United States Department of Labor
Employees' Compensation Appeals Board

T.R., Appellant	)	
and	)	**Docket No. 17-0047**
	)	**Issued: July 27, 2017**
DEPARTMENT OF THE AIR FORCE, WARNER ROBINS AIR LOGISTICS CENTER, ROBINS AIR FORCE BASE, GA, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On October 14, 2016 appellant filed a timely appeal from an April 19, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.[3]

[1] Appellant timely requested oral argument before the Board. By order dated April 13, 2017, the Board exercised its discretion and denied the request, finding that the issues could properly be adjudicated based on the evidence of record. *Order Denying Request for Oral Argument*, Docket No. 17-0047 (issued April 13, 2017).

[2] 5 U.S.C. § 8101 *et seq*.

[3] The record provided the Board includes evidence received after OWCP issued its April 19, 2016 decision. The Board's review is limited to the evidence that was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether appellant met his burden of proof to establish ratable permanent impairment of the lungs.

FACTUAL HISTORY

On March 1, 1991 appellant, then a 34-year-old equipment specialist, filed an occupational disease claim (Form CA-1) alleging an exacerbation of asthma from workplace exposure to chemicals and welding fumes. He first became aware of his condition in 1982 and realized that it was caused or aggravated by his employment on January 30, 1991. No work stoppage was attributed to this case. OWCP initially denied the claim but, following a second opinion examination on March 8, 1993, it accepted the claim for temporary aggravation of asthma due to chemical exposure. It also found that the accepted condition had ceased on January 30, 1991, due to the fact that appellant was no longer exposed to the aggravating condition. OWCP subsequently closed and retired the claim to the Federal Records Center due to lack of activity. There was no reported medical activity from 1993 until 2013.

On March 13, 2014 appellant requested that OWCP reopen his claim. On March 27, 2014 he filed a claim for a schedule award (Form CA-7).

In an August 19, 2014 letter, OWCP advised appellant of his previously accepted condition, and instructed him to submit an impairment rating under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).[4] He was afforded 30 days to submit the required medical evidence. OWCP received a September 8, 2014 letter from appellant, but no additional medical evidence.

By decision dated September 23, 2014, OWCP denied the schedule award claim as there had been no impairment rating provided in accordance with the A.M.A., *Guides* establishing any permanent impairment due to his accepted condition.

On October 12, 2014 appellant requested an oral hearing before OWCP's Branch of Hearings and Review.

In an October 15, 2014 report, Dr. Plummer estimated a whole person impairment rating for asthma as 15 to 20 percent. He indicated that appellant had reached maximum medical improvement (MMI) on August 22, 2014. Dr. Plummer referred to Chapter 5, Table 5-9 and Table 5-10 on page 104 of the A.M.A., *Guides*, and opined that appellant had class 2 impairment.[5] In his October 15, 2014 letter, Dr. Plummer indicated that appellant's pulmonary function was good so long as he used his long-acting bronchodilators and short-acting rescue inhaler as directed.

[4] A.M.A., *Guides* (6th ed. 2009).

[5] The tables to which Dr. Plummer referred appear in the 5th edition of the A.M.A., *Guides* (2001).

By decision dated March 25, 2015, the hearing representative found the case not in posture for decision. Accordingly, she remanded the case to the district medical adviser (DMA) for an impairment rating under the 6th edition of the A.M.A., *Guides.*

OWCP forwarded the case record, including Dr. Plummer's October 15, 2014 report, to Dr. Eric Puestow, a Board-certified internist and DMA, for review. In a March 31, 2015 report, Dr. Puestow opined that the evidence on file was insufficient to calculate an impairment rating as there were no current pulmonary function studies. He recommended a second opinion evaluation with a pulmonary specialist.

In a May 4, 2015 report, Dr. Rodrigo F. Morales, a Board-certified pulmonologist and OWCP referral physician, reviewed the medical record and a statement of accepted facts, which indicated that appellant's case had been accepted for aggravation of asthma due to chemical exposure. He reviewed the May 4, 2015 pulmonary studies. Dr. Morales noted mildly reduced FVC and FEV_1 without obvious airflow obstruction, with significant response to bronchodilator challenge.[6] Dr. Morales noted that appellant had a history consistent with work-related asthma and had been on therapy with a combination of an inhaled steroid and both long-acting and short-acting bronchodilators. He noted that the physical examination did not show objective evidence of airway obstruction or excessive airway mucus production. Dr. Morales indicated that the requirement of continuous therapy for appellant's asthma symptoms suggested that he had not reached MMI. Dr. Morales indicated that the post-bronchodilator FEV_1 was 82 percent. Based on the criteria under Table 5-5 of the A.M.A., *Guides* for rating asthma, he determined that a finding of FEV_1 of 82 percent of predicted placed appellant into class 0. Therefore, Dr. Morales opined that appellant's whole person permanent impairment rating for asthma was zero.

On June 8, 2015 OWCP forwarded Dr. Morales' report and the pulmonary studies to Dr. Puestow who reviewed the May 4, 2015 pulmonary function studies and indicated that appellant had reached MMI on May 4, 2015, the date of the studies. Dr. Puestow noted that the FVC was 79 percent and the FEV_1 was 85 percent. Under Table 5-5, page 90 of the A.M.A., *Guides*, he concurred that the FEV_1 was the key factor which, with FEV_1 of greater than 80 percent, put appellant in class 0 or zero percent permanent impairment of the whole person.

By decision dated June 9, 2015, OWCP denied appellant's schedule award claim, finding the weight of the medical evidence rested with the opinion of the second opinion examiner, Dr. Morales. It noted that the DMA, Dr. Puestow, also concluded that the evidence failed to establish a permanent, measurable impairment for the accepted condition of asthma. OWCP noted that Dr. Plummer had not provided an impairment rating based on pulmonary studies.

Appellant timely requested a hearing, which was held on February 17, 2016. He testified regarding his employment history, that he continued to have respiratory problems, and that he had been treated by Dr. Plummer for 30 years. Appellant argued that there was a conflict in medical opinion between Dr. Plummer and Dr. Morales, the second opinion physician.

[6] FVC refers to forced vital capacity and FEV_1 refers to forced expiratory volume.

OWCP received an August 26, 2015 pulmonary function study, as well as an August 26, 2015 report from Dr. Plummer. Dr. Plummer found the pulmonary tests reflected FEV_1 was 71 percent of predicted. He found appellant doing quite well.

In a September 4, 2015 report, Dr. Plummer indicated that he reviewed the reports of Dr. Morales and Dr. Puestow. He noted that both physicians had found a class 0 impairment rating, based on FEV_1 after bronchodilator value of 82 percent of predicted (not the 85 percent as noted by Dr. Puestow) that the predicted values used in Dr. Morales pulmonary function lab were identical to those from his lab, and that, under the A.M.A., *Guides*, Dr. Morales' post-bronchodilator FEV_1 placed appellant in a class 0 disability category. Dr. Plummer indicated, however, that appellant was on chronic therapy. Therefore, Dr. Plummer believed that because of the chronic inhaled steroid/long acting bronchodilator therapy, plus his symptomatology of intermittent wheezing he should be placed into a class 1 disability classification.

OWCP also received a March 31, 2016 pulmonary function study.

In an April 19, 2016 decision, the hearing representative affirmed the June 9, 2015 decision. She found that the weight of the medical evidence was afforded to Dr. Morales' second opinion report that appellant had zero percent permanent impairment, which the medical adviser had concurred.

LEGAL PRECEDENT

The schedule award provisions of FECA and its implementing regulations set 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.[7] 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.[8] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[9]

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.[10] The list of scheduled members includes the eye, arm, hand, fingers, leg, foot and toes.[11] Additionally, FECA specifically provides for

[7] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404.

[8] *Id.* at § 10.404.

[9] *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 and Permanent Disability Claims*, Chapter 2.808.6a (February 2013).

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

[11] 5 U.S.C. § 8107(c).

compensation for loss of hearing and loss of vision.[12] 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.[13] 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.[14] Compensation for total loss of use of a single lung is 156 weeks.[15]

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* (6th ed. 2009), provides whole person impairment ratings based on a designated class (0 to 4) of impairment. Class 0 is used for any maximum FEV_1 percentage predicted greater than 80 percent. Class 1 is used for FEV_1 percentage predicted from 70 to 80 percent. The FECA 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.[16]

ANALYSIS

In March 1993, OWCP accepted appellant's occupational disease claim for temporary aggravation of asthma due to chemical exposure. In March 2014, appellant requested a schedule award, which OWCP denied. The Board finds that appellant has not established a permanent impairment for schedule award purposes.

In his October 15, 2014 report, Dr. Plummer indicated that appellant had reached MMI on August 22, 2014. He opined that appellant had a class 2 impairment rating for asthma with previous exposure to chemicals and airway irritants which he estimated was 15 to 20 percent whole person permanent impairment. While he indicated appellant's impairment was calculated under Table 5-9 and Table 5-10, Dr. Plummer used the fifth edition of the A.M.A., *Guides*. OWCP, however, currently uses the sixth edition of the A.M.A., *Guides* to calculate schedule awards.[17] A medical opinion, based on an inappropriate edition of the A.M.A., *Guides*, is of diminished probative value in determining the extent of permanent impairment.[18]

[12] *Id.*

[13] 5 U.S.C. § 8107(c)(22); 20 C.F.R. § 10.404(b).

[14] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); *see Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[15] 20 C.F.R. § 10.404(b).

[16] 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).

[17] *See supra* note 8.

[18] *See P.O.*, Docket No. 15-1631 (issued June 2, 2016); *Fritz A. Klein*, 53 ECAB 642 (2002).

In his September 4, 2015 letter, Dr. Plummer indicated that appellant could plead that he should be placed in the class 1 disability category because of the fact he was on chronic therapy with his inhaled corticosteroid and long-acting bronchodilator plus his symptomatology. He also indicated that appellant's FEV_1 without bronchodilator would place appellant into the class 1 disability category. However, Dr. Plummer has not provided a basis for his enhanced rating, and has agreed with Dr. Morales' finding of FEV_1 as predicted at 82 percent. The FEV_1 at 82 percent clearly places him into class 0 under Table 5-5, the table utilized for rating impairment due to asthma. The Board has long held that an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's impairment.[19] Dr. Plummer's opinion is therefore of limited probative value and is insufficient to establish that appellant is entitled to a schedule award for permanent impairment of his lungs.

The second opinion physician, Dr. Morales, and OWCP's medical adviser, Dr. Puestow, applied Table 5-5 of the A.M.A., *Guides* to determine appellant's permanent lung impairment due to asthma. Based on objective testing of May 4, 2015, the physicians determined that the proper class was 0 and the impairment was zero. Dr. Morales determined that the post-bronchodilator FEV_1 of 82 percent of predicted placed appellant as class 0, which resulted in a whole person permanent impairment rating of zero. Dr. Puestow, the medical adviser, also reviewed the May 4, 2015 pulmonary function studies. While he noted that the post-bronchodilator FEV_1 was 85 percent, that rating would also place appellant in class 0, or zero percent permanent impairment of the lungs. The Board notes that under Table 5-5 of the A.M.A., *Guides*, FEV_1 over 80 percent represents class 0 or zero percent whole percent impairment. Accordingly, this represents a proper application of Table 5-5 and there were no contrary findings.

Appellant has not submitted sufficient medical evidence to establish permanent impairment of the lungs. He may, at any time, 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 a ratable permanent impairment of the lungs.

[19] *Carl J. Cleary*, 57 ECAB 563 (2006).

ORDER

IT IS HEREBY ORDERED THAT the April 19, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 27, 2017
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board