United States Department of Labor
Employees' Compensation Appeals Board

D.A., Appellant	)	
and	)	**Docket No. 18-1105**
	)	**Issued: January 10, 2019**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Dallas, TX, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 8, 2018 appellant filed a timely appeal from April 5 and 9, 2018 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish more than four percent permanent impairment of the lungs, for which she previously received schedule award compensation; and (2) whether OWCP used the proper rate of pay in calculating her schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.[2] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On February 9, 2009 appellant, then a 50-year-old vocational nurse, filed an occupational disease claim (Form CA-2) alleging that she experienced shortness of breath, nasal and sinus congestion, breathing difficulty, asthma, eye irritation, and mouth ulcers as a result of exposure to mold and toxins at her work location. OWCP accepted the claim for an aggravation of allergic rhinitis and an aggravation of asthma due to mold exposure.[3]

Dr. Gregory Powell, a Board-certified physiatrist, provided a March 7, 2012 impairment evaluation. Using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[4] for rating purposes he identified the diagnosis as class 1 asthma under Table 5-5 on page 90. He found that appellant had a class 1, grade D impairment due to asthma, which yielded eight percent whole person permanent impairment.[5]

OWCP, on August 21, 2012, referred appellant to Dr. Javed Ashiq, a Board-certified internist and pulmonologist, for a second opinion examination regarding the extent of her permanent impairment of the lungs. On September 11, 2012 Dr. Ashiq interpreted a pulmonary function study (PFS) as showing a normal large airway with no bronchodilator response, mildly reduced diffusing capacity of the lungs for carbon monoxide (DLCO), and normal lung volume. He diagnosed allergic rhinitis and asthma. Dr. Ashiq advised that appellant's postbronchodilator forced expiratory volume in one second (FEV_1) was 88 percent of predicted. He further found no impairment due to pulmonary dysfunction under Table 5-4 on page 88 based on objective tests, history, and examination findings.[6]

In an impairment evaluation dated April 6, 2015, Dr. Louise Lamarre, who specializes in family medicine, discussed appellant's history of injury. She reviewed a November 21, 2012 PFS showing an FEV_1 of 59 percent of predicted and a study two years later showing an FEV_1 of 70 percent of predicted. Dr. Lamarre noted that a July 28, 2008 computerized tomography (CT) scan revealed nodules in the right upper lobe of the lung. Using Table 5-5, she identified the diagnosis

[2] Docket No. 17-1753 (issued February 13, 2018).

[3] By decision dated March 6, 2009, OWCP denied appellant's claim as the medical evidence was insufficient to establish a diagnosed condition as a result of the accepted work factors. It subsequently vacated its March 6, 2009 decision on September 8, 2009.

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

[5] By decision dated May 15, 2012, OWCP denied appellant's claim for compensation for wage-loss on February 13 and 21, March 7, and April 24, 2012. On September 7, 2012 it vacated the May 15, 2012 decision and found that she was entitled to compensation for four hours per day on those dates for time lost due to doctor's appointments.

[6] Dr. H. Mobley, an internist and OWCP district medical adviser (DMA) reviewed the evidence and concurred with Dr. Ashiq's finding of no lung impairment. He indicated that Dr. Ashiq should submit a copy of the PFS relied upon in reaching his impairment rating.

as class 1 asthma based on the PFS showing an FEV_1 of 70 percent of the predicted value, which yielded a default value of 6 percent. Dr. Lamarre moved the value to grade D based on appellant's frequent exacerbations of her condition, use of medication, the lung nodule on the CT scan, and the prior PFS showing an FEV_1 of 59 percent of predicted, for a final impairment rating of 8 percent of the whole person.

OWCP determined that a conflict in medical opinion existed between Dr. Lamarre and Dr. Powell, appellant's treating physicians, and Dr. Ashiq, who provided a second opinion examination, regarding whether she sustained a permanent impairment of the lungs. On May 16, 2016 it referred her to Dr. Dennis M. Parker, a Board-certified internist and pulmonologist, for an impartial medical examination.

In a report dated August 8, 2016, Dr. Parker discussed appellant's history of injury. He obtained a PFS demonstrating a forced vital capacity (FVC) of 72 percent and an FEV_1 of 73 percent before bronchodilators and an FVC of 77 percent and an FEV_1 of 76 percent after bronchodilators. Using Table 5-4 on page 89 of the A.M.A., *Guides*, Dr. Parker found that appellant had class 1 impairment due to allergic asthma based on her intermittent use of albuterol. He determined that she had no physical findings and did not use optimal effort on testing, for a class 0 impairment. Dr. Parker opined that appellant had a class 1, grade 1 impairment as she required intermittent treatment, for two percent permanent impairment. He found that appellant had reached maximum medical improvement.

Dr. Albert A. Rizzo, a Board-certified internist and pulmonologist acting as a DMA, reviewed the evidence on October 3, 2016. He found that, under Table 15-4 on page 88 of the A.M.A., *Guides*, appellant had a class 1 impairment based on her FVC of 77 percent and an FEV_1 of 76 percent postbronchodilator, which yielded a default impairment rating of 6 percent. Dr. Rizzo further found a class 1 impairment due to dyspnea requiring medication and class 0 impairment based on physical findings, and thus adjusted the impairment rating down to four percent.

The employing establishment, on November 17, 2016, advised OWCP that appellant was last exposed to the conditions that caused her condition in March 2009. It provided pay rate information.

In a supplemental report dated December 14, 2016, Dr. Rizzo noted that Dr. Parker had found a class 0 impairment, but adjusted the impairment rating upward to two percent based on history even though it was a nonkey factor. He opined that appellant had class 1 impairment using Table 5-4 on page 88 based on the results of her pulmonary testing. Dr. Rizzo adjusted the impairment rating downward to four percent from the default value of six percent.

By decision dated January 24, 2017, OWCP granted appellant a schedule award for four percent permanent impairment of a lung. The period of the award ran for 6.24 weeks from August 8 to September 20, 2016. OWCP used March 1, 2009 as the effective pay rate date for schedule award compensation.

On April 7, 2018 appellant requested reconsideration. By decision dated June 29, 2017, OWCP modified in part and affirmed in part the January 24, 2017 decision. It found that

Dr. Parker's report represented the special weight of the evidence and demonstrated that appellant had six percent permanent impairment of the lungs. OWCP determined that its DMA should not have adjusted the report of the impartial medical examiner (IME), and modified its January 24, 2017 decision to reflect that appellant had six percent permanent impairment.

By decision dated July 7, 2017, OWCP granted appellant a schedule award for an additional two percent permanent impairment of a lung. The period of the award ran for 3.12 weeks from September 21 to October 12, 2016. OWCP based the amount of schedule award compensation on an effective pay rate date of March 1, 2009.

Appellant appealed to the Board. By decision dated February 13, 2018, the Board set aside the June 28 and July 7, 2017 decisions. The Board found that Dr. Parker did not properly evaluate the extent of appellant's permanent impairment under the A.M.A., *Guides*, noting that he calculated the impairment using Table 5-4 instead of Table 5-5, the applicable table for rating impairments due to asthma. The Board remanded the case for OWCP to obtain a supplemental report from Dr. Parker. The Board further noted that OWCP had issued schedule awards for a single lung impairment even though its procedures provided that the award should be based on the loss of use of both lungs.

OWCP, on February 15, 2018, requested that Dr. Parker rate appellant's impairment due to asthma using Table 5-5 of the A.M.A., *Guides*. It further indicated that he should rate the loss of use of both lungs.

In a March 20, 2018 response, Dr. Parker noted that appellant used bronchodilators as needed and that her maximum FEV_1 after bronchodilator was 76 percent of normal. He found that she had a class 1 impairment under Table 5-5 of the A.M.A., *Guides* based on her occasional use of medication and her maximum FEV_1 of 76 percent postbronchodilator, which yielded an impairment range of 2 to 10 percent of the whole person. Dr. Parker determined that appellant had two percent whole person impairment for loss of pulmonary function due to her comparatively mild and intermittent symptoms. He noted that he was using the results from his August 8, 2016 examination rather than current findings.

By decision dated April 5, 2018, OWCP vacated in part, modified in part, and affirmed in part its January 27, 2017 decision. It noted that Dr. Rizzo had previously reviewed the August 8, 2016 IME report and found that appellant had four percent whole person impairment, while Dr. Parker found two percent whole person impairment. OWCP found that appellant had four percent whole person impairment as it was the more generous rating, and multiplied the four percent whole person impairment rating by 312 weeks to find that she was entitled to an additional 3.12 weeks of schedule award compensation, for a total award of 12.48 weeks.

By decision dated April 9, 2018, OWCP granted appellant a schedule award for four percent permanent impairment of the lungs.[7] It noted that it had previously paid her schedule award for 9.46 weeks, and found that she was entitled to an additional 3.12 weeks of schedule award compensation, for a total of 12.48 weeks. OWCP found that appellant was entitled to schedule award compensation using a pay rate date of June 2, 2008.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA,[8] and its implementing federal regulations,[9] 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.[10] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[11]

OWCP's procedures provide that all claims involving impairment of the lungs will be evaluated by first establishing the class of respiratory impairment, following the A.M.A., *Guides* as far as possible. Awards are based on the loss of use of both lungs and the percentage for the applicable 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 in the schedule award.[12]

Table 5-5 of the A.M.A., *Guides* sets forth the criteria for rating permanent impairment due to asthma. It provides whole person impairment ratings based on a designated class (0 to 4)

[7] OWCP indicated that it was issuing appellant a schedule award for a whole person impairment rather than for the lungs, but properly calculated the number of weeks to be paid for a schedule award for the lungs. FECA does not provide for whole person impairment ratings. 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); *see also D.H.*, Docket No. 18-0024 (issued May 7, 2018). Although FECA does not specifically provide compensation for whole person impairment, the measurement of lung function warrants special consideration, including using tables in A.M.A., *Guides* that provide for a whole person impairment award. *See* A.M.A., *Guides* 88 and 90, Table 5-4 and Table 5-5; *see also J.G.*, Docket No. 16-1533 (issued March 15, 2018). The percentage for the particular class of whole person respiratory impairment is multiplied by 312 weeks (twice the award for loss of function of one lung) to obtain the number of weeks payable.

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404.

[10] *Id.* at § 10.404(a).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[12] *Id*. at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(c)(1) (February 2013).

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.[13]

Where OWCP has referred the case to an IME to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well reasoned and based upon a proper factual background, must be given special weight.[14]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish more than four percent permanent impairment of the lungs, for which she previously received schedule awards.

On prior appeal, the Board found that Dr. Parker rated the extent of appellant's impairment using Table 5-4 of the A.M.A., *Guides* instead of Table 5-5, the applicable table for rating impairments due to asthma. The Board remanded the case for OWCP to obtain a report from Dr. Parker applying Table 5-5. The Board also noted that OWCP should issue additional schedule award benefits based on the permanent impairment of the bilateral lungs rather than a single lung.

In an addendum report dated March 20, 2018, Dr. Parker found that appellant had a class one impairment using Table 5-5 of the A.M.A., *Guides*. He determined that the maximum FEV_1 after bronchodilator was 75 percent of normal, which yielded a class 1 impairment and a default value from 2 to 10 percent. Based on appellant's relatively mild and sporadic symptoms, Dr. Parker found that she had an impairment rating at the low end of the range. He opined that appellant had two percent whole person impairment due to her pulmonary dysfunction. Dr. Parker's report is detailed and well reasoned and thus sufficient to constitute the special weight of the evidence.[15]

Based on Dr. Parker's report, OWCP found that appellant had no more than the previously found four percent permanent impairment of the lungs, noting that it was the more generous award. The Board finds that there is no evidence supporting a greater impairment.

On appeal appellant questions the amount of her schedule award. As noted, in determining the impairment of the lung the percentage for the particular class of whole person respiratory impairment is multiplied by 312 weeks to obtain the number of weeks of compensation.[16] OWCP paid appellant for four percent permanent impairment of the lungs, or 12.48 weeks of compensation.

[13] A.M.A., *Guides* 90, Table 5-5.

[14] *See A.R.*, Docket No. 18-0632 (issued October 19, 2018).

[15] *See C.G.*, Docket No. 18-0392 (issued August 14, 2018).

[16] *See supra* note 11.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of FECA provides that schedule award compensation for permanent impairment of a scheduled member shall be based on the employee's monthly pay.[17] Such compensation is to be based on the pay rate as determined under section 8101(4) which defines monthly pay as "[t]he monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater…."[18]

The Board has held that where an injury is sustained over a period of time the date of injury is the date of last exposure to those work factors causing injury.[19] Applying this principle to schedule award claims, the Board has held that the date of injury is the date of the last exposure which adversely affects the impairment because every exposure which has an adverse effect (an aggravation) constitutes an injury.[20] In a case where a claimant continues to be exposed to injurious work factors and the medical evidence documents continued worsening of the claimed condition, OWCP selects the date of last exposure to injurious work factors as the date of injury.[21]

ANALYSIS -- ISSUE 2

The Board finds that OWCP erred in basing her schedule award compensation on an effective pay rate date of June 2, 2008.

As noted, where an injury is sustained over a period of time, as in this case, the date of injury is generally the date of last exposure to the employment factors causing the injury.[22] The employing establishment informed OWCP on November 17, 2016 that appellant was last exposed in March 2009 to the conditions identified as resulting in her injury. In its prior schedule award decisions dated January 24 and July 7, 2017, OWCP based her schedule award compensation on an effective pay rate date of March 1, 2009, which yielded a weekly compensation rate of $667.19. In its April 9, 2018 schedule award decision, however, it found that the effective date of appellant's pay rate for schedule award compensation was June 2, 2008, which yielded a weekly compensation rate of $647.48. As the employing establishment specified that she was last exposed to the conditions alleged to have caused her condition in March 2009, OWCP should base her pay rate

[17] 5 U.S.C. § 8107(a).

[18] *Id.* at § 8101(4).

[19] *See J.S.*, Docket No. 17-1277 (issued April 20, 2018); *Sherron A. Roberts*, 47 ECAB 617 (1996).

[20] *See Barbara A. Dunnavant*, 48 ECAB 517 (1997).

[21] *See G.L.*, Docket No. 12-1795 (issued September 24, 2013).

[22] *See D.D.*, Docket No. 15-0193 (issued May 11, 2015).

for schedule award compensation on her date of last exposure.[23] The Board will therefore remand the case for OWCP to recalculate appellant's pay rate for schedule award compensation.[24]

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish more than four percent permanent impairment of the lungs, for which she previously received schedule award compensation. The Board further finds, however, that OWCP improperly determined her pay rate for compensation purposes.

ORDER

IT IS HEREBY ORDERED THAT the April 9, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board. The April 5, 2018 decision is affirmed.

Issued: January 10, 2019
Washington, DC

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

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

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

[23] *See M.D.*, Docket No. 12-0976 (issued December 19, 2012).

[24] *Id*.