United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 23-0456**
	)	**Issued: October 2, 2023**
DEPARTMENT OF VETERANS AFFAIRS, EDWARD P. BOLAND VA MEDICAL CENTER, Leeds, MA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On February 15, 2023 appellant filed a timely appeal from a January 11, 2023 merit decision 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.

ISSUE

The issue is whether appellant has met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

FACTUAL HISTORY

On February 10, 2006 appellant, then a 49-year-old social worker, filed an occupational disease claim (Form CA-2) alleging that she developed bronchitis and nausea and began to feel ill

[1] 5 U.S.C. § 8101 *et seq.*

due to factors of her employment when she was deployed to a VA medical shelter in Waco, TX. She noted that she first became aware of her condition and realized its relationship to her federal employment on October 24, 2005. OWCP accepted appellant's claim for bilateral asthmatic bronchitis.

On May 14, 2020 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a development letter dated May 19, 2020, OWCP requested that appellant submit a detailed narrative medical report from her treating physician based upon a recent examination including a date of maximum medical improvement (MMI), the diagnosis upon which the impairment rating was based, a detailed description of any preexisting impairment, and a final rating of the permanent impairment and discussion of the rationale for calculation of the impairment, with references to the applicable criteria and tables of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[2] It afforded her 30 days to submit the requested information.

OWCP subsequently referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Michael Teiger, a Board-certified internist specializing in pulmonary disease, for a second opinion examination in order to determine whether she had permanent impairment of a scheduled member or function of the body due to her accepted injury in accordance with the A.M.A., *Guides*.

In a February 25, 2021 report, Dr. Teiger reviewed the SOAF and noted the accepted condition of bilateral bronchitis. He reported that appellant still complained of frequent bouts of shortness of breath, wheezing, a cough productive of clear secretions, and troubling chest tightness and approximately three attacks of asthma per year. Dr. Teiger also noted appellant's current medication of fluticasone 500/50, and nebulized albuterol taken as needed. On examination of appellant's lungs, he noted normal breath sounds on both the left and right side and no rhonchi or wheezing. Dr. Teiger indicated that a pulmonary function test (PFT) performed that day demonstrated that appellant had a prebronchondilator forced vital capacity (FVC) of 3.67L or 93 percent of predicted, a forced expiratory volume in one second (FEV_1) of 2.55L or 84 percent of predicted, and a ratio of FEV_1 to FVC of 90 percent of predicted. The PFT further revealed that total lung capacity (TLC) was 5.46L or 90 percent and a diffusion capacity (single breath capacity) was 92 percent of predicted. Dr. Teiger reported that the findings were consistent with mild bronchial asthma. He opined that appellant's present condition was a continuation of her employment-related asthmatic bronchitis with frequent exacerbations. Dr. Teiger noted that appellant had reached maximum medical improvement (MMI) as of that date. He referenced the A.M.A., *Guides* and determined that appellant had a Class 2 impairment with a severity of "D," which resulted in 20 percent permanent impairment of the whole person.

OWCP subsequently referred the case record to Dr. David I. Krohn, a Board-certified internist serving as a district medical adviser (DMA), for an opinion regarding appellant's permanent impairment.

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

In a May 6, 2021 report, Dr. David I. Krohn, a Board-certified internist serving as a district medical adviser (DMA), reviewed the medical record, including Dr. Teiger's February 25, 2021 second opinion report, and noted that appellant's claim was accepted for bilateral asthmatic bronchitis. He reported that in order to objectively substantiate the diagnosis of asthma, appellant should be formally tested with methacholine challenge. Utilizing the sixth edition of the A.M.A., *Guides*, the DMA referenced Table 5-4 (Pulmonary Dysfunction), page 88, and Table 5-5 (Asthma), page 90, and reported that the pulmonary function tests in each table correlated with a Class 0 or a zero percent whole person permanent impairment. He noted his disagreement with Dr. Teiger's impairment rating and indicated that for Table 5-4 and Table 5-5, objective tests were the key factor that served as the basis for any impairment rating.

On August 3, 2021 OWCP requested that Dr. Teiger review the May 6, 2021 DMA report and provide a supplemental opinion on whether appellant had permanent impairment of a scheduled member or function of the body due to her accepted injury in accordance with the A.M.A., *Guides*. In an April 26, 2022 report, Dr. Teiger indicated that he reevaluated appellant in light of a recent DMA report. He reported that appellant had active issues of bronchial asthma and recurrent episodes of asthmatic bronchitis exacerbation. Dr. Teiger indicated that he disagreed with the DMA's opinion of zero percent permanent impairment and explained that one normal pulmonary study was not reflective of appellant's overall condition that required daily use of the bronchodilator inhalers. He referred to Table 5-5 of the A.M.A., *Guides* and determined that appellant was a Class 2 impairment based on clinical parameters and medication requirement of daily usage of high dose fluticasone inhaler. Dr. Teiger again found that appellant had 20 percent whole person permanent impairment.

OWCP forwarded Dr. Teiger's February 25, 2021 and April 26, 2022 reports to Dr. Alan J. Goodman, a Board-certified internist specializing in allergy and immunology and serving as a DMA. In an August 5, 2022 report, the DMA reviewed the SOAF and noted that appellant's claim was accepted for bilateral bronchitis. He discussed appellant's medical records and reported that appellant had chronic asthma that required treatment with moderate dose inhaled corticosteroids. Referring to page 87 of the A.M.A., *Guides*, the DMA explained that the controlling factor in determination of permanent impairment was based on the key factors from objective tests. He reported that PFTs performed on October 10, 2006 and February 23, 2021 showed measurements of FVC, FEV_1, FEV_1/FVC, and DLCO within normal limits. Utilizing Table 5-4 and Table 5-5, the DMA determined that appellant was a Class 0, which translated to zero percent permanent impairment. He explained that non-key factors, such as daily use of steroids, could move the claimant within a class, but the A.M.A., *Guides* did not permit moving from the initial impairment class. The DMA indicated that while appellant had asthma, it did not rise to the level of permanent impairment as required by the A.M.A., *Guides*.

In an October 31, 2022 supplemental report, Dr. Teiger reiterated that appellant had a Class 2 impairment due to her chronic and symptomatic asthma, which resulted in 20 percent whole person permanent impairment. He noted his disagreement with the August 5, 2022 DMA report and explained that while objective tests were key factors, the A.M.A., *Guides* did not state that they should be the only factor used to determine permanent impairment. Dr. Teiger reported that Table 5-4 and Table 5-5 on pages 88 and 90, respectively, used both clinical parameters, as well as medication usage, as co-determinants to assess permanent impairment.

In a December 3, 2022 report, Dr. Goodman, the DMA indicated that after reviewing Dr. Teiger's recent October 31, 2022 report, he would continue to rate appellant at zero percent permanent impairment according to the A.M.A., *Guides*. He reported that OWCP's procedures indicated that for lung impairment, the class of respiratory impairment should first be established following the A.M.A., *Guides*. The DMA included an excerpt, which noted that "[w]hile [a] pulmonary function varies from day to day and from environment to environment, impairment exists for compensation purposes when the pulmonary function testing reveals Class 1 or greater impairment severity as defined by the A.M.A., *Guides*." He explained that based on this criterion, it was mandatory to consider PFT as the determination of impairment. The DMA noted that appellant was a Class 0 impairment for normal measurements of FVC, FEV_1, FEV_1/FVC, and DLCO. He also noted his disagreement with Dr. Teiger's impairment rating based on medication and further explained that non-key factors, such as medication use, were used in determining permanent impairment by moving a claimant within a class. The DMA referred to page 89 of the A.M.A., *Guides* and the clinical scenarios in Section 5.11, page 93, which demonstrated that medication use was a factor in the impairment ratings after the PFT was utilized to determine class impairment. He again concluded that while appellant still had asthma, which required medication use, it did not rise to the level of permanent impairment as defined by the A.M.A., *Guides*. The DMA concluded that his initial impairment of zero percent permanent impairment of the whole person remained unchanged.

By decision dated January 11, 2023, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body due to her accepted pulmonary condition. It found that the weight of the medical evidence rested with opinion of the DMA.

LEGAL PRECEDENT

The schedule award provisions of FECA[3] and its implementing regulations[4] 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. FECA, however, does not specify the manner in which the percentage of loss of a member 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 and the Board has concurred in such adoption.[5] As of May 1, 2009, the sixth edition of the A.M.A., *Guides*, published in 2009, is used to calculate schedule awards.[6]

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Id*. at § 10.404 (a); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (a) (March 2017); *id*. at Chapter 3.700.2 and Exhibit 1 (January 2010).

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.[7] 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.[8] 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.[9] Neither FECA nor the regulations provided for the payment of a schedule award for the permanent loss of use of the back or the body as a whole.[10] Compensation for total loss of use of a single lung is 156 weeks.[11]

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. OWCP procedures provide 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.[12]

OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[13]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

In reports dated February 25, 2021 and April 26, 2022, Dr. Teiger, an OWCP referral physician, reviewed the SOAF and noted the accepted condition of bilateral bronchitis. He provided examination findings and indicated that a PFT demonstrated that appellant had a FVC of

[7] *R.C.*, Docket No. 21-1332 (issued July 1, 2022); *W.C.*, 59 ECAB 372, 375-75 (2008); *Anna V. Burke*, 57 ECAB 521, 523-24 (2006).

[8] *Supra* note 3 § 8107(c)(13) and (14).

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

[10] *Id.* at § 8107(c); *id.* at § 10.404(a); *see J.C.*, Docket No. 21-0426 (issued October 12, 2021); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[11] 20 C.F.R. § 10.404(b).

[12] *Supra* note 6 at Chapter 2.808.5c(1); *id.* at Chapter 3.700.4d(1)(c).

[13] *See supra* note 6 at Chapter 2.808.6(f) (March 2017). *R.M.*, Docket No. 18-1313 (issued April 11, 2019); *C.K.*, Docket No. 09-2371 (issued August 18, 2010).

3.67L or 93 percent of predicted, a FEV_1 of 2.55L or 84 percent of predicted, and a ratio of FEV_1 to FVC of 90 percent of predicted. Dr. Teiger referenced the A.M.A., *Guides* and determined that appellant was a Class 2 impairment with a severity of "D" based on clinical parameters and medication requirement of daily usage of high dose fluticasone inhaler, which translated to 20 percent whole person permanent impairment.

OWCP forwarded Dr. Teiger's February 25, 2021 and April 26, 2022 reports to Dr. Goodman, a DMA. In an August 5, 2022 report, the DMA noted that appellant's claim was accepted for bilateral bronchitis and discussed appellant's medical records. He explained that page 87 of the A.M.A., *Guides* noted that the controlling factor in determination of permanent impairment was based on the key factors from objective tests. He reported that PFTs performed on October 10, 2006 and February 23, 2021 showed measurements of FVC, FEV_1, FEV_1/FVC, and DLCO within normal limits. Utilizing Table 5-4 and Table 5-5, the DMA determined that appellant was a Class 0 impairment, which translated to zero percent permanent impairment.

In an October 31, 2022 supplemental report, Dr. Teiger reiterated that appellant had a Class 2 impairment due to her chronic and symptomatic asthma, which resulted in 20 percent whole person permanent impairment. He explained that while objective tests were key factors, they should not be the only factor used to determine permanent impairment.

In a December 3, 2022 report, the DMA noted his disagreement with Dr. Teiger's recent October 31, 2022 report. He reported that it was mandatory to consider PFT when determining the class of permanent impairment and referred to OWCP procedures and the A.M.A., *Guides*. The DMA concluded that his initial impairment rating of zero percent remained unchanged.

As noted above, OWCP's procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the DMA providing rationale for the percentage of impairment specified.[14] Its procedures further provide that if the DMA disagrees with the second opinion doctor's impairment rating, the claims examiner should seek clarification or a supplemental report from the second opinion examiner.[15] After receiving clarification, the claims examiner should refer the case back to the DMA for review.[16] The Board finds that in accordance with its procedures, OWCP properly sought clarification from Dr. Teiger, the second opinion examiner, after the DMA disagreed with his impairment rating and referred Dr. Teiger's October 31, 2022 supplemental report back to the DMA for review.

In this case, the DMA properly applied appellant's PFT findings to determine the proper class of diagnosis in accordance with the A.M.A., *Guides*. He noted that PFTs performed on October 10, 2006 and February 23, 2021 showed measurements of FVC, FEV_1, FEV_1/FVC, and DLCO within normal limits, which translated to a Class 0 under Table 5-4 and Table 5-5. The DMA further explained that non-key factors, such as medication use, could not be used to move a

[14] *Id*.

[15] FECA Procedure Manual, *id*., at Chapter 2.808.6(f)(2) (March 2017).

[16] *Id*.

claimant's impairment in Class 0. He properly concluded that appellant had no ratable impairment under the A.M.A., *Guides* due to her accepted lung condition. As appellant's test results, the key factor, placed her at zero percent of the whole person permanent impairment, she has not met her burden of proof.[17]

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 permanent impairment.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish permanent impairment of a scheduled member or function of the body, warranting a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 2, 2023
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

[17] *G.H.,* Docket No. 22-0890 (issued January 9, 2023).