File Number:
HR11-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

RECEIVED SEP 30 2010

SEP 22 2010

Date of Injury: 08/01/2005
Employee:

~~RECEIVED SEP 29 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 preliminary review has been completed, and it has been determined that the case is not in posture for a hearing at this time. The decision of the District Office has been vacated and returned to the district office for further action as explained in the attached Remand Order.

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,

Debra Harvey
Hearing Representative

DEPARTMENT OF VETERANS AFFAIRS
VETERANS HEALTH ADMINISTRATION
G.V. MONTGOMERY VETERANS MED CENTER
1500 EAST WOODROW WILSON DRIVE
JACKSON, MS 39216

PAUL H. FESLER
ESQ.
FELSER LAW FIRM, P.C.
7 EASTCONGRESS 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 Veterans Affairs, Jackson, Mississippi. Case No.

Merit consideration was completed in Washington, D.C. Based on this review, the decision of the District Office dated June 29, 2010, is hereby set aside for the reasons set forth below.

The issue is whether the claimant has an impairment of the right lower extremity and of the left lower extremity in excess of eight percent for which schedule award benefits have been previously paid.

Please refer to the prior decision of the Hearing Representative dated September 23, 2009, which is incorporated into the instant decision by reference.

, date of birth, , is employed by the Department of Veterans Affairs in Jackson, Mississippi, as a Registered Nurse. On August 12, 2005, he filed the form CA-1, Notice of Traumatic Injury, stating on August 1, 2005, he felt pain and popping in the lower back and down the left leg after pulling a patient up from bed. The Attending Physician, Dr. David C. Lee, ordered MRI scans and a lumbar myelogram and diagnosed lumbar radiculitis and lumbar disc herniation, L4-5. The District Office accepted the claim for an L4-5 herniated disc on October 4, 2005.

EMG and nerve conduction studies were performed on December 19, 2005, and showed a left L4 radiculopathy. Repeat studies performed in February 2005 showed involvement of the L5 nerve root as well.

The claimant returned to full-time, limited duty work with restrictions of no lifting more than 50 pounds on April 17, 2007. Dr. Larry Parker, neurologist, diagnosed stenosis at all levels of the spine, with the worst being at L5-S1. He stated the claimant had back problems at multiple levels due to bulging disks and arthritis bone spurs that had caused both spinal stenosis and foraminal stenosis at minimal levels. There was no discussion as to whether these conditions had been caused or aggravated by employment factors.

On January 11, 2008, the Office accepted lumbar radiculopathy.

An Office directed second opinion examination, performed by Dr. B. Thomas Jeffcoat, orthopedist, stated the herniated discs had resolved with only minimal weakness on the left lower extremities.

The claimant filed the Form CA-7, Claim for Compensation, on August 12, 2008, for permanent impairment of the lower extremities as a result of the back condition. A report from Dr. David C. Lee dated March 31, 2008, noted 13% impairment based on a Functional Capacity Evaluation. The Office's District Medical Advisor (DMA) reviewed the medical file and stated the clamant had an aggravation of degenerative lumbar disease from which he returned to work without restrictions. The DMA stated, "There is no documentation of a radiculopathy" and found no lower extremity impairment.

The Office then referred the claimant to Dr. David Bomboy for a referee evaluation. Dr. Bomboy stated the claimant had limited range of motion but no radiculopathy. He opined for a 13% whole-body impairment as a result of the herniated disc with radiculopathy. Dr. Bomboy was contacted and asked for an impairment rating using the AMA *Guides to the Evaluation of Permanent Impairment* in terms of loss of use of the affected member of the body. Dr. Bomboy responded stating there was no impairment due to loss of function from sensory deficit pain or discomfort and no impairment due to loss of function from decreased strength. The DMA again reviewed the file and stated there was no impairment.

The Office denied schedule award benefits on January 22, 2009, finding no impairment. The claimant disagreed with the decision and, through his attorney, Paul Felser, requested a hearing before an OWCP Hearing Representative.

The hearing was held on June 20, 2009, in Atlanta, Georgia. By decision dated September 23, 2009, the Hearing Representative set aside the Office's decision and remanded the claim for additional medical development.

The Hearing Representative found that Dr. Bomboy's report was not considered to be a referee examination, but, rather, a second opinion evaluation. A conflict in medical opinion was determined to exist between Drs. Lee and Bomboy concerning the percentage of impairment in the lower extremities. In addition, additional back conditions had been diagnosed but not established to be causally related to the employment injury. The Office was instructed to update the Statement of Accepted Facts (SOAF) as necessary and refer the claimant to a Board-certified specialist for a referee examination to resolve the conflict in percentage of permanent impairment. In addition, the medical specialist was to be asked if additional lumbar conditions were causally related to the employment injury of August 1, 2005. That opinion would be considered a second opinion.

The Office then referred the claimant to Dr. Charlton Barnes, specialist in orthopedics, for the examination. Dr. Barnes reviewed the SOAF and the file and performed a physical examination.

The diagnosis was L4-5 nerve root radiculopathy. Dr. Barnes calculated a nine percent lower extremity rating using the AMA *Guides to the Evaluation of Permanent Impairment,* Sixth Edition, which became effective on May 1, 2009.[1] This was based on Class 1, page 535 "with regard to the femoral nerve." Dr. Barnes stated, "Since the patient has scoliosis convex to the left in the lumbar area this is a non-ratable deformity and may nullify any rating he has for disability. This is described on page 563 as non-ratable. This may be the basis for the man's problem and that his work injury on 8/1/2005 could have been an aggravation of the problem or not related to it at all."

Dr. Barnes was asked if any additional diagnoses were "directly related to the injury sustained on 8/1/2005." He stated, "My feeling is that due to the atrophy of the left thigh which is [sic] is significant, he does appear to have a problem with his femoral nerve. This may be attributed to the surgery he had on his heart previously in 1999 or it may be secondary to his scoliosis. In a rare instance it may be related to the work injury that he had on August 1 2005. With regard to further diagnostic testing I feel that it would be beneficial to do a myelogram because the previous one was not completed and had no worth. I would also recommend repeating the EMG NCV of his left leg."

The Office authorized the requested testing. The myelogram, performed on April 1, 2010, showed moderate multilevel degenerative disc disease extending from L4 through S1 suggesting a mild arachnoiditis. There were defects of the thecal sac extending from L2 through L5 "consistent with degenerative bulging of the intervertebral discs," most pronounced at the L3-4 level "likely representing moderate to severe central spinal canal stenosis." This was confirmed on a post myelogram CT scan.

The nerve conduction study was normal with no signs of neuropathy. EMG findings were consistent with a left L4-5 radiculopathy.

In a June 14, 2010, supplemental report from Dr. Barnes, he stated the claimant had a nine percent disability rating under the femoral nerve classification. On June 16, 2010, Dr. Barnes stated, "I believe that the injury to his femoral nerve is work related if the patient did not have any problems prior to August 1, 2005. The patient's rating would be 9% disability rating lower extremity as described on page 533 under femoral nerves." An Office DMA reviewed this report and stated the AMA *Guides* were not applied correctly to give a nine percent impairment rating. The DMA stated Dr. Barnes "used the peripheral nerve impairment Grids, Table 16-12, pp 534 & 535 and did not apply the grade modifiers for the degree of [illegible] in the proper methodology. OWCP mandates the use of the AMA 6 Guides Newsletter for rating spinal nerve impairment in the July/August 2009 issue." The DMA stated the EMG studies confirmed an L4-5 radiculopathy with moderate sensory loss of the L4 nerve root and moderate L4 motor loss of the left lower extremity on the examination. He stated that based on Table 2, Page 6, of the newsletter a moderate L4 sensory loss equaled three percent impairment and five percent impairment based on a left L4 motor loss for a total of eight percent of the left lower extremity. He opined for no right lower extremity impairment.

[1] Bulletin 09-03, issued March 15, 2009

On June 29, 2010, the District Office issued a formal decision awarding eight percent impairment of the left lower extremity and no impairment of the right lower extremity. The claimant disagreed with this decision and, through her attorney, requested another oral hearing. I find, however, that the case is not in posture for a hearing at this time.

The prior hearing decision instructed the Office to determine if additional lumbar conditions were causally related to the employment injury. While the Office asked Dr. Barnes to provide additional work-related diagnoses, the Office failed to issue a decision concerning additional conditions. Thus, I find that the case must be REMANDED for determination as to whether additional lumbar conditions should be accepted.

In addition, I find the formal decision concerning the schedule award must be SET ASIDE at this time. Dr. Barnes was considered a referee physician concerning the percentage of impairment. The DMA who reviewed and calculated all impairment ratings prior to the final one on June 24, 2010, was Dr. Howard Hogshead. The June 24th DMA review was unsigned. Thus, it is unknown if Dr. Hogshead or another DMA provided the impairment rating. The FECA *Procedure Manual* 2-0810-11(d) states, "When a referee examination was arranged to resolve a conflict created by a DMA with respect to a schedule award issue, that DMA should not review the referee specialist's report. Rather, another DMA or consultant should review the file (*John W. Slonaker,* 35 ECAB 997)."

Once the Office determines if additional conditions should be accepted, the file should be referred back to a DMA other than Dr. Hogshead for calculation of impairment. The DMA should sign his rating form. A *de novo* decision on the impairment should then be issued.

DATED: SEP 22 2010

WASHINGTON, D.C.

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