



February 15, 2012, OWCP granted a schedule award for 17 percent impairment of the lungs (pulmonary system). The award covered a period of 26.52 weeks from December 5, 2008 through June 8, 2009.<sup>3</sup> OWCP based its decision on the district medical adviser's (DMA) August 20, 2010 report, which found 17 percent pulmonary impairment under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*(A.M.A., *Guides*) (2008).<sup>4</sup>

In a decision dated September 28, 2012, the Branch of Hearings & Review set aside the February 15, 2012 schedule award. OWCP had incorrectly calculated the 17 percent award based on impairment of a single lung (156 weeks) rather than both lungs (312 weeks).<sup>5</sup> Additionally, appellant submitted a March 20, 2012 pulmonary function study (PFS) and a May 22, 2012 impairment rating from Dr. Stephen R. Gorman, an osteopath. Relying on appellant's latest PFS values, Dr. Gorman found 32 percent whole person impairment under Table 5-4, A.M.A., *Guides* 88 (6<sup>th</sup> ed. 2008). In light of OWCP's miscalculation and the recent medical evidence submitted, the hearing representative remanded the case for referral to the DMA.

In a report dated November 29, 2012, another DMA, Dr. Morley Slutsky, found 17 percent whole person impairment under Table 5-4, A.M.A., *Guides* 88 (6<sup>th</sup> ed. 2008). He explained that the latest spirometry values (FEV<sub>1</sub> and FVC) represented a class 2 pulmonary dysfunction with a default (c) whole person rating of 17 percent. The DMA then converted his 17 percent whole person impairment to a 26.15 percent (organ/lung) respiratory impairment.

By decision dated January 14, 2013, OWCP found that appellant had 26 percent respiratory impairment based on Dr. Slutsky's (DMA) November 29, 2012 rating. The decision noted that the award was for both lungs and that appellant had previously been compensated \$34,449.48 for impairment of one lung. OWCP indicated that the current award would be adjusted to reflect the previous schedule award.

On or about January 15, 2013 OWCP disbursed payment of \$22,729.98. It calculated that appellant was entitled to receive \$57,179.46 for the period March 20 to December 28, 2012 (40.56 weeks).<sup>6</sup> That figure was reduced by the prior payment of \$34,449.48, leaving a balance owed of \$22,729.98.

On appeal, counsel argues that OWCP once again improperly based its schedule award on impairment of a single lung (156 weeks) rather than both lungs (312 weeks). Appellant's counsel also challenges OWCP's reliance on Dr. Slutsky's (DMA) impairment rating instead of Dr. Gorman's higher rating.

---

<sup>3</sup> Appellant received a single payment of \$34,449.48.

<sup>4</sup> See Table 5-4, Pulmonary Dysfunction, A.M.A., *Guides* 88 (6<sup>th</sup> ed. 2008).

<sup>5</sup> Assuming the accuracy of the DMA's 17 percent impairment rating, appellant should have received 53.04 weeks' compensation (.17 x 312) rather than 26.52 weeks.

<sup>6</sup> OWCP paid appellant 13 percent impairment for each lung (20.28 weeks) based on the single lung rate of 156 weeks' compensation.

## LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.<sup>7</sup> FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.<sup>8</sup> Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).<sup>9</sup>

No schedule award is payable for a member, function or organ of the body that is not specified in FECA or in the implementing regulations.<sup>10</sup> The list of scheduled members includes the eye, arm, hand, fingers, leg, foot and toes.<sup>11</sup> Additionally, FECA specifically provides for compensation for loss of hearing and loss of vision.<sup>12</sup> By authority granted under FECA, the Secretary of Labor expanded the list of scheduled members to include the breast, kidney, larynx, lung, penis, testicle, tongue, ovary, uterus/cervix and vulva/vagina and skin.<sup>13</sup>

Impairment ratings for schedule awards include those conditions accepted by OWCP as employment related and any preexisting permanent impairment of the same member or function.<sup>14</sup> If the employment-related injury has affected any residual usefulness in whole or in part, a schedule award may be appropriate.<sup>15</sup> There are no provisions for apportionment under FECA.<sup>16</sup>

The procedure manual recognizes certain “special considerations” when evaluating schedule awards.<sup>17</sup> Impairment to the lungs falls within that category. Such impairment should

---

<sup>7</sup> 5 U.S.C. § 8107(c)(1).

<sup>8</sup> 20 C.F.R. § 10.404 (2012).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (February 2013); *see* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

<sup>10</sup> *W.C.*, 59 ECAB 372, 374-75 (2008); *Anna V. Burke*, 57 ECAB 521, 523-24 (2006).

<sup>11</sup> 5 U.S.C. § 8107(c).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at § 8107(c)(22); 20 C.F.R. § 10.404(b).

<sup>14</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.5d (February 2013).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Supra* note 14 at Chapter 2.808.5(c)(1).

be evaluated in accordance with the A.M.A., *Guides* insofar as possible. The procedure manual specifies 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>18</sup>

### ANALYSIS

Both Dr. Slutsky (DMA) and Dr. Gorman rated appellant’s pulmonary dysfunction under Table 5-4, A.M.A., *Guides* 88 (6<sup>th</sup> ed. 2008). Both physicians relied on appellant’s latest PFS dated March 20, 2012. The difference between Dr. Slutsky’s 17 percent whole person impairment rating (class 2, grade c) and Dr. Gorman’s 32 percent whole person rating (class 3, grade c) is that the DMA relied on the postbronchodilator spirometry results and Dr. Gorman relied on the prebronchodilator results.

The DMA explained that the postbronchodilator values reflect the final permanent respiratory impairment after optimal therapy and that ratings under the A.M.A., *Guides* are performed only after optimal therapy. He cited section 5.6(b), A.M.A., *Guides* 89 (6<sup>th</sup> ed. 2008) as justification for his reliance on the March 20, 2012 postbronchodilator values. However, this section pertains to the evaluation of asthma under Table 5-5, A.M.A., *Guides* 90 (6<sup>th</sup> ed. 2008). While Table 5-5 (Asthma) clearly references postbronchodilator values, Table 5-4 (Pulmonary Dysfunction) does not.

Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.<sup>19</sup> Accordingly, the case shall be remanded for clarification as to why appellant’s postbronchodilator values are purportedly a better indicator of pulmonary dysfunction under Table 5-4, A.M.A., *Guides* 88 (6<sup>th</sup> ed. 2008).

The Board also finds that OWCP improperly calculated appellant’s schedule award based on loss of function of one lung (156 weeks).<sup>20</sup> Moreover, OWCP should have based the award on the calculated “whole person” impairment rating under Table 5-4, A.M.A., *Guides* 88 (6<sup>th</sup> ed. 2008). The DMA’s conversion from 17 percent whole person impairment to 26 percent “organ” impairment was unwarranted. The case will be remanded for further development. After OWCP has developed the case record to the extent it deems necessary, a *de novo* decision shall be issued.

### CONCLUSION

The case is not in posture for decision.

---

<sup>18</sup>*Id.*

<sup>19</sup>*Richard F. Williams*, 55 ECAB 343, 346 (2004).

<sup>20</sup> 5 U.S.C. § 8107(c)(22); 20 C.F.R. § 10.404(b).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 14, 2013 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: September 13, 2013  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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