

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

L.A., Appellant)	
)	
and)	Docket No. 23-0212
)	Issued: May 22, 2023
U.S. POSTAL SERVICE, LAMAR STATION,)	
Memphis, TN, 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
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On November 30, 2022 appellant filed a timely appeal from a June 10, 2022 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.²

ISSUE

The issue is whether appellant has greater than eight percent permanent impairment of a respiratory organ for which he received a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the June 10, 2022 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

FACTUAL HISTORY

On July 26, 1995 appellant, then a 44-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he broke three ribs and suffered two collapsed lungs when he was struck by a car backing out of a driveway. He stopped work on July 26, 1995. OWCP accepted the claim for three broken ribs and two collapsed lungs. It subsequently expanded its acceptance of the claim to include contusions of multiple sites not otherwise classified, a closed fracture of the clavicle, bilateral knee sprain, and trigger finger of the right thumb.³

On June 29, 2020 appellant filed a schedule award claim (Form CA-7).

On July 13, 2021 OWCP referred appellant to Dr. Cameron S. Huxford, a Board-certified internist, for a second opinion evaluation.

In an August 9, 2021 impairment evaluation, Dr. Huxford recounted appellant's history of being struck and run over by a vehicle backing out from driveway. He discussed his complaints of shortness of breath on exertion and difficulty taking deep breathes since the accident. Dr. Huxford indicated that appellant required bilateral chest tubes and had undergone multiple surgeries for his orthopedic injuries. He noted that he was negative for smoking history. On examination, Dr. Huxford found symmetrical expansion of the chest with respiratory, clear lungs, no crackles or rhonchi, and no tachypnea. He indicated that the right clavicle was "chronically dislocated." Dr. Huxford performed a pulmonary function study (PFS) which showed mild obstruction of 69 percent in the FEV₁ (forced expiratory volume in one second)/FVC (forced vital capacity) ratio and an FEV₁ of 2.14, or 78 percent of predicated. He diagnosed moderate obstructive lung disease due to the July 26, 1995 employment injury. Dr. Huxford opined that appellant had reached maximum medical improvement. He found that he had 10 percent permanent impairment according to Table 5-4 on page 88 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ Dr. Huxford applied a grade modifier for functional history (GMFH) and a grade modifier for physical examination (GMPE) of two, which moved the impairment class from the default value of 6 percent to 10 percent whole person impairment. He noted that he had used objective tests to identify the diagnosis class.

On September 10, 2021 Dr. Morley Slutsky, a Board-certified occupational medicine specialist serving as a district medical adviser (DMA), found that appellant had a Class 1 impairment due to pulmonary dysfunction based on his FEV₁ between 65 and 79 percent of predicted. He applied a GMFH of two due to appellant's breathing difficulty and found that a GMPE was not applicable as it was not sensitive enough "to reflect the changes found during spirometry." Dr. Slutsky found a net adjustment of one and a final whole person impairment of eight percent.

³ By decision dated June 9, 1997, OWCP granted appellant a schedule award for 23 percent permanent impairment of the right upper extremity.

⁴ A.M.A., *Guides* (6th ed. 2009).

In a supplemental report dated December 17, 2021, Dr. Huxford indicated that he had reviewed Dr. Slutsky's report and concurred with his finding of eight percent permanent impairment. On January 20, 2022 he submitted the results of the PFS.

On February 4, 2022 Dr. Slutsky again found eight percent permanent impairment of the whole person. On June 1, 2022 he clarified that eight percent whole person impairment constituted an eight percent respiratory organ impairment under the A.M.A., *Guides*.

By decision dated June 10, 2022, OWCP granted appellant a schedule award for eight percent permanent impairment of the respiratory organ. The period of the award ran for 12 weeks and 3 days from August 3 to October 29, 2021.

LEGAL PRECEDENT

The schedule award provision of FECA,⁵ and its implementing federal regulation,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 As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁸

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.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

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* at § 10.404(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁹ *Id.* at Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(c)(1) (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 5 U.S.C. § 8107(c)(13) and (14).

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.

OWCP's 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.¹⁵

ANALYSIS

The Board finds that appellant has no more than eight percent permanent impairment of the lungs. The Board further finds that OWCP failed to properly calculate the period of the schedule award.

In an impairment evaluation dated August 9, 2021, Dr. Huxford, an OWCP referral physician, diagnosed moderate obstructive lung disease causally related to appellant's accepted July 26, 1995 employment injury. He found that appellant's lungs were clear with no crackles, rhonchi, or tachypnea. Dr. Huxford determined that an PFS revealed 69 percent FEV₁/FVC and FEV₁ of 78 percent of predicted. Using Table 5-4 on page 88 of the A.M.A., *Guides*, he found a Class 1 impairment of the lungs due to pulmonary dysfunction, which yielded a default value of six percent. Dr. Huxford applied a GMFH and GMPE of two, which moved the default value two places to the right for 10 percent permanent impairment of the whole person due to pulmonary dysfunction.

Dr. Slutsky, the DMA, reviewed Dr. Huxford's impairment evaluation on September 10, 2021. He concurred with his finding that appellant had Class 1 impairment due to pulmonary dysfunction according to Table 5-4 based on the results of his FEV₁ between 67 and 79 percent of predicted. Dr. Slutsky applied a GMFH of two based on appellant's difficulty breathing and determined that a GMPE was not applicable as it was not sensitive enough to show

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).

¹⁵ *Supra* note 8 at Chapter 2.808.5(c)(1); *supra* note 8 at Chapter 3.700.4d(1)(c).

the changes found on testing. Utilizing the net adjustment formula, he found a net adjustment of one and an eight percent whole person impairment.¹⁶

In a December 17, 2021 supplemental report, Dr. Huxford concurred with Dr. Slutsky's finding of eight percent permanent impairment.

On February 4, 2022 Dr. Slutsky again found that appellant had eight percent whole person impairment due to his pulmonary dysfunction, which he indicated constituted an eight percent impairment of the respiratory organ pursuant to the A.M.A., *Guides*. On June 1, 2022 he advised that eight percent whole person impairment constituted an eight percent respiratory organ impairment under the A.M.A., *Guides*. There is no current medical evidence in conformance with the sixth edition of the A.M.A., *Guides* establishing greater than eight percent permanent impairment of the lungs. Accordingly, appellant has not met his burden of proof to establish greater than eight percent permanent impairment of the lungs.¹⁷

In determining the impairment of the lung, the percentage for the particular class of whole person respiratory impairment is multiplied by 312 weeks to obtain the number of weeks of compensation.¹⁸ Eight percent of 312 is 24.96 weeks. OWCP, however, paid appellant a schedule award for only 87 days, or 8 percent of 156, the amount payable for impairment to a single lung. As noted, OWCP procedures provide that 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.¹⁹ Consequently, the case must be remanded for OWCP to recalculate the period of the schedule award.

On appeal appellant contends that he should have received a schedule award of 10 percent for each lung rather than the amount found by the DMA, a nonexamining physician. As discussed, however, while Dr. Huxford initially found 10 percent whole person impairment due to pulmonary dysfunction, he subsequently concurred with the DMA's finding of 8 percent permanent impairment. Appellant also questioned why reports from his attending physician were not considered; however, his attending physician did address the extent of his lung impairment pursuant to the A.M.A., *Guides*.

CONCLUSION

The Board finds that appellant has no more than eight percent permanent impairment of the lungs. The Board further finds that OWCP failed to properly calculate the period of the schedule award.

¹⁶ Utilizing the net adjustment formula discussed above, $(GMFH-CDX) \text{ or } (2-1) = 1$, yielded an adjustment of one.

¹⁷ See *J.C.*, Docket No. 21-0426 (issued October 12, 2021).

¹⁸ See *supra* note 15; *D.A.*, Docket No. 18-1105 (issued January 10, 2019); *D.A.*, Docket No. 17-1753 (issued February 13, 2018).

¹⁹ *Supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the June 10, 2022 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 22, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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