

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

B.C., Appellant)
and) Docket No. 18-1389
DEPARTMENT OF HOMELAND SECURITY,)
CUSTOMS & BORDER PROTECTION,)
El Paso, TX, Employer)
Issued: January 11, 2019

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 July 9, 2018 appellant filed a timely appeal from a June 20, 2018 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 met his burden of proof to establish permanent impairment of his lungs, warranting a schedule award.

FACTUAL HISTORY

On November 2, 2011 appellant, then a 45-year-old canine enforcement officer, filed a traumatic injury claim (Form CA-1) alleging that, on October 20, 2011, he injured his left shoulder

¹ 5 U.S.C. § 8101 *et seq.*

and upper arm in the performance of duty. OWCP accepted the claim for a sprain of the superior glenoid labrum of the left shoulder and disorder of the bursae and tendons of the left shoulder region. On March 7, 2012 appellant underwent a left subacromial decompression and acromioplasty. Subsequent to the surgery, on March 7, 2012 he was admitted to the hospital for acute pulmonary edema after being intubated and experiencing hemoptysis, and hypoxemia. OWCP subsequently expanded acceptance of the claim to include left pneumonia due to other specified organism, an unspecified pneumonia organism, pure hypercholesterolemia, shortness of breath, and other respiratory abnormality.²

Appellant, on September 1, 2016, contacted OWCP regarding a schedule award for a permanent impairment of his lungs.

OWCP referred appellant to Dr. Carlo Majid Hatem, a Board-certified internist and pulmonologist, for a second opinion examination. It requested that Dr. Hatem provide an opinion regarding the extent of permanent impairment, if any, of appellant's lungs using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³

In a report dated October 13, 2016, Dr. Hatem discussed appellant's history of experiencing a respiratory event after surgery that required hospitalization. Following his surgery, appellant had developed asthma requiring the use of Symbicort daily and Albuterol before exercise. Dr. Hatem diagnosed uncomplicated mild intermittent asthma. He noted that appellant could work without restrictions and had not experienced any "recent hospitalizations or emergency room visits for his condition."

Dr. Hatem, in a December 20, 2016 addendum, related that a December 19, 2016 pulmonary function study (PFS) demonstrated postbronchodilator forced expiratory volume in one second (FEV₁) of 88 percent of predicted. He opined that appellant had class 1, grade E impairment based on the FEV₁ results and his daily use of steroids.

In a December 22, 2016 addendum, Dr. Hatem opined that, pursuant to Table 5-5 on page 90 of the (A.M.A., *Guides*), appellant had class 1, grade E impairment due to asthma, which yielded 10 percent whole person impairment.

Dr. Albert A. Rizzo, a Board-certified internist and pulmonologist acting as an OWCP district medical adviser (DMA), on January 24, 2017 reviewed the records provided to him. He noted that appellant had developed pneumonia after shoulder surgery in 2011 and currently experienced mild symptoms of asthma that did not affect his work ability. Dr. Rizzo found that a December 2016 PFS demonstrated FEV₁ of 88 percent of predicted, forced vital capacity (FVC) after bronchodilator of 84 percent of predicted, and a ratio of FEV₁ to FVC of 82 percent of predicted. Based on the results of the PFS, he opined that appellant had class 0, or no impairment

² By decision dated March 6, 2013, OWCP granted appellant a schedule award for seven percent permanent impairment of the left upper extremity. By decision dated June 24, 2016, it granted him a schedule award for an additional one percent permanent impairment of the left upper extremity impairment.

³ A.M.A., *Guides* (6th ed. 2009).

of the lungs, according to Table 5-4 on page 88 of the A.M.A., *Guides*. Dr. Rizzo noted that appellant had class 1 impairment based on his use of medication and a class 0 impairment based on the lack of findings on examination, which yielded no adjustment from the class 0 impairment.

Appellant, on February 13, 2017, filed a schedule award claim (Form CA-7) for permanent impairment of the lungs.

By decision dated February 24, 2017, OWCP denied appellant's schedule award claim. It found that the medical evidence of record was insufficient to establish permanent impairment of the lungs, warranting a schedule award.

On March 23, 2017 appellant requested a telephonic hearing before an OWCP hearing representative.

During the telephonic hearing, held on August 22, 2017, appellant noted that Dr. Hatem found that he had 10 percent whole person impairment. He advised that he continued to receive treatment for his lung condition.

By decision dated October 12, 2017, OWCP's hearing representative vacated the February 24, 2017 decision. She found that the DMA had not discussed Dr. Hatem's December 22, 2016 addendum or explained why his report did not support permanent impairment under the A.M.A., *Guides*. The hearing representative instructed OWCP to refer the case back to the DMA for a supplemental opinion.

Dr. Rizzo provided an addendum report on November 27, 2017. He related that appellant had class 0 impairment based on the results of PFS showing postbronchodilator results for FEV₁ of 88 percent of predicted, FVC of 84 percent of predicted, an FEV₁/FVC ratio of 82 percent of predicted, and a diffusion capacity of 86 percent of predicted according Table 5-4 on page 88 of the A.M.A., *Guides*. Dr. Rizzo noted that the A.M.A., *Guides* instructed the evaluator to use the key factor of pulmonary function to identify the class and that nonkey factors such as history and physical factors did not alter the class identification in evaluation pulmonary impairments under both Table 5-4 and Table 5-5. He concluded that appellant had no impairment of the lungs according to Table 5-4 on page 88 of the A.M.A., *Guides*.

By decision dated June 20, 2018, OWCP denied appellant's claim for a schedule award for the lungs.

LEGAL PRECEDENT

The schedule award provision of FECA⁴ and its implementing federal regulation⁵ 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

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

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

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.⁸

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) of impairment. Class 0 is used for any maximum FEV₁ percentage predicted greater than 80 percent. Class 1 is used for FEV₁ percentage predicted from 70 to 80 percent.⁹

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish permanent impairment of his lungs, warranting a schedule award. Dr. Hatem, an OWCP referral physician, evaluated appellant on October 13, 2016. He diagnosed uncomplicated mild intermittent asthma. Dr. Hatem indicated that appellant could work without limitations, but required daily use of low dose steroids to control his asthma. In a December 20, 2016 addendum, he reviewed a December 19, 2016 PFS and noted that the FEV₁ was 88 percent of predicted. Based on the FEV₁ results and appellant's use of steroids, Dr. Hatem found a class 1, grade E impairment. On December 22, 2015 he specified that he used Table 5-5 on page 90 of the A.M.A., *Guides* to find that appellant had class 1, grade E impairment due to asthma, or 10 percent whole person impairment.

Dr. Rizzo, a DMA, reviewed Dr. Hatem's October 13, 2016 report and found that appellant had no pulmonary impairment. In a supplemental report dated November 27, 2017, he reviewed the records provided, including Dr. Hatem's December 20 and 22, 2015 addendums. Dr. Rizzo utilized Table 5-4 on page 88 of the A.M.A., *Guides* to find that appellant had no ratable impairment of the lungs based on postbronchodilator results of 88 percent of predicted for FEV₁, 84 percent of predicted for FVC, an FEV₁/FVC ratio of 82 percent of predicted, and a diffusion capacity of 86 percent of predicted. He noted that the test results constituted key factors while history and physical findings constituted nonkey factors that did not alter class identification according to the A.M.A., *Guides*. Dr. Rizzo further found that the A.M.A., *Guides* on page 88

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) (March 2017); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁸ *Id.* at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(c)(1) (February 2013).

⁹ A.M.A., *Guides* 90, Table 5-5.

provided that Table 5-5, used to rate impairments due to asthma, had the same key elements as Table 5-4. He concluded that appellant had a class 0 impairment of the lungs.

The A.M.A., *Guides* provides for evaluation of asthma under Table 5-5 on page 90. The objective findings for asthma impairment are not the same as for the pulmonary function impairment under Table 5-4 on page 88. Both tables, however, begin rating impairment with FEV₁ at 80 percent or less of predicted. Table 5-5 of the A.M.A., *Guides* begins with a maximum postbronchodilator FEV₁ of 80 percent of predicted and then descends to under 50 percent of predicted. As appellant's FEV₁ was 88 percent of predicted, he has a class 0 impairment under both Table 5-4 and Table 5-5.

Dr. Rizzo disagreed with Dr. Hatem's finding that appellant had class 1 impairment due to asthma under Table 5-5 based on his daily use of medication, noting that the A.M.A., *Guides* provided that test results were the key factors used to identify class under both Table 5-4 and Table 5-5. The A.M.A., *Guides* provides that the key factor used to determine the impairment class is the loss of pulmonary function as demonstrated by the relevant objective test results for the condition rated, and that nonkey factors are history and physical examination.¹⁰ The first step is to determine the impairment class according to the key factors, and then use the key factors to add or subtract from the default impairment found through application of the key factor.¹¹ As appellant's PFS results established a class 0 impairment, he is not entitled to a schedule award for the lungs.¹²

On appeal appellant notes that he continues to experience asthma requiring medication and medical treatment. He contends that he is entitled to the 10 percent permanent impairment found by Dr. Hatem. As noted, however, appellant's test results place him at zero percent impairment of the lungs, and thus the medical evidence of record is insufficient to establish permanent impairment.¹³

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.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish permanent impairment of his lungs, warranting a schedule award.

¹⁰ *Id.* at 86; *see also* D.W., Docket No. 17-0974 (issued January 16, 2018).

¹¹ *Id.*

¹² D.W., *supra* note 10; *see also* T.R., Docket No. 17-0047 (issued July 27, 2017).

¹³ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the June 20, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 11, 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