

File Number:
HR10-D-H

U.S. DEPARTMENT OF LABOR

EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
Phone: (202) 693-0045

OCT 27 2008

Date of Injury:
Employee:

RECEIVED NOV 03 2008

Dear :

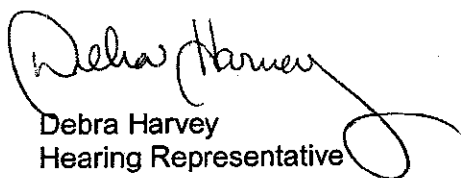
This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of hearings and Review.

A hearing was held on 08/18/2008. As a result of such hearing, it has been determined that the decisions issued by the District Office should be vacated and the case remanded to the district office for further action as explained in the enclosed copy of the Hearing Representative's Decision.

Your case file has been returned to the Jacksonville District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 6 JAC
LONDON, KY 40742-8300

Sincerely,


Debra Harvey
Hearing Representative

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WORKERS' COMP DIVISION-AHL-100
800 INDEPENDENCE AVENUE, SW, RM 521
WASHINGTON, DC 20591

PAUL FELSER
ESQ
FELSER LAW FIRM
7 EAST CONGRESS ST
SUITE 400
SAVANNAH, GA 31412

U.S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

*In the matter of the claim for compensation under Title 5, U.S. Code 8101 et seq. of
, Claimant, Employed by the Department of Transportation, Hilliard,
Florida. Case No: Hearing was held in Atlanta, Georgia on August 18,
2008.*

The issues are: 1) whether the claimant is entitled to compensation for eight hours' leave on April 15, 2006, and 2) whether the claimant has permanent impairment of the lower extremities in excess of three percent and of the hands in excess of five percent for which schedule award benefits have been previously paid.

The claimant, date of birth, , was employed by the Department of Transportation, FAA, Hilliard, Florida, as an Air Traffic Control Specialist. He filed the Form CA-1, Notice of Traumatic Injury, on January 5, 2006, for Guillain-Barre Syndrome that he stated developed after he received an agency administered influenza vaccination on November 29, 2005. The claim was initially denied on June 5, 2006, with the Office finding a causal relationship between the flu shot and the Guillain-Barre was not established. The claimant, through his Attorney, Paul Felser, requested an oral hearing; however, the Hearing Representative found the case was not in posture for a decision and remanded the case on September 12, 2006, for a second opinion neurological examination.

The second opinion specialist, Dr. Gerald Gerling, Board certified neurologist, also opined against causal relationship and the District Office determined a conflict in medical opinion existed between Dr. Gerling and the treating physician, Dr. Daniel Greblewski, a Board certified neurologist. The claimant was then referred to Dr. Steven Pappas, Board certified neurologist, for a referee examination to resolve the conflict in medical opinion.

Dr. Pappas opined for a causal relationship and the claim was accepted for Guillain-Barre syndrome on March 22, 2007.

The claimant filed the Form CA-1, Claim for Compensation, for compensation benefits for leave repurchase for April 12, 2006, through May 31, 2006, and for March 7, 2007, through August 16, 2007. The Office paid intermittent periods and denied the dates of April 15, 17, 18, 20, 24, 26, 27, and May 8, 2006, as well as July 2-6, 2007, and August 6, 2007. This decision was overturned on reconsideration on May 14, 2008, and compensation was paid for all dates listed above, excepting for eight hours on April 15, 2008. The Office denied this date stating the claimant was not entitled to compensation as he was not scheduled to work on April 15. The claimant, through his Attorney, disagreed

with this decision and requested an oral hearing before an OWCP Hearing Representative.

The record establishes the claimant was disqualified from his air traffic control duties and has been working as a Senior Training Advisor, effective July 9, 2007. This position was determined to fairly and reasonably represent his wage earning capacity and compensation benefits were reduced on October 24, 2007, effective July 9, 2007. The Office has subsequently accepted the conditions of idiopathic peripheral neuropathy as well as other neuropathies. On September 24, 2007, the claimant submitted the Form CA-7 for schedule award benefits for permanent impairments to the upper and lower extremities as a result of the accepted conditions.

In support of his claim, he submitted a medical report dated October 8, 2007, from Dr. Greblewski who stated the claimant "suffers from a residual polyneuropathy of all extremities symmetrically." He provided summaries of the visits and treatment provided and stated the claimant had reached maximum medical improvement as of August 16, 2007. On that date the claimant had some "significant improvement of his discomfort, although he was still having some dysesthesias. The patients' biggest complaint on his last evaluation on 8/16/07 was his pain. His gait was okay, although he was still mildly unbalanced. His dysesthesias seemed to involve his hands, arms, feet and legs. His examination, in terms of his cranial nerves, was completely intact. His motor examination showed his strength to be normal in his upper and lower extremities 5/5, proximal to distal. His reflexes were 1-2 in the upper as well as the lower. He had trace ankle reflexes with downgoing toes. He had normal finger-to-nose and heel-to-shin testing." The doctor stated the claimant's sensory testing "was decreased in a stocking glove distribution to pinprick, vibratory sense, temperature and proprioception minimally. His gait appeared to be normal. He did an adequate tandem, toe, and heel walk." He provided an impairment rating of 18% "due to loss of function or from sensory deficits, pain or discomfort based on the *AMA Guides*, 5th edition, page 346, Table 13-23". He stated, "The degree of permanent impairment of his extremities due to loss of function for decreased strength is 0%.

The Office requested additional information from Dr. Greblewski on October 9, 2007, to establish a permanent impairment. He was asked the date of maximum medical improvement; a description of any restriction of movement in terms of degrees of retained active motion; description of all other pertinent objective findings (decrease of strength, atrophy, ankylosis, sensory changes, or other as applicable); description of subjective complaints causing impairment (pain, discomfort, etc.), and the recommended percentage of impairment of the affected member(s), with the physician showing how he arrived at the figure using the applicable table in the *AMA Guides*. The physician responded on November 1, 2007, stating the claimant had polyneuropathy and had an 18% impairment of the extremities due to loss of function from sensory deficit, pain or discomfort and no loss of function from decreased strength.

Also received was a report from Dr. Michael T. Pulley, Assistant Professor, Department of Neurology, University of Florida College of Medicine. This report was dated December 7, 2007, and was addressed to Dr. Greblewski. Dr. Pulley provided an accurate history and performed a physical examination. Examination findings were: strength bilaterally 4+, 5- in the right tricep, 5 on the left but 5 in the deltoid, wrist extensors and ulnar intrinsic hand muscles. In the legs hamstrings were about a 4+ to 5- on the left but otherwise strength was normal throughout. "Sensory exam revealed a mild to moderate reduction of vibratory appreciation at the toes, mild reduction at the ankle but normal proprioception. Pinpoint was completely absent to the upper shin bilaterally and absent in his arms, forearms and hands bilaterally. His reflexes were 3 at the biceps and the brachioradialis, 2 at the triceps, 2+ at the knees, 2 at the (R) ankle, 2+ on the (L) with a downgoing (R) plantar response and a mute (L) plantar response."

Dr. Pulley continued:

As I discussed in some detail today with Mr. _____, his current physical examination shows some distal sensory loss consistent with residual dysfunction related to the episode of Guillain-Barre syndrome that he has had previously. However, his brisk reflexes at this time suggest that recovery of nerve function has been fairly substantial. In fact, his reflexes seem almost pathologically brisk for a patient who has previously had an episode of Guillain-Barre syndrome and suggests there may be some underlying myelopathic process. This could be in the high cervical region or due to B12 deficiency.

He stated if the claimant continued to take his medication he would have no permanent impairment due to pain. He stated:

In this patient's case, the loss of sensation is an objective finding would be the only deficit clearly related to his previous episode of Guillain-Barre syndrome. If we assume maximum sensory deficit in the distribution of the peripheral nerve supplying the foot and the hand, the degrees of impairment in this case is 3% for the leg and 5% for the hand.

He stated this was based on sensory loss and not based on pain.

On March 28, 2008, the Office referred the medical file to its District Medical Advisor (DMA) for review and calculation of permanent impairment. The DMA agreed with Dr. Paulson's report, stating the claimant had residual sensory deficits of the peripheral nerve supplying the arms and the legs, particularly the foot and hand of the involved extremity, due to the Guillain-Barre syndrome. He stated that, "Based on AMA V Guides Tables 16-15 p 492 & 17-37 p 552 combined with Table 16-10, p 482, a 5% SA can be awarded to each UE and 3% SA can be assigned to each LE in agreement with the AP."

On April 15, 2008, the District Office issued a formal decision awarding schedule award benefits for 5% impairment to each hand and 3% for each lower extremity. The claimant

disagreed with this decision and requested an oral hearing before an OWCP Hearing Representative.

The Hearing was held on August 18, 2008, in Atlanta, Georgia. The claimant did not appear at the hearing but was represented by Mr. Felser.

Concerning issue number one, Mr. Felser stated the claimant was preparing a statement as to why he was claiming leave repurchase for April 15, 2008, and his remarks would be submitted after the conclusion of the hearing.

Mr. Felser also discussed the claimant's current job, stating this position was temporary and if it was ever withdrawn, he believed the claimant would be entitled to reinstatement of compensation benefits. That issue is not being considered in the instant decision as the Office has issued no formal decision concerning the present job.

Concerning issue number two, the percentage of permanent impairment, Mr. Felser argued that this case is unusual and "the law does indicate that the claimant is entitled to the best and most favorable calculation."¹ He stated:

In this instance, we are contending that because of the injury to the nervous system and because of the symptoms that have been identified and diagnosed by Dr. Grobaluski in some of his early assessment reports, the claimant has sustained separate and distinct injury to the hand, to the arm, to the fingers, to the legs. In Dr. Grobaluski's current report, which I have, -- which we are attempting to pursue some additional medical documentation even still with Dr. Grobaluski, but the medical documentation that is in hand indicates an impairment rating of 18 percent to the arms bilaterally, 18 percent to the hands bilaterally, 18 percent of each of the digits, both of his upper extremities each, and 18 percent of the legs bilaterally, 18 percent of the feet bilaterally, 18 percent of the toes of each of the lower extremities.²

He stated that while this sounded extreme, "this is what has happened to each of his scheduled body parts as a result of the separate and distinct damage that he has suffered under the circumstances."³ He stated the evidence indicated damage to the arms, not just the hands. He stated impairment to the upper extremities should have been considered, not just impairment to the hands. He stated that issuing the award to the hand and not to the arm was considered a deficiency.

The record was held open for 30 days to allow for the receipt of additional evidence.

A copy of the Hearing Transcript was submitted to the Employing Agency on August 26, 2008, for review and comments. There was no response.

¹ Hearing transcript, pages 10-11.

² Transcript, page 11.

³ Transcript, page 12.

The claimant did submit an additional statement from the Employing Agency dated April 21, 2008, stating the claimant was returned to administrative duty (not air traffic control) on April 12, 2006. "It appears that Mr. [redacted] had used his regular days off (RDO's) previously in the week he returned to duty because his time and attendance was processed using the rotating air traffic control work schedule (he regularly worked Saturdays as a controller prior to the injury). The switch to administrative duties because of medical restrictions caused his work schedule to change to having weekends off. There was no administrative work available for him on Saturday, April 14th, 2006, therefore he took leave for that day (Mr. [redacted] chose sick leave). This was done on a one-time basis in order for Mr. [redacted] to have five days in a pay status for that week."

The agency stated, "Under the circumstances we believe that Mr. [redacted] should be able to repurchase this leave used as a result of the injury. He had been released to full air traffic control duties, he would have been scheduled to work weekend hours. The transition from a schedule that included weekends to one that did not, and the fact that administrative offices are closed on the weekends is what caused Mr. [redacted] to have to use leave on the day in question."

After the hearing had concluded a July 10, 2008, report from Dr. Greblewski was received. He stated he was "providing a breakdown of the end of the percentage impairment of the different components of his limbs, both upper and lower extremities. As stated in my initial narrative, his symptoms involved his arms, hand, legs, and feet."

In keeping with the *Guides to the Evaluation of Permanent Impairment, Fifth Edition*, by the American Medical Association, Mr. [redacted]'s impairment is 18% of his arms bilaterally, 18% of his hands bilaterally, 18% of each of his digits, both of his upper extremities each. Mr. [redacted]'s impairment of his lower extremities is 18% of his legs bilaterally, 18% of his feet bilaterally, and 18% each of his toes in the lower extremities."

An August 15, 2008, report from Dr. Pulley was also submitted. In this report, Dr. Pulley stated the claimant had recently been diagnosed with tennis elbow. The claimant had some reduced bulk in his right forearm extensor compartment and triceps. His strength was still basically normal. In the legs, the strength was entirely normal but he had a moderate to moderately severe reduction of vibratory appreciation at his toes. "The claimant was unable to feel pinprick in the arms. He had numbness in the left thumb. His reflexes were somewhat decreased in the hands, knees, and the ankles. Dr. Pulley stated, "The etiology of the hyperflexia, given the fact that this patient has had Guillain-Barre syndrome is a little unclear." Dr. Pulley mentioned the possibility of a cervical spine problem or a B-12 deficiency.

Mr. Felser submitted an October 3, 2008, brief noting the Employing Agency's statement concerning the unavailability of work on April 15, 2007. He stated benefits should be paid for that date.

He stated the new reports from Dr. Greblewski and Dr. Pulley indicated an award in excess of that previously paid for impairment of the hands and lower extremities and referenced the calculations provided by the physicians.

Concerning issue one, the repurchase of sick leave, I find the Office's decision should be REVERSED.

Office regulations provide that compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.⁴

I find the claimant is entitled to eight hours' compensation for April 15, 2007. He was placed on light duty but his Employing Agency was unable to accommodate that light duty on April 15, 2008. Since they were unable to accommodate him on this date, he should be allowed to repurchase the sick leave used on that date. Thus, the Office's decision of May 14, 2008, is REVERSED concerning the leave repurchase on April 15, 2007. Upon return of the case file, the Office should proceed with leave repurchase for eight hours' leave on April 15, 2007.

Concerning issue two, Section 8107 of the Federal Employees' Compensation Act (FECA), provides that if there is a permanent disability involving the loss or loss of use of a member of function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function. Section 8107 also sets for the number of weeks of compensation to be paid for permanent loss of use of the members of the body that are listed in the schedule. Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. The Board has held, however, that for consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The Office has adopted the American Medical Association's *Guide to the Evaluation of Permanent Impairment* as the standard for determining the extent of permanent impairment and the Board has concurred such adoption of these *Guides*.⁵ Effective February 1, 2001 the fifth edition of the A.M.A. *Guides* is utilized to calculate any awards.⁶

The proper procedure requires obtaining or selecting a single medical report regarding the organ or member of the body that contains all of the essential information such as ranges of motion, pain, loss of strength, etc. The medical adviser must then give reasons for selecting a specific medical report over the other medical reports of record. The Board remanded for further medical development.⁷

⁴ *Judith A. Cariddo*, 55 ECAB ____ (Docket No. 03-2270, issued February 24, 2004)

⁵ *A. George Lampo*, 45 ECAB 441 (1994).

⁶ Federal Employees Compensation Act Bulletin No. 01-05, issued January 29, 2001).

⁷ *Louis Jackson, Sr.*, 47 ECAB ____ (Docket No. 94-801, issued February 27, 1996).

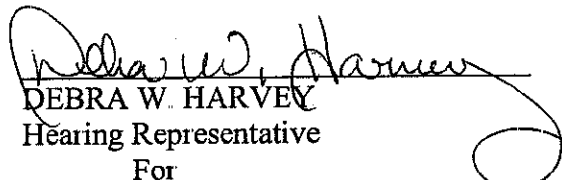
In this case, the file contains two medical reports (from Drs. Greblewski and from Dr. Pulley) concerning the percentage of permanent impairment. The District Medical Advisor selected Dr. Pulley's report over that of Dr. Greblewski. He did not explain why he selected this report, nor did he explain the deficiencies in Dr. Greblewski's report. Thus, I find the case should be REMANDED for additional and review by the DMA.

Upon return of the case file, the DMA should review the medical reports from Drs. Greblewski and Pulley, to include the new reports submitted after the hearing. The DMA should advise which of these reports satisfies the requirements needed for determining permanent impairment and provide reasoning for his opinion. He should also provide comments as to why an impairment was given for the lower extremities but for the hands in lieu of the upper extremities. Once the DMA completes his review, and after completion of any additional development the Office deems necessary, a *de novo* decision on permanent impairment of the upper and lower extremities should be issued.

Therefore, for the reasons set forth above, the decision of the District Office dated May 14, 2008, is hereby REVERSED and the decision dated April 15, 2008, is hereby SET ASIDE and the case REMANDED for action as described above.

DATED: OCT 27 2008

WASHINGTON, D.C.


DEBRA W. HARVEY
Hearing Representative
For
Director, Office of Workers'
Compensation Programs