

CLAIM HISTORY AND APPEAL PROCEEDINGS:

This is an appeal from a November 15, 2006 Hearing Officer decision. The Hearing Officer found that the Worker was not entitled to a permanent medical impairment ["PMI"] rating of greater than 20 percent, given the Board's Guidelines for the Assessment of Permanent Medical Impairment ["PMI Guidelines"].

I will set out only those portions of the claim history and appeal proceedings which are most relevant to my reasoning and conclusion.

The Worker received a PMI rating of 15 percent with respect to coal workers pneumoconiosis, in 1978. In 1986, the Worker received a PMI rating of 5 percent with respect to the Automatic Assumption ["AA"] provisions, for a total PMI rating of 20 percent.

Subsequent to 1986, the Worker made a number of requests to increase his PMI rating, all of which were refused by the Board. In a July 14, 2006 medical-legal report, Dr. Abayomi Ajayi, a specialist affiliated with the Cape Breton Pulmonary Unit, recommended that the Board provide the Worker with a 5 percent increase in his PMI rating concerning AA. Such an increase would provide the Worker with a PMI rating concerning AA of 10 percent, and a global PMI rating with respect to the respiratory system of 25 percent.

The Worker applied for an increase in his PMI rating, based on Dr. Ajayi's medical-legal report. A September 7, 2006 Occupational Disease Adjudicator decision denied the Worker's request, and found that the Worker would continue to be entitled to a PMI rating of 20 percent concerning the respiratory system. The Worker appealed the Adjudicator decision by means of an October 10, 2006 Notice of Appeal to Hearing Officer. That appeal led to the November 15, 2006 Hearing Officer decision which forms the subject matter of this appeal

This appeal was commenced by the Worker's filing of a Notice of Appeal dated December 15, 2006 with the Workers' Compensation Appeals Tribunal [the "Tribunal"].

This appeal proceeded by way of written submissions. The Workers' Representative filed submissions dated March 1, 2007. No other participant filed submissions or additional evidence with the Tribunal in this appeal.

ISSUES AND OUTCOMES:

At issue is whether the Worker is entitled to a PMI rating of greater than 20 percent with respect to the respiratory system, considering both AA and coal workers pneumoconiosis.

The Worker's appeal is denied. The Worker is not entitled to a PMI rating of greater than 20 percent with respect to the respiratory system.

ANALYSIS:

I have reviewed the materials in the Board and Tribunal files, the Workers' Representative's March 1, 2007 submissions, and the Worker's self-prepared October 7, 2006 submissions to the Hearing Officer. I will set out only those portions of the materials most relevant to my reasoning and conclusion.

I deny the Worker's appeal, substantially for the reasons set out by the Occupational Disease Adjudicator and the Hearing Officer.

The Worker was awarded his PMI ratings concerning coal workers pneumoconiosis and AA in 1978 and 1986 respectively. The Worker ceased employment with the Employer in 1987, and has not worked as a coal miner since that date. Consequently, the Worker's injury occurred prior to January 1, 2000. Therefore, his PMI rating is determined in accordance with the PMI Guidelines.

Both the Adjudicator and the Hearing Officer set out in their decisions the schedule which determines a worker's PMI rating pursuant to the AA provisions. Consequently, I will not replicate the AA schedule in this decision. The AA schedule (which forms part of the PMI Guidelines) is also the primary tool for quantifying a worker's PMI rating when that worker is found to suffer from a respiratory disease such as coal workers pneumoconiosis. Consequently, a worker's PMI rating for both AA and coal workers pneumoconiosis is substantially determined by assessing that worker's pulmonary function test results in the light of the AA schedule. Moreover, both the AA provisions and coal workers pneumoconiosis concern the respiratory system. A worker does not receive full, separate PMI ratings for both coal workers pneumoconiosis and AA, because both impairments relate to the same bodily system; to provide two full and separate PMI ratings would result in over-compensation. Rather, the overall PMI rating for both AA and coal workers pneumoconiosis is determined by assessing the pulmonary function test results in the light of the AA schedule. These general principles have been set out in a large number of previous Tribunal decisions. For example, I refer to *Decision 98-294-AD* (May 31, 1999, NS WCAT) and *Decision 2001-412-AD* (October 17, 2001, NSWCAT).

In addition, the Adjudicator and the Hearing Officer both correctly pointed out that the PMI rating for loss of lung function is based on the greater of the obstructive or restrictive impairments per the AA schedule, not a combination of the two. I find that both the Adjudicator and the Hearing Officer correctly stated the governing principle. For example, I refer to *Decision 2002-828-AD* (March 13, 2003, NS WCAT). In that appeal, the worker's obstructive impairment on its own would have entitled him to a 35 percent PMI rating, while the restrictive impairment on its own also would have entitled that worker to a 35 percent PMI rating. However, the impairments concerning the obstructive and restrictive

impairments were not combined; rather, the worker was awarded a global PMI rating of 35 percent concerning the respiratory system.

In the present appeal, Dr. Ajayi based his medical-legal opinion on March 7, 2006 pulmonary function test results. The Worker's FEV1/FVC was 63 percent of predicted, which falls in the "mild disability" section concerning obstructive disease. This would entitle the Worker to a 10 percent PMI rating concerning obstructive disease. The Worker's vital capacity was 81 percent of predicted, which would place the Worker in the "moderate disability" section concerning restrictive disease. Such a finding entitles the Worker to a 20 percent PMI rating respecting the respiratory system. Following the AA schedule set out in the PMI Guidelines, the Worker is therefore entitled to a PMI rating of 20 percent, which is the greater of the two impairment levels.

In his medical-legal report, Dr. Ajayi did not refer to the appropriate schedule or the PMI Guidelines in setting out his recommendation for an increase of 5 percent in the Worker's PMI rating for AA. Even though Dr. Ajayi is a specialist, the determination of a worker's PMI rating is to a great extent a legal determination, not a medical determination. Given the date of the Worker's injury, his PMI rating is determined in accordance with the PMI Guidelines. Even though Dr. Ajayi may have correctly understood the pulmonary function test results, his recommendation of an increase in the PMI rating was based on an incorrect application of the governing guidelines. On the other hand, the August 28, 2006 Medical Opinion of Dr. Janet Marche, Board Medical Advisor, did correctly apply the PMI Guidelines to the pulmonary function test results; Dr. Marche advised against an increase in the PMI rating.

In short, given the AA schedule in the PMI Guidelines, which is the primary tool for quantifying the PMI rating for impairments concerning the respiratory system, the Worker is not entitled to an increase in his current PMI rating of 20 percent.

CONCLUSION:

The Worker's appeal is denied, for the above reasons. The Worker is not entitled to an increase in his existing PMI rating of 20 percent concerning the respiratory system.