

File Number:
HR10-D-H

RECEIVED JUN 28 2010

U.S. DEPARTMENT OF LABOR

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

JUN 22 2010

Date of Injury:
Employee:

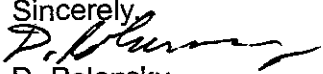
Dear Mr. _____ :

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 04/15/2010. As a result of such hearing, it has been determined that the decision 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 San Francisco District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 13 SFC
LONDON, KY 40742-8300

Sincerely,

D. Polonsky
Hearing Representative

PAUL FELSER
7 EAST CONGRESS ST, SUITE 400
SAVANNAH, GA 31401

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
, in , California; Case number
A Telephone Hearing was held on April 15, 2010.

The issues for determination are (1) if the claimant's schedule award was correctly calculated and (2) if he is entitled to greater than a 35% permanent partial impairment of the right leg.

born on , is employed as a special agent with the
in ,
California. The claimant filed a CA1 Notice of Traumatic Injury claim on
stating that as a result of biking while participating in an agency physical training
program he felt tightening in his lower back and numbness in the right foot and leg with
loss of motion in the right foot. On July 8, 2008 a L5 laminectomy, and bilateral
foraminotomies were performed. The claimant stopped working on May 12, 2008 and
began receiving compensation for disability. The claimant returned to work on May 26,
2009. The claimant was referred for a second opinion examination and in his report
dated September 9, 2009 Dr. determined that Mr had a 35%
permanent partial impairment of his right leg. Dr. report was referred to the
District Medical Advisor (DMA) for review and consideration and in his September 30,
2009 report the DMA determined that the claimant had a 35% permanent partial
impairment of his right lower extremity.

The claimant filed a CA7 Claim for Compensation requesting a schedule award on
October 6, 2009. On October 19, 2009 the Office advised the DMA that the claimant had
previously been paid for an 8% permanent partial impairment of his right lower extremity
under case number and asked about the claimant's net permanent partial
impairment. The DMA responded in a report dated October 24, 2009; however he was
not provided a copy of the 8% calculation. Therefore this was forwarded to the DMA on
November 3, 2009 and the DMA was asked to determine the claimant's right leg
impairment when considering his prior award. In his report dated November 10, 2009 the
DMA determined that Mr. was entitled to an additional 27% permanent partial
impairment of his right lower extremity. The DMA stated,

"The file is currently resubmitted to review a prior record under a prior claim A
13-11722/03 (sic) in order to determine if the prior 8% impairment of the right
lower extremity would be combined with the current award of 35%.

The 08/20/00 report is available and indicates that the individual was assessed an 8% right lower extremity impairment based on right lower extremity symptoms and findings with the S1 nerve root identified.

The current assessed 35% impairment of the right lower extremity is based in part upon both L5 and SI nerve root involvement with the peroneal nerve currently identified.

After reviewing the prior award and the current award this reviewer would conclude that the current 35% impairment of the right lower extremity would be 27 percentage points higher than the previous award, and that the prior 8% would not be combined with the 35%. The current award of 35% represents an award some 27 percentage points higher than the previous award of 8%. The Office should take this into account in assessing and assigning benefits.”

By decision dated December 14, 2009 the claimant was awarded a 27% permanent partial impairment of his right lower extremity and awarded schedule award compensation benefits for the period September 10, 2009 through March 8, 2011. The decision noted that he had previously been awarded an 8% permanent partial impairment under case number _____ so his total right leg impairment was determined to be 35%.

The claimant disagreed with the December 14, 2009 decision and requested a Hearing. A Telephone Hearing was held on April 15, 2010. The claimant did not appear at the Hearing however he was represented by Paul Felsner at the proceedings.

As required by Office procedures, a copy of the Hearing Transcript was forwarded to the employing agency to afford them the opportunity to comment on the claimant's testimony. No comments have been received and the time allotted to all parties for the submission of additional evidence has now passed.

Mr. Felsner argued that the 8% impairment previously awarded to Mr. _____ should not have been subtracted directly from the 35% permanent partial impairment calculated to award the claimant 27% impairment. On page 10 of the Hearing Transcript Mr. Felsner argued that in his October 29, 2009 report Dr. _____ noted that he reviewed his report of September, 2009 and determined that it could not be changed and therefore opined that the claimant had a 35% permanent partial impairment and that he disagreed with the DMA. On pages 11 through 13 of the Hearing Transcript Mr. Felsner argued that because Dr. _____ stated on page 9 of his report that clinical studies are not available to him that a net adjustment is minus one that Mr. _____ lost percentage points in his schedule award determination. On page 16 of the Hearing Transcript Mr. Felsner argued that there should be an evaluation that deals with the overall impairment as it relates to the sciatic nerve and that would come up with a higher impairment. On page 17 of the Hearing Transcript Mr. Felsner argued that there were additional conditions identified by the attending physician which include a herniated disc which should be accepted. On page 19 of the Hearing Transcript Mr. Felsner stated that degenerative arthritis of the ankle should also be accepted which could result in a greater

impairment calculation. On page 20 of the Hearing Transcript Mr. Felsner argued that it is not clear that the second opinion physician did the appropriate testing and that a two point discrimination is recommended. On pages 22 and 23 of the Hearing Transcript Mr. Felsner was advised that his arguments regarding the calculation of the schedule award would be considered. It was noted that that the calculation of a schedule award is a medical issue and the claim would be held open for 30 days to afford time to submit additional medical evidence. The claimant subsequently requested additional time to provide medical evidence and was advised that he could submit additional evidence for consideration through June 10, 2010.

Section 8107 of the Federal Employees' Compensation Act¹ authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.²

Before the A.M.A., *Guides* may be utilized, a description of the impairment must be obtained from an examining physician. This description must be in sufficient detail so that a claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.³ The examining physician does not rate the impairment using the A.M.A., *Guides*, it is appropriate for an Office medical adviser to apply the A.M.A., *Guides* to the findings reported on examination.⁴ When the Office medical adviser provides the only evaluation that conforms to the A.M.A., *Guides*, that evaluation constitutes the weight of the medical evidence.⁵

Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an Office 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.⁶

The evidence of record has been reviewed. A May 13, 2010 report from Dr. and June 7, 2010 statement from Mr. Felsner were received. Mr. Felsner stated that Dr. 46% right lower extremity impairment calculation should be considered and the decision should be remanded and a new schedule award decision issued.

Mr. Felsner argued that the claimant's schedule award of 35% should not have been reduced by the 8% awarded in case number . Mr. Felsner's argument is noted however as procedurally required I find that the District Office properly reduced the

¹ 5 USC § 8107

² 20 CFR § 10.404 (2002).

³ *Roel Santos*, 41 ECAB 1001 (1990)

⁴ *Lena P. Huntley*, 46 ECAB 643 (1995).

⁵ *John L. McClenic*, 48 ECAB 552 (1997). If the clinical findings are fully described, any knowledgeable observer may check the findings with the criteria of the A.M.A., *Guides* A.M.A., *Guides* 17 (5th ed 2001).

⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2 808.6(d) (January 2010).

claimant's schedule award from 35% to 27% in light of his prior award for impairment of his right lower extremity.⁷

Mr. Felsner argued that the claimant's schedule award was not calculated correctly and that he has a right ankle condition which could increase his impairment calculation. However medical evidence to establish that Mr. _____ permanent partial impairment should be increased based on the Sixth Edition of the AMA Guides due to an ankle condition has not been received, and therefore Mr. Felsner's argument cannot be considered.

Mr. Felsner noted that Dr. _____ stated that the claimant has a loss of bowel and bladder function and sexual drive due to his herniated disc which worsened due to his disc degeneration. Mr. Felsner also stated that there is an indication that the claimant sustained an emotional condition as a result of his May 9, 2008 injury. I find that based on the medical evidence of record it cannot be established that Mr. _____ sustained the claimed consequential incontinence, sexual dysfunction and psychiatric / emotional condition or conditions. If the claimant wants these claimed conditions formally considered by the Office he should submit a written request, and provide detailed and well-rationalized medical evidence based on examination findings to establish that his claimed consequential injuries resulted from his work-related injury. The reports should clearly address how the accepted factors of employment caused or aggravated the diagnosed conditions.

An employee who asserts that a nonemployment-related injury was a consequence of a previous employment-related injury has the burden of proof to establish that such was the fact.⁸ To establish causal relationship, appellant must submit a physician's report in which the physician reviews the factors of employment identified by appellant as causing his/her condition and, taking these factors into consideration as well as findings upon examination of appellant and appellant's medical history, states whether these employment factors caused or aggravated appellant's diagnosed conditions and present medical rationale in support of this opinion.⁹

Mr. Felsner noted that the claimant has been diagnosed with a herniated disc which has not been accepted by the Office and that if that condition were accepted it could possibly result an increased permanent partial impairment calculation. It should be noted that Dr. _____ diagnosed the claimant with a herniated disc and noted in the section of his report titled "Review of Medical Records" that the herniated disc was found on a May 24, 2008 MRI scan.

Mr. Felsner also argued that the instant claim should be doubled with case number _____ and both claims should be fully considered when calculating the claimant's permanent partial impairment.

⁷ Any previous impairment to the schedule member under consideration is included in calculating the percentage of loss except when the prior impairment is due to a previous work-related injury, in which case the percentage already paid is subtracted from the total percentage of impairment. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2 808 7(a)(2) (January 2010).

⁸ Margarette B Rogler, 43 ECAB _____ (Docket No. 92-32, issued August 5, 1992).

⁹ Donald W Long, 41 ECAB 142, 146-47 (1989)

Based on the additional evidence submitted I find that Mr. case must be remanded. Dr. determined that the claimant has a 46% permanent partial impairment of his right lower extremity based on his review of the claimant's medical records, history of injury, examination findings, and calculations according to the AMA Guides Sixth Edition. Dr. report indicates that the claimant has a herniated which has not been formally accepted by the Office, and that his impairment may have been calculated incorrectly or that he may be entitled to a greater impairment than previously awarded.

The Office may undertake to develop either factual or medical evidence for determination of the claim.¹⁰ It is well established that proceedings under the Act are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence.¹¹ The Office has the obligation to see that justice is done.¹²

On Remand the Office should double this case with case number . As procedurally indicated cases should be doubled when correct adjudication of the issues depends on frequent cross-reference between files and cases must be doubled when a new injury case is reported for an employee who previously filed and injury claim for a similar condition or the same part of the body.¹³

Upon Remand a referral should be made to the DMA to calculate the claimant's permanent partial impairment of his right lower extremity under the Sixth Edition of the AMA Guides. The DMA should be asked to fully consider all pertinent medical evidence in the instant case and case number including Dr. May 13, 2009 report. The DMA should be asked if the claimant sustained a lumbar herniated disc as a result of his May 9, 2008 injury and if so, to consider that diagnosis in the impairment rating. Upon completing this action and any other actions deemed necessary for calculation of a schedule award the Office should issue a *de novo* decision.

If it is determined that the claimant is entitled to a greater impairment than previously awarded a *de novo* decision with the increased percentage of permanent partial impairment should be issued and appropriate benefits paid. However it should also be noted that if it is determined that the claimant has a lesser impairment than previously awarded it is appropriate to issue a new decision which addresses the change in the rating and declare an overpayment. FECA CIRCULAR NO. 10-06 Issue Date: May 14, 2010 states in pertinent part,

“Therefore, if a schedule award decision is set aside (after a hearing or review by the ECAB, or as part of the reconsideration process) and additional development is undertaken to resolve the schedule award issue, a new schedule award decision

¹⁰ 20 C.F.R. § 10.11(b); see also *John J. Carlone*, 41 ECAB 354 (1989)

¹¹ *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

¹² *William J. Cantrell*, 34 ECAB 1233 (1983).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Doubling*, Chapter 2 0400 8c and 2 04008c (1)

should be issued that fully addresses the reasons for the change in rating. Declaring an overpayment thereafter is appropriate if the later decision substantiates a lesser degree of impairment than previously awarded.”

Accordingly, the decision of the District Office dated December 14, 2009 is hereby set aside and remanded to the District Office for actions consistent with this decision.

JUN 22 2010

Dated:
Washington, D.C.



D. Polonsky
Hearing Representative
for
Director, Office of Workers'
Compensation Programs