

FACTUAL HISTORY

On March 22, 2011 appellant, then a 72-year-old retired industrial planner/estimator,² filed an occupational disease claim (Form CA-2) alleging that he had developed pulmonary conditions causally related to factors of his federal employment including exposure to fumes, dust, chemicals and asbestos. OWCP accepted the claim for chronic airway obstruction and bilateral asbestosis exposure.

By decision dated October 27, 2017, OWCP granted appellant a schedule award for 65 percent permanent impairment of both lungs (whole person impairment). The award was ran for a 202.8-week period from May 27, 2015 through April 15, 2019. The decision indicated that appellant's permanent impairment was calculated under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).³

On September 19, 2019 appellant filed a claim for compensation (Form CA-7) for an increased schedule award. He did not submit any additional medical evidence to support increased permanent impairment.

On October 4, 2019 OWCP advised appellant of the need for additional medical evidence regarding permanent impairment under the sixth edition of the A.M.A., *Guides*.

Appellant thereafter submitted reports from Dr. Agnieszka Palecki, Board-certified in pulmonary disease, including pulmonary function tests (PFT) of October 5, 2017 and June 19, 2019,⁴ a June 14, 2019 chest x-ray, and a June 13, 2019 six-minute walk test.

Based on the recommendation of its district medical adviser (DMA), OWCP, in a letter dated January 15, 2020, requested that appellant submit a report from his physician, which rated appellant's permanent impairment.⁵

In a February 10, 2020 letter, Dr. Palecki indicated that appellant was diagnosed with severe chronic obstructive pulmonary disease (COPD) Gold Guidelines stage IV, which severely limited his daily activity. He noted that appellant's condition was permanent and stable. Dr. Palecki noted that appellant required inhalers and oxygen 24/7 and used continuous positive airway pressure (CPAP) every night for treatment of obstructive sleep apnea.

On April 16, 2020 OWCP requested that its DMA review the medical evidence and the February 2, 2017 statement of accepted facts (SOAF). In a May 28, 2020 report, Dr. David I.

² Appellant retired from the employing establishment effective March 31, 2004. He first learned of his lung disease and its relationship to factors of his federal employment on March 31, 2004.

³ A.M.A., *Guides* (6th ed. 2009).

⁴ The June 19, 2019 PFT report noted post bronchodilator results of FVC 49 percent, FEV1 26 percent, and FEF 16 percent and diffusion capacity at 22 percent.

⁵ OWCP also referred appellant for a second opinion evaluation in New Jersey. However, the second opinion appointment was cancelled as appellant was living in Florida at the time and clarification was requested from his treating physician.

Krohn, a Board-certified internist, serving as the DMA, reviewed the SOAF and appellant's medical record, noting that he smoked cigarettes from age 14 to 65, about 3 to 4 cigarettes a day. The DMA noted his review of a December 12, 2012 report of Dr. Malcom H. Hermele, an internist, who opined that appellant had 100 percent pulmonary disability along with Dr. Palecki's February 10, 2020 statement. He noted that a more specific description of appellant's symptoms was not provided and there was no report of appellant's physical examination when Dr. Palecki evaluated him. The DMA also noted that the most recent PFT report was dated May 19, 2019,⁶ the results were post bronchodilators, and revealed a FVC 49 percent, FEV1 26 percent, and FEF 16 percent, diffusion capacity 22 percent. Citing Table 5-4 on page 88 of the A.M.A., *Guides*, he assigned Class 4 impairment for severe dyspnea. The DMA found that the nonkey factor of history was 0, and the nonkey factor of physical findings was -1. Per page 86 of the A.M.A., *Guides*, the DMA assigned additional +1 to all nonkey factors as the key factor was Class 4. Applying the modifications for history (0 plus 1 or 1) and physical findings (-1 plus 1 or 0), he opined that appellant had Class 4 Grade D or 60 percent permanent of the whole person for pulmonary dysfunction.

On July 1, 2020 OWCP requested clarification from its DMA. It noted that appellant previously received 65 percent impairment for each lung, which was less than he had found.

In a July 16, 2020 letter, the DMA indicated that he re-reviewed appellant's medical records from November 5, 2015, the date of the schedule award of Dr. Monroe Karetzky, Board-certified in internal medicine and pulmonary disease, who assigned a "100 percent of total permanent pulmonary disability with a Pulmonary Dysfunction Class 4 [Grade] D impairment rating." He indicated that, under Table 5-4 of the A.M.A., *Guides*, Class 4 Grade D corresponded to 60 percent whole person impairment. The DMA noted that Dr. Karetzky's claim of 100 percent disability would be Class 4 Grade E under Table 5-4; however, Dr. Karetzky did not assign Grade E. He indicated that appellant requested an increased schedule award for more than the previously awarded total of 65 percent impairment of each lung; however, the maximum allowed by Table 5-4 was 65 percent.

By decision dated August 14, 2020, OWCP denied appellant's claim for an additional schedule award. It found that the evidence of record was insufficient to establish greater permanent impairment than that which was previously awarded.

On August 28, 2020 appellant requested a review of the written record before a representative of OWCP's Branch of Hearings and Review.

In an August 26, 2020 report, Dr. Palecki indicated that appellant was seen for COPD/chronic respiratory failure. He indicated that his last pulmonary function test showed FEV1 reduction of 26 percent, which showed severe COPD Gold Stage 4. Dr. Palecki opined that appellant had 100 percent pulmonary impairment and 80 percent whole person impairment. He indicated that appellant was unable to walk or perform any sort of exertion without oxygen replacement 24/7, which was proven on the last six-minute walk. Duplicative copies of appellant's last PFT dated June 19, 2019 and six-minute walk test dated June 13, 2019 were provided.

⁶ The Board notes that the most recent PFT is dated June 19, 2019.

By decision dated November 27, 2020, an OWCP hearing representative affirmed OWCP's August 14, 2020 decision.

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.⁷ It, 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.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 schedule members includes the eye, arm, hand, fingers, leg, foot, and toes. Additionally, FECA specifically provides for compensation for loss of hearing and loss of vision.¹¹ 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.¹² 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.¹³ Compensation for total loss of use of a single lung is 156 weeks.¹⁴

Although FECA does not specifically provide for compensation for whole person impairment, the measurement of lung function warrants special consideration. Table 5-4, Pulmonary Dysfunction, A.M.A., *Guides* page 88, 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 pulmonary dysfunction is 0 to 65 percent. The Federal (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

⁷ 5 U.S.C. § 8107(c).

⁸ 20 C.F.R. § 10.404.

⁹ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *id.* at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

¹⁰ *J.G.*, Docket No. 16-1533 (issued March 15, 2018); *W.C.*, 59 ECAB 372, 374-75 (2008); *Anna V. Burke*, 57 ECAB 521, 523-24 (2006).

¹¹ *Supra* note 7 at § 8107(c)(13) and (14).

¹² *Id.* at § 8107(c)(22); 20 C.F.R. § 10.404(b).

¹³ *Id.* at § 8107(c); *Id.* at § 10.404(a); see *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

¹⁴ *Id.* at § 10.404(b).

impairment will be multiplied by 312 weeks (twice the award for loss of function of one lung) to obtain the number of weeks payable.¹⁵

ANALYSIS

The Board finds that appellant has not established greater than 65 percent permanent impairment of the lungs for which he previously received a schedule award.

The record reflects that Dr. Palecki did not explain how he applied the A.M.A., *Guides* to determine an impairment rating. When an examining physician does not apply the A.M.A., *Guides* to determine an impairment rating, OWCP may rely on the opinion of its district medical adviser to apply the A.M.A., *Guides* to the physical findings reported by the attending physician.¹⁶ In May 28 and July 16, 2020 reports, the DMA applied the A.M.A., *Guides* to the diagnostic testing and description of appellant's symptoms Dr. Palecki provided. He referenced Table 5-4 of the A.M.A., *Guides* and explained that Dr. Palecki's assignment of Class 4, Grade D, for severe dyspnea, equaled 60 percent permanent impairment for both lungs. The DMA found that the results of the pulmonary function test placed appellant in a Class 4, with a ratable impairment from 45 to 65 percent and a default value of 55 percent. He found that appellant's history and physical findings resulted in a Class 4 Grade D lung impairment. The Board finds that the DMA properly applied the A.M.A., *Guides* in calculating 60 percent permanent bilateral lung impairment for Class 4 Grade D lung impairment.¹⁷ The DMA further explained that, as appellant was previously awarded 65 percent impairment, there was no higher rating entitlement as 65 percent whole person impairment for pulmonary dysfunction was the maximum amount allowed by Table 5-4.

Thus, OWCP's medical adviser's finding of 60 percent permanent impairment of both lungs constitutes the weight of the medical evidence.¹⁸ Appellant has not met his burden of proof to establish greater permanent impairment than the 65 percent previously awarded.

On appeal appellant contends that he is 100 percent disabled. He alleges that his 100 percent impairment rating was supported by Dr. Palecki's August 26, 2020 statement in which he opined that appellant has 100 percent pulmonary impairment. As explained above the medical evidence of record does not establish greater than the 65 percent permanent bilateral lung impairment previously awarded.

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.

¹⁵ *Supra* note 9 at Chapter 2.808.5(c)(1); *supra* note 9 at Chapter 3.700.4d(1)(c).

¹⁶ *See B.T.*, Docket No. 19-0531 (issued August 19, 2019); *J.G.*, *supra* note 10; *J.G.*, Docket No. 09-1714 (issued April 7, 2010).

¹⁷ *See* A.M.A., *Guides* 87.

¹⁸ *J.G.*, *supra* note 10; *see also H.B.*, Docket No. 09-2240 (issued June 18, 2010); *E.V.*, Docket No. 06-1989 (issued May 21, 2007); *Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

CONCLUSION

The Board finds that appellant has not established greater than 65 percent permanent impairment of the lungs for which he previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the November 27, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 12, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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