United States Department of Labor
Employees' Compensation Appeals Board

R.F., Appellant	)	
and	)	**Docket No. 16-0192**
	)	**Issued: November 8, 2016**
DEPARTMENT OF VETERANS AFFAIRS, JAMES H. QUILLEN VETERANS ADMINISTRATION MEDICAL CENTER, Mountain Home, TN, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 11, 2015 appellant, through counsel, filed a timely appeal from an October 22, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the decision.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant met his burden of proof to establish permanent impairment due to the accepted pulmonary condition.

On appeal counsel asserts that, because Dr. Martin Fritzhand, a Board-certified urologist, provided an impairment evaluation relying on clinical findings, his opinion should carry the weight of the medical evidence.

FACTUAL HISTORY

On March 6, 2012 appellant, then a 51-year-old painter, filed an occupational disease claim (Form CA-2) alleging that spraying lead-based paint during the course of his employment, in 104-degree heat, caused breathing problems. He advised that he first became aware of the condition and its relationship to his federal employment on March 11, 2011. The paint shop supervisor indicated that he was first made aware of the condition on March 11, 2011. The supervisor's acknowledgment signature was signed March 6, 2012.

On an emergency department treatment note dated March 11, 2011, Dr. Terry L. Puckett, Board-certified in preventive medicine and medical director of occupational health services at the employing establishment, noted a history that, following two days of painting at work, appellant developed a cough, headache, a very sore throat, and raw-feeling lungs. He provided physical examination findings and prescribed medication.

By decision dated April 17, 2012, OWCP denied the claim because the medical evidence submitted was insufficient to establish entitlement to benefits.

In correspondence received by OWCP on April 19, 2012, Dr. Puckett forwarded treatment notes dated September 28, 2011 to March 14, 2012. In each of these report, he noted appellant's complaint of periodic shortness of breath. Dr. Puckett indicated that appellant was being treated for chemical pneumonitis following exposure to paint and finish vapors in March 2011. On March 14, 2012 he advised that appellant had been on prednisone since February 2012 and reported improved breathing. Dr. Puckett diagnosed chemical pneumonitis with good response to appropriate therapy, as evidenced by current normal spirometry. He recommended continued medication.

On May 2, 2012 appellant, through counsel, requested a hearing. Following a preliminary review of the record, in a June 20, 2012 decision, an OWCP hearing representative found that the evidence submitted by Dr. Puckett established the claim and she reversed the April 17, 2012 OWCP decision.

On June 25, 2012 OWCP accepted the condition of chemical pneumonitis, ICD-9 code 506.3.[3]

[3] ICD-9 code 506.3 is identified as other acute and subacute respiratory conditions due to fumes and vapors. www.cdc.gov.

On May 23, 2014 appellant forwarded a March 6, 2012 schedule award claim (Form CA-7) to OWCP.

By letter dated June 2, 2014, OWCP requested that Dr. Puckett submit an impairment evaluation for appellant's accepted condition of "other acute respiratory conditions due to fumes and vapors." It instructed Dr. Puckett to provide an evaluation in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).[4]

In a report dated August 26, 2014, Dr. Fritzhand, a Board-certified urologist, noted his review of the history of injury and Dr. Puckett's reports. He described appellant's report that he had not worked since March 2012. Dr. Fritzhand advised that appellant's acute symptoms resolved over two weeks after the March 2011 chemical exposure although he had continued shortness of breath which restricted his activity. He related that pulmonary functions were obtained. Dr. Fritzhand advised that, in accordance with Table 5-5 of the A.M.A., *Guides*, which deals exclusively with the condition of asthma, appellant had a class 2 impairment, based on key factor, for a whole person impairment of 14 percent. Pulmonary function studies dated August 27, 2016 demonstrated forced vital capacity 57 percent predicted before bronchodilator and FEV_1 60 percent of predicted before bronchodilator.

OWCP forwarded the case record, including Dr. Fritzhand's report, to Dr. Eric Puestow, a Board-certified internist and OWCP medical adviser, for review. In a January 27, 2015 report, Dr. Puestow advised that only an acute condition had been accepted, and that Dr. Fritzhand reported that appellant's acute symptoms had resolved two weeks after the March 2011 exposure. He concluded that, as the accepted condition was no longer present, calculation of a schedule award was not appropriate.

By decision dated February 2, 2015, OWCP found the weight of the medical evidence rested with the opinion of OWCP's medical adviser, Dr. Puestow, and denied appellant's claim for a schedule award.

Appellant, through counsel, timely requested a hearing, which was held on August 5, 2015. He testified regarding his employment history that he continued to have respiratory problems and was being treated at the employing establishment. Appellant stated that he was not working and had applied for disability retirement.

In an October 22, 2015 decision, OWCP's hearing representative reported that no additional evidence had been received. She noted that, based on the evidence of record, other than the report of Dr. Fritzhand, appellant was last treated for the accepted condition in 2012. The hearing representative affirmed the February 2, 2015 decision, finding that appellant had not established that any lung impairment was due to the accepted claim.

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

LEGAL PRECEDENT

It is the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of any employment injury.[5]

The schedule award provision of FECA and its implementing federal regulations[6] 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.[7] For decisions after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[9] Chapter 5 of the A.M.A., *Guides* addresses the framework to be used for addressing the pulmonary system.[10]

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.[11] The procedures further provide that, after obtaining all necessary medical evidence, the file should be routed to the medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[12]

ANALYSIS

The Board finds that appellant has not established permanent impairment due to a pulmonary condition. As noted, it is his burden to establish a permanent impairment of a

[5] *See Tammy L. Meehan*, 53 ECAB 229 (2001).

[6] 20 C.F.R. § 10.404 (2011). *See* 5 U.S.C. § 8107.

[7] *Id*.

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010).

[9] *Supra* note 4 at 3, section 1.3, "The [ICF,] Disability and Health: A Contemporary Model of Disablement."

[10] *Id*. at 77-99.

[11] *Supra* note 8 at Chapter 3.700.4(d)(1).

[12] *Id.* at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

scheduled member or function as a result of any employment injury.[13] The accepted condition is other acute and subacute respiratory conditions due to fumes and vapors (chemical pneumonitis).

In his August 26, 2014 report, Dr. Fritzhand noted that he had examined appellant. He reviewed medical evidence, provided physical examination findings, and advised that he had performed pulmonary function studies. Dr. Fritzhand concluded that, in accordance with Table 5-5 of the A.M.A., *Guides*, appellant had 14 percent whole body impairment. Moreover, section 5.5 of the A.M.A., *Guides* provides the methodology to be used in determining impairment,[14] noting that most pulmonary impairments can be rated according to Table 5-4, the standard impairment classification table.[15] Table 5-5 is used for rating impairment solely for asthma.[16] Dr. Fritzhand did not explain why he used the table for asthma, which is not an accepted condition, rather than Table 5-4. For these reasons, his August 26, 2014 report is insufficient to establish that appellant is entitled to a schedule award for permanent impairment of his lungs.

OWCP procedures provide that, to support a schedule award, the record must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of maximum medical improvement), describes the impairment in sufficient detail for the claims examiner to visualize the character and degree of disability, and gives a percentage of impairment, based on a specific diagnosis, not the body as a whole, except for impairment to the lungs.[17] When the examining physician does not provide an estimate of impairment confirming to the A.M.A., *Guides*, OWCP may rely on the impairment rating provided by its medical adviser.[18] Dr. Puestow, the medical adviser, indicated that, because only an acute condition had been accepted and this condition was no longer present, calculation of a schedule award was not appropriate.

Appellant may request a schedule award or increased schedule award 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 met his burden of proof to establish permanent impairment due to the accepted pulmonary condition.

[13] *See supra* note 5.

[14] *Supra* note 4 at 86-87.

[15] *Id*. at 87.

[16] *Id*. at 90.

[17] *Supra* note 8 at Chapter 2.808.5.

[18] *J.Q.*, 59 ECAB 366 (2008).

ORDER

IT IS HEREBY ORDERED THAT the October 22, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 8, 2016
Washington, DC

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

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

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