

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

M.M., Appellant

and

**DEPARTMENT OF THE NAVY, U.S. NAVAL
ACADEMY, Annapolis, MD, Employer**

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**Docket No. 13-1991
Issued: January 27, 2014**

Appearances:
Stephen J. Dunn, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 26, 2013 appellant, through her counsel, timely appealed the February 25, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has greater than 32 percent impairment of the lungs.

¹ An appeal is considered filed upon receipt by the Clerk of the Board. 20 C.F.R. § 501.3(f). The notice of appeal must be filed within 180 days from the date of issuance (February 25, 2013) of an OWCP decision. *Id.* at § 501.3(e). In this instance, the 180th day fell on a weekend; Saturday, August 24, 2013. Under the circumstances, the period for filing is extended to the "close of the next business day," which is Monday, August 26, 2013. *Id.* at § 501.3(f)(2). The notice of appeal was received by the Clerk of the Board on August 26, 2013, which renders the appeal timely. *Id.*

² 5 U.S.C. §§ 8101-8193 (2006).

FACTUAL HISTORY

Appellant, a 74-year-old retired laundry worker, has an accepted occupational disease claim for aggravation of intrinsic asthma, which arose on or about October 1, 1992.³ As a result of prolonged asthma-related steroid (Prednisone) usage, appellant developed aseptic necrosis in her hips and knees, which OWCP accepted as a consequential injury. OWCP granted schedule awards totaling 56 percent bilateral lower extremity impairment.⁴

By decision dated March 10, 2010, OWCP granted appellant an award for 32 percent impairment of both lungs.⁵ The schedule award covered a period of 49.92 weeks. OWCP based its decision on an August 2, 2009 report.⁶ Applying Table 5-5, Asthma, A.M.A., *Guides* 90 (6th ed. 2008), the DMA found class 3 impairment based on appellant's regular steroid usage, which represented a (default/grade C) whole person impairment of 32 percent.

On November 4, 2011 appellant filed a claim for an additional schedule award. OWCP received a September 22, 2011 impairment rating from Dr. Jeffrey D. Gaber, a Board-certified internist. With respect to appellant's asthma, he found 50 percent whole person impairment under Table 5-5, A.M.A., *Guides* 90 (6th ed. 2008). Dr. Gaber explained that appellant was steroid dependent and her asthma was not controlled by treatment, thus representing class 4 impairment. He obtained a pulmonary function study with a best effort forced expiratory volume (FEV₁) that was 35 percent of predicted. Dr. Gaber characterized the spirogram as consistent with severe restriction and obstruction.

In a December 20, 2011 letter, appellant's counsel challenged the previous schedule award on the basis that OWCP incorrectly calculated the number of weeks' compensation appellant was entitled to receive. Based on the 32 percent whole person impairment rating, appellant should have received 99.84 weeks' compensation instead of 49.92 weeks. Counsel argued that OWCP erroneously based the March 10, 2010 award on impairment of a single lung (0.32 x 156 weeks) rather than both lungs (0.32 x 312 weeks).⁷ He also argued that appellant's asthma-related impairment had since worsened, citing to Dr. Gaber's September 22, 2011 rating of 50 percent whole person impairment.

³ Appellant worked as a presser at the employing establishment's laundry and dry cleaning facility. She attributed her respiratory distress to exposure to dry cleaning fumes, mist and dust.

⁴ OWCP's latest bilateral lower extremity award was dated July 13, 2012, and included a combination of impairments affecting appellant's hips and knees.

⁵ The award was based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2008).

⁶ Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and district medical adviser (DMA), reviewed, *inter alia*, the April 8, 2008 examination findings of Dr. Natvarlal K. Rajpara, a Board-certified internist with a subspecialty in pulmonary disease. OWCP referred appellant to Dr. Rajpara.

⁷ The applicable regulation provides that compensation for total loss of use of one lung is 156 weeks. 20 C.F.R. § 10.404(b).

After referring Dr. Gaber's report to the DMA, OWCP issued a February 28, 2012 decision denying appellant's claim for additional impairment due to asthma.⁸ OWCP also found it had properly calculated the weeks of compensation payable under the March 10, 2010 schedule award.

By decision dated July 13, 2012, OWCP again denied an additional schedule award for pulmonary/lung impairment.⁹

Appellant's counsel requested an oral hearing which was held on October 23, 2012. Following the hearing, counsel submitted a November 1, 2012 report from Dr. Gaber who recently examined appellant and found 55 percent whole person impairment due to asthma under Table 5-5, A.M.A., *Guides* 90 (6th ed. 2008).¹⁰ He noted having previously examined appellant on at least five occasions between October 2004 and September 2011. With respect to appellant's pulmonary situation, Dr. Gaber indicated that she continued to go to the emergency room periodically and required increasing amounts of various inhalers. He also noted that appellant frequently used Prednisone for flare-ups. Appellant reportedly used her inhalers that same morning. Her chest examination revealed markedly diminished breath sounds and background wheezing. Dr. Gaber also administered a pulmonary function study (PFS) that revealed a best effort FEV₁ of 69 percent of predicted.¹¹ The results were consistent with moderate restriction. Dr. Gaber reiterated that appellant had used her inhalers that morning and was on Prednisone.

In finding 55 percent whole person impairment under Table 5-5, A.M.A., *Guides* 90 (6th ed. 2008), Dr. Gaber explained that appellant best fit a class 4 impairment because she was basically steroid dependent and her asthma was "noncontrolled." The 55 percent whole person rating represented the default grade C for class 4 asthma impairment under Table 5-5. Dr. Gaber commented that there was no such thing as rating each lung individually. He also noted that appellant's situation had declined since he last saw her. Lastly, Dr. Gaber indicated that appellant reached maximum medical improvement and that her current condition remained related to her 1992 employment exposure.

⁸ In a report dated February 5, 2012, Dr. Berman reaffirmed his August 2, 2009 finding of 32 percent whole person impairment. He explained that the rating represented 16 percent impairment for each lung. While Dr. Berman acknowledged Dr. Gaber's 50 percent whole person impairment rating, he did not otherwise explain why there was no change in his prior recommendation of 32 percent impairment.

⁹ In separate decisions also dated July 13, 2012, OWCP expanded appellant's claim to include bilateral aseptic necrosis of the hip and awarded an additional (6 percent) bilateral lower extremity impairment for a total of 56 percent for each lower extremity. *See supra* note 4.

¹⁰ Dr. Gaber also provided an impairment rating regarding appellant's lower extremities. His specific findings in this regard have been omitted because the extent of appellant's bilateral lower extremity impairment is not currently at issue.

¹¹ Dr. Gaber's narrative report incorrectly noted the November 1, 2012 FEV₁ as 60 percent of predicted. The accompanying PFS report reveals that Dr. Gaber mistakenly switched the latest FVC (60 percent) and FEV₁ (69 percent) results.

In a decision dated December 18, 2012, the hearing representative set aside OWCP's July 13, 2012 decision and remanded case for further medical development in light of Dr. Gaber's November 1, 2012 impairment rating.¹²

On February 10, 2013 Dr. Berman reviewed Dr. Gaber's November 1, 2012 impairment rating. He disagreed with Dr. Gaber's assessment of class 4 impairment under Table 5-5, A.M.A., *Guides* 90 (6th ed. 2008). One of the criteria for class 4 designation is that the individual's asthma is "not controlled by treatment."¹³ Dr. Berman indicated that appellant's asthma was controlled by treatment and, therefore, Dr. Gaber's 55 percent award was unacceptable. Consequently, he saw no basis for changing his previous rating of 32 percent impairment of the lungs.

By decision dated February 25, 2013, OWCP denied an additional schedule award. It found that the medical evidence did not support an increase in the impairment already compensated.

On appeal, counsel argued that OWCP improperly based its 32 percent award on impairment of a single lung (0.32 x 156 weeks) rather than both lungs (0.32 x 312 weeks). He also argued that appellant's pulmonary impairment worsened as evidenced by Dr. Gaber's November 1, 2012 finding of 55 percent whole person impairment due to uncontrolled asthma. Counsel did not specifically challenge OWCP's finding with respect to appellant's bilateral lower extremity impairment.

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.¹⁴ 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.¹⁵ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).¹⁶

¹² The hearing representative also set aside OWCP's July 13, 2012 bilateral lower extremity award based on the mistaken belief that OWCP had not yet accepted appellant's bilateral hip condition and associated impairment. *See supra* notes 4 and 9.

¹³ A.M.A., *Guides* 90 (6th ed. 2008) Table 5-5.

¹⁴ 5 U.S.C. § 8107(c).

¹⁵ 20 C.F.R. § 10.404.

¹⁶ *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (February 2013).

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.¹⁷ The list of schedule members includes the eye, arm, hand, fingers, leg, foot and toes.¹⁸ Additionally, FECA specifically provides for compensation for loss of hearing and loss of vision.¹⁹ By authority granted under FECA, the Secretary of Labor expanded the list of schedule members to include the breast, kidney, larynx, lung, penis, testicle, tongue, ovary, uterus/cervix and vulva/vagina and skin.²⁰ Neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole.²¹ Compensation for total loss of use of a single lung is 156 weeks.²²

Although FECA does not specifically provide for compensation for whole person impairment, the measurement of lung function warrants special consideration. Table 5-5, Asthma, A.M.A., *Guides* 90 (6th ed. 2008), provides whole person impairment ratings based on a designated class (0-4) of impairment. Depending on the assigned class, the range of whole person impairment due to asthma is 0 to 65 percent. The procedure manual provides that lung impairment should be evaluated in accordance with the A.M.A., *Guides* insofar as possible. It further provides that schedule awards are based on the loss of use of both lungs, and the percentage for the particular class of whole person respiratory impairment will be multiplied by 312 weeks (twice the award for loss of function of one lung) to obtain the number of weeks payable.²³

ANALYSIS

In March 2010, OWCP granted a schedule award for 32 percent impairment of both lungs. In his August 2, 2009 report, Dr. Berman, the DMA, found 32 percent whole person impairment under Table 5-5, Asthma, A.M.A., *Guides* 90 (6th ed. 2008). He determined that appellant had class 3 impairment due to asthma based on her regular steroid usage. Under Table 5-5, the default grade C for class 3 impairment is 32 percent whole person impairment. Counsel does not contest Dr. Berman's August 2, 2009 impairment rating, but instead takes issue with OWCP's award of only 49.92 weeks' compensation based on the DMA's finding. He also argues that appellant's lung impairment has worsened since the March 10, 2010 schedule award.

¹⁷ *W.C.*, 59 ECAB 372, 374-75 (2008); *Anna V. Burke*, 57 ECAB 521, 523-24 (2006).

¹⁸ 5 U.S.C. § 8107(c).

¹⁹ *Id.*

²⁰ *Id.* at § 8107(c)(22); 20 C.F.R. § 10.404(b).

²¹ *Id.* at § 8107(c); 20 C.F.R. § 10.404(a); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

²² 20 C.F.R. § 10.404(b).

²³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(c)(1); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4d(1)(c).

Appellant's physician, Dr. Gaber, provided impairment ratings dated September 22, 2011 and November 1, 2012. He initially found 50 percent whole person impairment under Table 5-5, A.M.A., *Guides* 90 (6th ed. 2008), but based on his most recent November 1, 2012 rating, appellant's asthma-related impairment had increased to 55 percent. In both instances, Dr. Gaber found class 4 impairment on the basis that appellant's asthma was not controlled by treatment.²⁴ Dr. Berman reviewed Dr. Gaber's latest impairment rating and found it unacceptable because appellant's asthma was controlled by treatment. The basis for Dr. Gaber's finding that appellant's asthma is "noncontrolled" is not readily apparent from either of his reports. Absent a rationalized explanation for Dr. Gaber's assignment of class 4 impairment, appellant has failed to establish that she has greater than 32 percent impairment of the lungs.

While the current medical evidence does not support impairment in excess of the prior 32 percent award, the Board finds that OWCP improperly calculated appellant's March 10, 2010 schedule award based on loss of function of one lung (156 weeks). Schedule awards are based on the loss of use of both lungs, and the percentage for the particular class of whole person respiratory impairment will be multiplied by 312 weeks (twice the award for loss of function of one lung) to obtain the number of weeks payable.²⁵ As noted, Dr. Berman previously found 32 percent whole person impairment under Table 5-5, A.M.A., *Guides* 90 (6th ed. 2008). Multiplying the 32 percent whole person impairment by 312 weeks, appellant is entitled to receive 99.84 weeks' compensation. OWCP paid her 49.92 weeks' compensation. Accordingly, appellant is entitled to an additional 49.92 weeks' compensation.

Appellant has not submitted sufficient medical evidence to establish greater than 32 percent impairment of the lungs. She may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

Appellant failed to establish that she has greater than 32 percent impairment of the lungs. Based on her previously demonstrated level of impairment due to employment-related asthma (32 percent whole person), appellant is entitled to 99.84 weeks' compensation.

²⁴ The default grade C for class 4 impairment is 55 percent whole person impairment. *See* Table 5-5, A.M.A., *Guides* 90 (6th ed. 2008).

²⁵ *See supra* note 24.

ORDER

IT IS HEREBY ORDERED THAT the February 25, 2013 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: January 27, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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