

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

E.G., Appellant)	
)	
and)	Docket No. 15-1606
)	Issued: November 19, 2015
DEPARTMENT OF THE INTERIOR, U.S.)	
GEOLOGICAL SURVEY, Denver, CO,)	
Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 21, 2015 appellant filed a timely appeal from a July 1, 2015 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 met his burden of proof to establish that he is entitled to a schedule award for a permanent impairment of the lungs.

FACTUAL HISTORY

On March 8, 2010 appellant, then a 73-year-old laborer, filed an occupational disease claim (Form CA-2) alleging that he sustained a restriction in the airflow to his lungs and blockage of his bronchial tubes after removing and replacing ceiling tiles at work, OWCP File

¹ 5 U.S.C. § 8101 *et seq.*

No. xxxxxx933. OWCP accepted the claim for cough, ventilation pneumonitis, unspecified allergic alveolitis and pneumonitis, emphysema, shortness of breath, and nonspecific abnormal radiologic findings in other intrathoracic organs.

OWCP also accepted that appellant sustained a left inguinal hernia in File No. xxxxxx163, which it doubled into the current file number. It paid him wage-loss compensation under file number xxxxxx163 from May 24, 2010 until June 29, 2013, when it terminated his wage-loss compensation. OWCP paid appellant compensation for total disability under the current file number beginning June 30, 2013.

In a report dated December 30, 2011, Dr. Tareq Jamil, a pulmonologist, evaluated appellant for cough, wheezing, and shortness of breath. He noted that appellant had a history of organic dust exposure after replacing ceiling tiles at work. Dr. Jamil opined that a computerized tomography (CT) scan dated September 13, 2010 did “not show any parenchymal problem and was essentially clear.” He further found that pulmonary function studies showed an obstructive and restrictive impairment, but the CT scan did not show “any interstitial scarring process to correlate with the restrictive part” and attributed the discrepancy to obesity.

On September 27, 2013 appellant filed a claim for a schedule award (Form CA-7). By letter dated October 11, 2013, OWCP requested that he submit an evaluation from his attending physician addressing the extent of any employment-related permanent impairment in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th ed. 2009) (A.M.A., *Guides*).

In response appellant submitted a page from the August 10, 2010 opinion of Dr. Bogdan C. Nowakowski, a pulmonologist and OWCP referral physician.² He further submitted a report dated June 12, 2014 from Dr. Reza Berjis, Board-certified in family practice. Dr. Berjis obtained a history from appellant of developing pneumonitis and emphysema after removing “contaminated ceiling tiles” at work. On examination he found no rhonchi, rales, or wheezing and normal auscultation and respiratory effort. Dr. Berjis diagnosed emphysema and pneumonitis and referred him for a pulmonary consultation.

On July 10, 2014 Dr. Ferdinand Tan, a Board-certified internist and treating physician, evaluated appellant for employment-related chronic obstructive pulmonary disease. On examination he found normal respiratory effort and auscultation. Dr. Tan diagnosed reactive airway disease, asthma, a history of uvuloplasty, and a history of septoplasty. He referred appellant for a spirometry test and chest x-ray, but noted that appellant refused diagnostic testing.

In a report dated July 21, 2014, Dr. Marjorie A. Malleck, an internist, indicated that appellant had a lung condition covered under workers’ compensation, but was “having difficulty getting compensation....” She diagnosed asthma, diabetes, hyperlipidemia, hypertension, and depression. In an August 15, 2014 work restriction evaluation, Dr. Malleck found that he was totally disabled due to asthma, depression, and low back pain.

² In a report dated August 10, 2010, Dr. Nowakowski diagnosed cough, organic fungal pneumonitis, unspecified allergic alveolitis and pneumonitis, emphysema, dyspnea, and an abnormal chest x-ray. He attributed appellant’s condition to organic dust exposure from removing “contaminated ceiling tiles” at work. Dr. Nowakowski advised that appellant was totally disabled. Based on his report, OWCP accepted appellant’s claim.

By decision dated January 21, 2015, OWCP denied appellant's claim for a schedule award. It found that he had not submitted medical evidence addressing the extent of any impairment under the sixth edition of the A.M.A., *Guides*.

On February 11, 2015 appellant requested a review of the written record. In a decision dated July 1, 2015, an OWCP hearing representative affirmed the January 21, 2015 decision. He found that appellant had not submitted medical reports or diagnostic studies showing an impairment of the lungs. The hearing representative noted that the medical reports from Dr. Tan and Dr. Berjis showed normal respiratory findings on examination. He also reviewed Dr. Jamil's finding that a 2010 CT scan showed no interstitial scarring, but rather a restrictive impairment due to obesity.³

On appeal appellant contends that the physicians were biased. He asserts that Dr. Tan did not examine him and complained about the extra work required by OWCP. Appellant alleges that the hearing representative ignored medical evidence in finding that his condition resulted from obesity rather than his employment-related respiratory condition.

LEGAL PRECEDENT

The schedule award provision of FECA,⁴ and its implementing federal regulations,⁵ 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, FECA 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁶ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁷

It is the claimant's burden to establish that he sustained a permanent impairment of the scheduled member or function as a result of any employment injury.⁸ OWCP procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of maximum medical improvement), describes the impairment in

³ The OWCP hearing representative indicated that the date of Dr. Jamil's report was December 30, 2011 rather than January 19, 2012.

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* at § 10.404(a).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁸ *See Tammy L. Meehan*, 53 ECAB 229 (2001).

sufficient detail so that it can be visualized on review, and computes the percentage of impairment in accordance with the A.M.A., *Guides*.⁹

ANALYSIS

OWCP accepted that appellant sustained cough, ventilation pneumonitis, unspecified allergic alveolitis and pneumonitis, emphysema, shortness of breath, and nonspecific abnormal radiologic findings in other intrathoracic organs as a result of removing and replacing ceiling tiles at work. It paid him compensation for total disability beginning June 30, 2013.

On September 27, 2013 appellant filed a schedule award claim. OWCP advised him by letter dated October 11, 2013 of the evidence necessary to establish his schedule award claim. It specifically informed appellant that he should submit an impairment evaluation from an attending physician in accordance with the A.M.A., *Guides*. Appellant did not, however, provide the requested information. He submitted the first page of an August 10, 2010 report from Dr. Nowakowski, who provided a second opinion examination. Appellant also submitted a June 12, 2014 report from Dr. Berjis who diagnosed emphysema and pneumonitis and referred appellant for a pulmonary examination. On July 10, 2014 Dr. Tan diagnosed reactive airway disease and asthma and referred him for a chest x-ray and spirometry testing. Appellant, however, declined to undergo the diagnostic testing. On examination, both Dr. Berjis and Dr. Tan found normal respiratory effort and auscultation. In a report dated July 21, 2014, Dr. Malleck evaluated him for an employment-related lung condition. On August 15, 2014 he advised that appellant was totally disabled due to low back, pain, asthma, and depression. None of these physicians, however, addressed the extent of any permanent impairment due to appellant's employment injury or provided a description of any impairment in sufficient detail to allow it to be visualized on review such that the percentage of impairment could be calculated under the A.M.A., *Guides*.¹⁰ Consequently, their reports are insufficient to meet appellant's burden of proof.

On appeal appellant asserts that the physicians were biased, that Dr. Tan failed to examine him, and that Dr. Tan complained about the extra work required by OWCP. As discussed, however, the relevant issue is whether he submitted medical evidence establishing a permanent impairment to a scheduled member as defined under section 8107 of FECA or the implementing federal regulations. Appellant did not provide, as requested by OWCP, a medical report specifically addressing whether he had a permanent impairment of his lungs due to the accepted work injury.

Appellant further asserts that OWCP hearing representative wrongly attributed his condition to obesity instead of his work injury. OWCP, however, has accepted that he sustained an employment-related lung condition and that he is disabled as a result of his injury. The issue is whether appellant sustained an impairment of the lungs warranting payment of a schedule award. Appellant submitted medical evidence addressing the extent of his disability for work, but did not submit any medical evidence showing an impairment of the lungs. Under FECA, the term disability means the incapacity, because of an employment injury, to earn the wages that the

⁹ See *supra* note 7 at Chapter 2.808.5(b) (February 2013).

¹⁰ *Id.*

employee was receiving at the time of injury.¹¹ Disability is not synonymous with physical impairment, which may or may not result in incapacity to earn wages.¹² A schedule award is not intended to be compensation for wage loss or potential wage loss and is made without regard to whether or not there is a loss of wage-earning capacity resulting from the injury or its effects upon employment or social opportunities.¹³ As appellant has not submitted medical evidence showing a permanent impairment of the lungs under the A.M.A., *Guides*, he has not established entitlement to a schedule award.

Appellant 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

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

ORDER

IT IS HEREBY ORDERED THAT the July 1, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 19, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹¹ *D.M.*, 59 ECAB 164 (2007); *Sean O Connell*, 56 ECAB 195 (2004).

¹² *See D.M.*, *id.*

¹³ *L.H.*, Docket No. 13-1990 (issued February 11, 2014); *Renee M. Straubinger*, 51 ECAB 667 (2000).