powell should explain how the predicted values he reported were consistent with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). If he could not, then the Board found he should apply the criteria of the A.M.A., *Guides* to evaluate any impairment demonstrated by the pulmonary function studies he obtained on December 21, 2005. The Board added: "He must then explain whether any such impairment is causally related to appellant's accepted employment injury."

On remand, the Office asked Dr. Powell for additional information, but he did not respond. It therefore referred appellant, together with the case record and a statement of accepted facts, to Dr. Manoj H. Majmudar, a Board-certified pulmonologist, for an impartial medical evaluation.

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[1] Docket No. 08-319 (issued May 12, 2008).

[2] In 2002 appellant, then a 79-year-old auxiliary operator, filed a claim alleging that he developed pneumoconiosis as a result of his federal employment. The Office accepted his claim for bilateral pneumoconiosis, which it later updated to coal workers' pneumoconiosis.

On August 28, 2008 Dr. Majmudar related appellant's history and findings on physical examination. But appellant was unable to perform the pulmonary function test, which Dr. Majmudar judged to be of very poor quality: "I don't think that we can interpret this PFT very well." Dr. Majmudar added that the chest x-ray was also very poor quality because appellant was unable to stand up. He assessed the following:

> "[An] 85-year-old gentleman who has a CVA and is totally disabled because of the CVA came for a cough and shortness of breath. His cough and shortness of breath is most likely from his previous history of smoking and mild chronic obstructive pulmonary disease. There is no significant clinical evidence of pneumoconiosis. Most of the disability in this patient is related to his underlying CVA."

On September 19, 2008 Dr. Majmudar added that appellant's impairment was Class 4 under the A.M.A. *Guides* and that appellant was 51 to 100 percent totally disabled.

An Office medical adviser noted that Dr. Majmudar could not obtain meaningful pulmonary tests or an adequate x-ray due to appellant's limitations from a stroke. The medical adviser noted that Dr. Majmudar did not feel that appellant had a work-related pulmonary disorder. "And, in any event, I doubt we will be able to ever obtain truly valid pulmonary function studies for this 85-year-old gentleman who is totally disabled from his CVA."

In a decision dated November 7, 2008, the Office denied appellant's claim for a schedule award. It found that the weight of the medical evidence rested with Dr. Majmudar and established no ratable impairment. On June 26, 2009 an Office hearing representative affirmed. The hearing representative found that the evidence was insufficient to establish appellant's entitlement to a schedule award.

On appeal, appellant's representative argues that the Office accepted pneumoconiosis, so its existence is not an issue. He argues that Dr. Majmudar did not address the issue he was selected to address, namely, impairment due to the accepted pneumoconiosis. Further, appellant's representative argues that Dr. Majmudar's opinion on the existence of pneumoconiosis is at odds with appellant's treating physician, with the Office referral physician, and with Dr. Powell, the initially selected impartial medical specialist. He argues that Dr. Majmudar's opinion is not well rationalized or based on accepted facts.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[3] authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[4]

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report. When the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative, or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question.[5] Unless this procedure is carried out by the Office, the intent of section 8123(a) will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.[6]

ANALYSIS

The Office referred appellant to Dr. Majmudar, a Board-certified pulmonologist, to resolve the conflict over the extent of any lung impairment resulting from appellant's work-related pneumoconiosis, but he was unable to obtain a meaningful pulmonary function test. In a follow-up report, he stated that appellant's impairment was Class 4, representing a 51 to 100 percent impairment of the whole person, but he did not explain how he was able to rate this impairment without a useable pulmonary function test.

The Board finds that Dr. Majmudar's opinion requires clarification. He has not resolved the extent of any lung impairment resulting from appellant's work-related pneumoconiosis. The Board will remand the case for a supplemental report and a well-reasoned opinion from Dr. Majmudar. If, as it appears, there is little likelihood of obtaining a truly valid pulmonary function study at this point, Dr. Majmudar should review the pulmonary function studies previously obtained and select one as the best representation of appellant's pulmonary function. He must give reasons for his choice. Using the selected study, he should determine the extent of any lung impairment under the proper edition of the A.M.A., *Guides*. He must explain whether any impairment demonstrated by this study is causally related to appellant's work-related pneumoconiosis.

The Board will set aside the Office's June 26, 2009 decision and remand the case for further development of the medical evidence. After such further development as may be necessary, the Office shall issue an appropriate final decision on appellant's entitlement to a schedule award.

On appeal, appellant's representative argues that the Office accepted pneumoconiosis and that the conflict the Office selected Dr. Majmudar to resolve was not whether appellant has this disease but whether appellant has any ratable lung impairment attributable to the accepted pneumoconiosis. Dr. Houser opined in the affirmative, Dr. Anderson in the negative, attributing the main pulmonary function test abnormality to the CVA. Dr. Majmudar must resolve this conflict with sound medical reasoning. In doing so, he must base his opinion on the accepted

[5] *See Nathan L. Harrell*, 41 ECAB 402 (1990).

[6] *Harold Travis*, 30 ECAB 1071 (1979).

facts of the case, which means accepting that appellant developed an employment-related bilateral or coal workers' pneumoconiosis.

CONCLUSION

The Board finds that this case is not in posture for decision. Further development of the medical evidence is warranted.

ORDER

IT IS HEREBY ORDERED THAT the June 26, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: July 2, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board