United States Department of Labor
Employees' Compensation Appeals Board

H.B., Appellant	)	
and	)	**Docket No. 09-2240**
	)	**Issued: June 18, 2010**
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Hebron, OH, Employer	)	

Appearances:
Alan J. Shapiro, 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 8, 2009 appellant filed a timely appeal from the August 7, 2009 merit decision of the Office of Workers' Compensation Programs 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 merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he is entitled to a schedule award for permanent impairment of his lungs.

FACTUAL HISTORY

On April 17, 2008 appellant, then a 53-year-old mine inspector, filed an occupational disease claim alleging that he sustained a lung condition due to exposure to mine dust at work. The employing establishment submitted documents indicating that appellant began working for the employing establishment in July 1992 and that his job required him to inspect surface and

underground mining operations. Appellant was exposed to silica dust from the drilling and blasting of different types of rock for about 18 to 24 hours per week.[1]

Appellant submitted copies of medical evaluations and diagnostic testing that the employing establishment obtained between 1992 and 2007. He also submitted October 15, 2004, November 19, December 3 and 13, 2007 reports of Dr. Eric Pacht, an attending Board-certified pulmonologist, who documented a worsening of appellant's silicosis on computerized tomography (CT) scan and reported that his pulmonary function tests had remained quite well preserved, with slight loss of residual volume and diffusing capacity. Results from a CT scan on April 4, 2008 were considered to be consistent with appellant's history of silicosis and showed worsening of the disease since the study performed three years prior.

In order to confirm the medical connection between the diagnosed condition and appellant's employment exposure, the Office referred him to a second opinion examination with Dr. William M. Chinn, a Board-certified pulmonologist. In a September 5, 2008 report, Dr. Chinn provided a detailed discussion of appellant's work history and job duties, the development of his condition and the medical treatment he received. He reported the findings of pulmonary function testing obtained on September 5, 2008 which consisted of spirometry, lung volume determinations and diffusing capacity testing. The spirometry was performed before and after administration of aerosol bronchodilator. Dr. Chinn indicated that the baseline vital capacity result was low normal and that expiratory flow rates were within normal limits. There was mild reduction in lung volumes especially with respect to residual volume and diffusing capacity was normal. Dr. Chinn stated that there was no significant change in expiratory flow postbronchodilator. He indicated that there appeared to be a mild restrictive ventilatory defect present as manifested primarily by reduced lung volume determinations. Spirometry and diffusing capacity were essentially normal and there was no evidence of obstructive disease.

In a September 19, 2008 supplemental report, Dr. Chinn indicated that an August 29, 2008 chest x-ray suggested "prominent interstitial markings in both upper lungs with large lung parenchymal and hilar masses in the upper lobes." He noted that the findings were "consistent with silicosis and/or workers' pneumoconiosis with progressive massive fibrosis" and were also consistent with previous x-rays obtained on August 23, 2004 and the CT scan performed on April 4, 2008.

In a September 22, 2008 report, Dr. Chinn confirmed that he reviewed the medical records of Dr. Pacht and the diagnostic test results. He indicated that his own physical examination of appellant was essentially unremarkable and within normal limits, with no findings in the lungs and a normal oxygen saturation of 96 percent. Dr. Chinn stated that the findings of August 29, 2008 x-ray testing were consistent with the diagnosis of silicosis and/or workers' pneumoconiosis with progressive massive fibrosis. He explained that the pulmonary function studies performed on September 5, 2008 were also essentially normal except for the finding of a reduced residual volume which was only moderately reduced at 49 percent of the predicted value. The diffusing capacity and forced vital capacity (FVC) were normal but

[1] Appellant had been exposed to mine dust working as a privately-employed coal miner in West Virginia for approximately 17 years prior to 1992. He indicated that he smoked about a pack of cigarettes per week between age 16 and 30 but that he had not smoked since then.

borderline low. Dr. Chinn indicated that the testing was suggestive of a borderline restrictive ventilatory defect and consistent with the studies obtained by Dr. Pacht. He found that there was no evidence of obstructive disease. Dr. Chinn diagnosed appellant with pneumoconiosis silicosis which he posited had progressed from a simple to complicated state with areas of progressive massive fibrosis in both upper lobes. He explained that CT scan evidence between 2004 and 2008 documented this progression. Dr. Chinn opined that this significant progression was due to ongoing exposures to respirable silica elements in appellant's federal work environment as opposed to the natural progression of his preexisting disease. He concluded that, based solely on pulmonary function results and performance, appellant fell under Class I of Table 5-12 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), which correlated to a zero percent impairment of the whole person.

On October 31, 2008 the Office referred the case to Dr. Daniel D. Zimmerman, a Board-certified internist, serving as an Office medical adviser. On November 8, 2008 Dr. Zimmerman indicated that the September 5, 2008 pulmonary function study showed excellent mechanics of breathing and excellent diffusing capacity which, using Table 5-12 of A.M.A., *Guides*, placed appellant in Class I. Dr. Zimmerman stated that Class I from Table 5-12 caused a zero percent whole person impairment rating. A zero percent whole person impairment rating for purposes of schedule award processing meant that appellant had a zero percent impairment of his right lung and a zero percent impairment of his left lung. Dr. Zimmerman noted that it did not appear that there was a review of the chest x-ray by a 'B' reader, but he opined that the excellence of appellant's pulmonary function study would preclude a schedule award for either lung regardless. On November 14, 2008 the Office requested a copy of the 'B' reader certificate for Dr. Lawrence Repsher, the Board-certified pulmonologist, who read the study. A copy of the certificate authorizing Dr. Repsher as a "B' reader was found to already be on file.

In a December 29, 2008 decision, the Office accepted appellant's claim for the condition of coal workers' pneumoconiosis. In another December 29, 2008 decision, it denied appellant's entitlement to a schedule award. The Office afforded the weight of medical evidence to the opinions of Dr. Chinn and Dr. Zimmerman who found that appellant's condition was Class I under Table 5-12 of the A.M.A., *Guides* and therefore constituted a zero percent impairment. It indicated that appellant did not submit medical evidence showing that he was entitled to a schedule award for permanent impairment of his lungs.

Appellant requested a hearing before an Office hearing representative. At the May 21, 2009 hearing, he discussed the history of his exposure to mine dust. Appellant's attorney asserted that Dr. Pacht should have been allowed to comment on Dr. Chinn's and Dr. Zimmerman's findings. The Office hearing representative agreed that copies of Dr. Chinn's and Dr. Zimmerman's reports would be sent to appellant's attorney and that the record would be left open for 30 days to provide the opportunity to submit additional evidence from Dr. Pacht concerning the impairment issue.

In an August 7, 2009 decision, the Office hearing representative affirmed the Office's December 29, 2008 decision. She indicated that appellant had not submitted any additional medical evidence within the allotted time.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing 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 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.[4]

Chapter 5 of the A.M.A., *Guides* addresses the framework to be used for assessing respiratory impairments[5] 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 the FVC, forced expiratory volume in one second (FEV_1) or diffusing capacity of carbon monoxide (Dco), measured by their respective predicted values. If one of the three ventilatory function measures, FVC, FEV_1 or Dco or the ratio of FEV_1 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.[6]

ANALYSIS

In this case, the Office accepted appellant's claim for an occupational disease claim for the condition of coal workers' pneumoconiosis. Appellant claimed that he was entitled to a schedule award for permanent impairment of his lungs.

The Board finds that the Office has appropriately afforded the weight of medical evidence to Dr. Chinn, a Board-certified pulmonologist serving as an office referral physician, and Dr. Zimmerman, a Board-certified internist serving as an Office medical adviser. Dr. Chinn carried out detailed studies on September 5, 2008 including spirometry, lung volume determinations and diffusing capacity testing. Dr. Chinn and Dr. Zimmerman both properly determined that the findings of these studies established that appellant's lung condition was considered to be Class I under Table 5-12 of the A.M.A., *Guides*.[7] Both physicians correctly opined that Class I is equivalent to a zero percent rating under the A.M.A., *Guides.* Dr. Chinn

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] *Id*.

[5] A.M.A., *Guides* 87-115.

[6] *Id.* at Table 5-12 at 107; *see Boyd Haupt*, 52 ECAB 326 (2001).

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

further confirmed that the test results completed as part of the second opinion evaluation were consistent with those of appellant's attending Board-certified pulmonologist, Dr. Pacht.

In his reports dated between 2004 and 2007, Dr. Pacht did not address the extent of appellant's lung impairment or reference the A.M.A., *Guides*. The Board further notes that his reports do not otherwise contain findings showing that appellant is entitled to a schedule award for the lungs. Appellant was afforded the opportunity to submit additional medical evidence in support of his claim following his hearing before an Office hearing representative, but no further information was received for consideration. He has not submitted medical evidence countering or disputing the findings and impairment determinations of Dr. Chinn and Zimmerman. As the reports of Dr. Chinn and Dr. Zimmerman provided the only evaluations which conformed with the A.M.A., *Guides*, they constitute the weight of the medical evidence.[8] For these reasons, appellant has not shown that he is entitled to a schedule award for permanent impairment of his lungs.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he is entitled to a schedule award for permanent impairment of his lungs.

[8] *See Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

ORDER

IT IS HEREBY ORDERED THAT the August 7, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 18, 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