

**United States Department of Labor
Employees' Compensation Appeals Board**

M.H., Appellant

and

DEPARTMENT OF THE NAVY, PUGET
SOUND NAVAL SHIPYARD, Bremerton, WA,
Employer

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**Docket No. 14-13
Issued: April 2, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 8, 2013 appellant filed a timely appeal from a July 24, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 has more than an 18 percent permanent impairment of the lungs.

FACTUAL HISTORY

On January 10, 2013 appellant, then a 70-year-old former insulator, filed an occupational disease claim (Form CA-2) alleging a pulmonary condition causally related to asbestos exposure in his federal employment. He had previously filed a claim in October 1993 for a respiratory condition due to chemical exposure. The claim was accepted for aggravation of preexisting

¹ 5 U.S.C. § 8101 *et seq.*

asthma and was before the Board on a prior appeal.² By decision dated April 17, 2013, the Board noted that OWCP had issued a decision dated August 15, 2008 for an 18 percent impairment to the lungs based on the accepted asthma condition. The Board affirmed a September 10, 2012 OWCP decision finding that appellant had not established entitlement to an increased schedule award.

On January 29, 2013 OWCP accepted the current claim for asbestos-related pleural thickening. It prepared a statement of accepted facts and referred appellant to Dr. Robert Cox, a Board-certified pulmonologist. In a report dated May 7, 2013, Dr. Cox provided a history, results on examination and review of medical records. He noted the results on complete pulmonary function tests. With respect to permanent impairment, Dr. Cox found that appellant had a class 1 impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (sixth edition). He advised that appellant's forced vital capacity (FVC) was 78 percent, and with intermittent shortness of breath and constant physical findings, appellant was a grade E impairment or a 10 percent whole person.

In a report dated June 6, 2013, an OWCP medical adviser noted the results on pulmonary testing. He agreed that the impairment was a 10 percent impairment under Table 5-4 of the A.M.A., *Guides* based on the objective tests, physical findings and history. The medical adviser found the 10 percent whole person impairment was 15 percent of the maximum 65 percent impairment under Table 5-4 and therefore found a 15 percent lung impairment.

By decision dated July 24, 2013, OWCP found that appellant was not entitled to an additional schedule award. It noted that appellant had previously been paid a schedule award for 18 percent to each lung.

LEGAL PRECEDENT

Section 8107 of FECA provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.³ Neither FECA nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁴ For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.⁵

OWCP 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

² Docket No. 13-421 (issued April 17, 2013).

³ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

⁴ A. George Lampo, 45 ECAB 441 (1994).

⁵ FECA Bulletin No. 09-03 (issued March 15, 2009).

obtain the number of weeks payable; all such awards will be based on the loss of use of both lungs.⁶

It is well established that benefits payable under 5 U.S.C. § 8107(c) are reduced by the period of compensation paid under the schedule for an earlier injury if: (1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.⁷

ANALYSIS

The second opinion physician, Dr. Cox, and OWCP's medical adviser, applied Table 5-4 of the A.M.A., *Guides* to determine appellant's current impairment. This table provides that objective tests are used to determine the class of impairment (from 0 to 4).⁸ The physicians determined that the impairment was a class 1, based on testing that included an FVC of 78 percent. The default impairment is six percent for class 1, but the impairment was adjusted to the maximum of 10 percent based on history that included intermittent dyspnea and constant mild physical findings.⁹ This represents a proper application of Table 15-4 and there were no contrary findings.

OWCP determined that appellant was not entitled to an additional schedule award because he had previously received an August 15, 2008 schedule award. In the July 24, 2013 decision, it described the prior award as representing 18 percent "of each lung." On appeal, appellant argues that his prior award was 18 percent or 9 percent for each lung. In this regard the Board notes that, as the above legal precedent indicates, impairments to the lung under FECA are not paid based on an individual lung, but represent impairment to the lungs. The prior award was for an 18 percent impairment to the lungs, as the Board noted in its prior decision.

Although OWCP determined that the current impairment was less than the prior impairment, this does not itself resolve the issue presented. As noted above, the current impairment must duplicate the prior impairment in order to preclude appellant from an additional schedule award to the lungs. This is a medical issue and there is no probative medical evidence of record in this regard. The prior award was based on an asthma condition, and the A.M.A., *Guides* provides a separate Table 5-5 for asthma impairment calculations.¹⁰ The objective tests for asthma impairment are not the same as for the pulmonary function impairment under Table 5-4.¹¹ It is not clear that the current impairment duplicates in whole or in part the prior award based on an asthma condition. The case will be remanded to OWCP for further medical opinion on the issue.

⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(c)(1) (February 2013).

⁷ *T.S.*, Docket No. 09-1308 (issued December 22, 2009); 20 C.F.R. § 10.404(c).

⁸ A.M.A., *Guides* 88, Table 5-4.

⁹ *Id.*

¹⁰ *Id.* at 90, Table 5-5.

¹¹ See *L.B.*, Docket No. 13-1088 (issued September 13, 2013).

In addition, OWCP's medical adviser's June 6, 2013 report raises an issue with respect to the final calculation of an impairment to the lungs under FECA. Table 5-4 provides a maximum "whole person" impairment rating of 65 percent. The medical adviser calculated that 10 percent of 65 percent resulted in a 15 percent impairment to the lungs. OWCP procedures state that the whole person impairment should constitute the lung impairment, offering the following rationale: "Whole person impairment measurements can be directly translated into organ ratings in the case of vital organs, such as the lungs, where the total impairment of the organ(s) produces 100 percent impairment of the whole person."¹² Clearly the medical adviser did not find that the whole person impairment represented the impairment to the lungs. On remand, the medical adviser should clarify whether the stated method of determining impairment to the lungs in OWCP procedures has a proper medical basis under the sixth edition of the A.M.A., *Guides*.

The case will be remanded to OWCP for further development of the medical evidence in accord with the above discussion. After such further development, it should issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision and is remanded to OWCP for further development of the evidence.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 24, 2013 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: April 2, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700(d)(1) (January 2010).