

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

HARRISON R. BOSTON, Appellant)
)
and)
)
OCCUPATIONAL HEALTH & SAFETY)
ADMINISTRATION, Jacksboro, TN,)
Employer)
_____)

**Docket No. 05-1550
Issued: December 8, 2005**

Appearances:
Harrison R. Boston, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 19, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decisions dated September 16, 2004 and April 25, 2005, denying an additional schedule award. Under 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 is entitled to additional compensation for his bilateral lung impairment.

FACTUAL HISTORY

Appellant, a 65-year-old inspection supervisor, filed a Form CA-2 claim for benefits on January 10, 2002 alleging that he developed pneumoconiosis in both lungs causally related to employment factors.

In a report dated April 26, 2002, Dr. Jamal Isber, Board-certified in internal medicine and a specialist in pulmonary medicine, diagnosed pneumoconiosis based on appellant's history of significant coal dust exposure in the workplace of approximately 10 years. Chest x-rays were consistent with coal miner pneumoconiosis. Dr. Isber advised that he had Class 4 severe impairment of whole person.

In an impairment evaluation dated September 25, 2002, an Office medical adviser found that appellant had sustained pneumoconiosis causally related to his federal employment. He found that appellant had a zero percent lung impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed.). The Office medical adviser stated that appellant's height was incorrectly measured in the calculations used by Dr. Isber.

By decision dated October 3, 2002, the Office accepted the claim for pneumoconiosis, but found that appellant was not entitled to a schedule award pursuant to the A.M.A., *Guides*.

On October 8, 2002 appellant filed a Form CA-7 claim for a schedule award. By letter dated September 30, 2003, he requested reconsideration of the Office's October 3, 2002 decision, contending that he was entitled to a schedule award for his pneumoconiosis condition. Appellant enclosed a September 17, 2003 report from his county health department which indicated that his height was 69 inches, the same measurement Dr. Isber found in his April 26, 2002 report. He also submitted a September 24, 2003 report in which Dr. Isber stated that he remeasured appellant's height to be 68 and 3/8 inches. He stated that, regardless of appellant's height, the percentage reference based on diffusion capacity according to the A.M.A., *Guides* at Table 5-12, page 107 translated to a Class 4, 51 to 100 percent severe impairment of the whole person. He explained his conclusion as follows:

“As you can see, regardless of the patient's height the percent Reference is < 0.27 and according to the A.M.A., *Guides* 5th ed. page 107, it stated that, if the percent Ref[erence] for DLco is < 40 percent of predicted the patient should be classified as having Class 4, 51 to 100 percent, severe impairment of the whole person.”

By decision dated December 29, 2003, the Office denied appellant's request for reconsideration. The Office stated that he failed to submit the protocol regarding how profusion testing was performed, which the Office medical adviser stated would be required to properly assess impairment in accordance with the A.M.A., *Guides*.

By letter dated January 20, 2004, appellant requested reconsideration. He submitted the pulmonary function testing and diffusion capacity testing performed on April 18, 2002 at St. Mary's Medical Center, on which Dr. Isber based his September 24, 2003 impairment evaluation.

In a memorandum/impairment evaluation dated March 21, 2004, the Office medical adviser found that appellant had 51 percent impairment of the right lung and a 51 percent impairment of the left lung due to the accepted condition of pneumoconiosis.

On September 16, 2004 the Office granted appellant schedule awards for a 51 percent permanent impairment of the right and left lung. The period of the awards ran from January 1, 2004 to January 18, 2007, for a total of 159.12 weeks of compensation.

By letter dated November 26, 2004, appellant requested reconsideration. He contended that Federal (FECA) Procedure Manual program memorandum No. 269 and Federal (FECA) Procedure Manual at Chapter 2.808.6,¹ provided that impairment to the lungs will be based on the percentage of impairment to both lungs. Memorandum No. 269 and the Federal (FECA) Procedure Manual note that, “since FECA regulations only refer to one lung, the percentage of whole man impairment for the particular class of impairment will be multiplied by 312 weeks (twice the award for loss of function of one lung) to obtain the number of weeks payable. Schedule awards are to be based on the loss of use of both lungs. Appellant noted that the Office medical adviser stated that the lung impairment was 51 percent of the right lung and 51 percent of the left lung. However, he received an award for 159.12 weeks of compensation. Appellant argued that this was incorrect because his impairment and the number of weeks of compensation should have been based on Memorandum No. 269 and Chapter 2.808.6.

In an Office memorandum dated February 1, 2005, the Office asked the Office medical adviser to review the case file and to specifically consider appellant’s reference to Federal (FECA) Procedure Manual. The Office asked the Office medical adviser whether he considered the percentage of impairment multiplied by 312 weeks and if so, whether it represented an increase in permanent impairment.

In a memorandum dated February 23, 2005, the Office medical adviser stated:

“The 51 percent of the body as a whole was in my consideration of the scheduled award, as shown in my critique dated March 21, 2004, shown to be 51 percent of each lung.

I do not know how this may have been processed for scheduled award purposes.”

By decision dated April 25, 2005, the Office denied modification of the September 16, 2004 schedule award. The Office noted that the Office medical adviser found 51 percent impairment to both lungs based on the diffusion capacity abnormality in the respiratory assessment parameters, which placed him in the Class 4 level.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees’ Compensation Act² sets forth the number of weeks of compensation to be paid for permanent loss or loss of use, of the

¹ Federal (FECA) Procedure Manual, Part 2 -- Schedule Awards and Disability Claims, *Evaluation of Schedule Awards*, Chapter 2.808.6 (March 1995).

² 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

members of the body listed in the schedule.³ Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.⁴ However, the Act does not specify the manner in which the percentage of loss of use, of a member is to be determined. For consistent results and to insure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (5th ed.) as the standard to be used for evaluating schedule losses.⁵

ANALYSIS

In this case, Dr. Isber found in a September 24, 2003 report that the percentage of diffusion capacity measured on pulmonary testing resulted in a Class 4, 51 to 100 percent severe impairment of the whole person according to the A.M.A., *Guides* at Table 5-12, page 107. The Office medical adviser adopted Dr. Isber's findings and impairment rating of both lungs in a March 21, 2004 report. Dr. Isber reported that appellant's Class 4 impairment was between 51 percent and 100 percent of the whole person. In granting the schedule award, the Office medical adviser allowed 51 percent impairment, the lowest possible Class 4 impairment percentage. Dr. Isber's report and the A.M.A., *Guides* at page 107 provide that the mildest value for DLco Class 4 impairment is 40 percent of predicted value. Therefore, a more severe Class 4 impairment would be less than 40 percent predicted value for DLco. Since appellant's DLco predicted value was 27 percent, his impairment is more severe than the mildest impairment of 40 percent of predicted value, which warrants the 51 percent impairment classification. The Office medical adviser has not adequately explained why he rated appellant at the mildest impairment percentage classification for Class 4 impairment, when appellant's DLco value was not at the mildest range of predicted values.

Accordingly, the Office's April 25, 2005 decision is set aside and remanded for further development to obtain a rationalized medical explanation as to the percentage of impairment classification, between 51 percent to 100 percent, appellant is entitled to for his Class 4 impairment.

CONCLUSION

The Board finds that the April 25, 2005 Office decision must be set aside and remanded for further development of appellant's compensation entitlement for his bilateral lung impairment based on the loss of use, of both lungs pursuant to the A.M.A., *Guides*.

³ 5 U.S.C. § 8107(a)(c). With respect to the loss of use of a lung, the applicable regulation provides that for a total or 100 percent loss of use of a single lung, an employee shall receive 156 weeks' compensation. 20 C.F.R. § 10.404(a). Regarding loss of use due to lung impairments, as in the instant case, the Office has determined that the percentage of impairment will be multiplied by 312 weeks (twice the award for loss of function of one lung) to obtain the number of weeks payable. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4 (November 1998). The Office has applied the proper methodology for calculation of the bilateral lung impairment. Schedule awards are not payable for whole man impairment. But rather are converted to impairment values for single or bilateral lung impairment. The maximum allowable award for a bilateral lung impairment is 312 weeks.

⁴ 5 U.S.C. § 8107(c)(19).

⁵ 20 C.F.R. § 10.404.

ORDER

IT IS HEREBY ORDERED THAT the April 25, 2005 decision of the Office of Workers' Compensation Programs be set aside and remanded for further development in conformance with this decision.

Issued: December 8, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board