

File Number:
HR10-D-H

U. S. DEPARTMENT OF LABOR

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

JUL 13 2010

Date of Injury:
Employee:

RECEIVED JUL 19 2010

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 04/19/2010. 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 Jacksonville 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 6 JAC
LONDON, KY 40742-8300

Sincerely,



Carol E. Adams
Hearing Representative

PAUL FELSER
ATTORNEY-AT-LAW
P O BOX 10267
SAVANNAH, GA 31412-0000

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 ; Case number
A hearing was held on April 19, 2010.

The issue for determination is whether the claimant has a permanent impairment to his upper extremities that resulted from his work injury of January 22, 2007.

The claimant is employed by the as a
He filed a claim for traumatic injury. His claim was accepted for left shoulder strain, left rotator cuff strain, left joint derangement and closed dislocation of the right shoulder. As a result of the injury, the claimant had surgery on both shoulders.

On December 6, 2009, the claimant filed a claim for schedule award for permanent impairment.

From Dr. a medical report was received dated December 4, 2008, to support the claim for schedule award. Dr. provided a permanent impairment rating of 6% of each upper extremity, based on the *AMA Guides*, 5th edition.

On October 19, 2008, the claimant was examined by a second opinion examiner Dr. who provided different findings on range-of-motion (ROM) of the shoulders than that of Dr.

In accordance with Office procedures, the case file was referred to the District Medical Advisor to review and to provide calculation of the permanent impairment based on the *AMA Guides*, 6th edition. The DMA, after his review, determined that the claimant had no impairment of the upper extremities based on the *AMA Guides*, 6th edition. He noted that there was differences in the ROM provided by Dr. and Dr.; therefore, he stated the *Guides* indicated, in this situation, the ROM should not be used for the rating.

The claimant disagreed with the decision and, through his attorney, requested a hearing before an OWCP representative.

A hearing was held on April 19, 2010. The claimant was represented by Attorney Paul Felser.

The employing agency was sent a copy of the transcript and afforded twenty days to submit comment or evidence. No additional information was received, and all time allotted for this purposed has now past.

I have reviewed the evidence of record, and I have determined there is a conflict in medical opinion of equal or near equal weight. Therefore, I find that the decision of the Office, dated January 13, 2010, must be set aside and the case remanded for further development.

The fact, the *Guides* say the ROM should not be used to determine a rating when there are differences in findings between physicians, is not the controlling factor. The Federal Employees' Compensation Act is the controlling entity when there is a conflict in medical evidence. The Federal Employees' Compensation Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹

There is a clear conflict in medical findings, regarding the ROM of the shoulders, between the Dr. _____, second opinion physician, and Dr. _____, the treating physician, which warrants further development.

On remand, the Office should update the Statement of Accepted Facts to show that the claimant returned to full-time, full-duty work on January 12, 2009. The claimant should be referred along with a copy of the entire case file (factual and medical) to a referee examiner to resolve the conflict in the findings of the ROM between the attending physician's findings of December 4, 2008, and the second opinion's findings of October 16, 2008.

After completion of the aforementioned development and any other development the Office deems necessary, a new decision should be issued.

In accordance with the above findings, the decision of the Office dated January 13, 2010, is set aside and the case **remanded** for further development.

JUL 13 2010

Dated:

Washington, D.C.



Carol Adams
Hearing Representative
for
Director, Office of Workers'
Compensation Programs

¹ 5 USC § 8123(a)