

RECEIVED MAY 23 2011

U S. DEPARTMENT OF LABOR

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

MAY 16 2011

Date of Injury: 01/22/2007  
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 02/07/2011. 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

DEPARTMENT OF HOMELAND SECURITY  
TSA-FEDERAL AIR MARSHAL SERVICE  
ATLANTA FIELD OFFICE  
200 WEST PARKWAY DRIVE, SUITE 300  
EGG HARBOR TOWNSHIP, NJ 08234

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 Department of Homeland Security; Case number \_\_\_\_\_  
A hearing was held on February 7, 2011.

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The issue for determination is whether the claimant has permanent impairment of the upper extremities.

The claimant is employed by the Department of Homeland Security as a Federal Air Marshall. 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.

By decision dated July 13, 2010, the Office denied compensation for schedule award.

The claimant disagreed with the decision and requested a hearing before an OWCP representative.

By hearing decision dated July 13, 2010, the case was remanded for further development. The Office was advised that the Act was controlling, regarding conflicts in range of motion (ROM) differences by the medical evaluators, and not the AMA Guides. Therefore, on remand, the Office was to obtain a referee evaluation to resolve the conflict in medical findings, regarding the ROM differences.

The hearing decision of July 13, 2010 is incorporated by reference.

The Office referred the claimant for a referee evaluation. The claimant was evaluated by Dr. Feroze Yusufji on August 25, 2010. The doctor determined that the claimant had a 6% permanent impairment of each upper extremity. The doctor based his impairment rating on the stand alone tables of the AMA Guides, 6<sup>th</sup> edition, using the claimant's ROM of his upper extremities.

The Office determined that additional information was needed from Dr. Yusufji. On September 10, 2010 the Office sent Diagnosis Based Impairment (DBI) worksheets to Dr. Yusufji for completion.

On September 27, 2010, the case was referred to the District Medical Advisor (DMA) for review of the referee examiner's calculation of the permanent rating. The DMA reviewed the medical reports on record and compared them with the referee's findings and determined that the referee

findings were not creditable. The DMA determined that the claimant had no impairment of the upper extremities.

On September 27, 2010, the Office also received a letter from Dr. Yusufji and the completed worksheets. In the letter dated September 23, 2010, Dr. Yusufji indicated that he completed the Diagnosis Based Impairment (DBI) worksheets but pointed out that he based his rating on the claimant's ROM and that the AMA Guides required that a ROM table rating should stand alone. In the DBI worksheets Dr. Yusufji just entered the ROM table rating.

The new information was sent to the DMA for review. In his memo dated September 29, 2010, the DMA noted that Dr. Yusufji did not complete the worksheets and did not provide the actual ROM findings as required by AMA Guides. He also noted that the severe internal rotation, which was found by Dr. Yusufji, could not exist without corresponding limitations of motion on other planes. The DMA determined that Dr. Yusufji's findings lacked credibility. The DMA determined that the claimant had no impairment of the upper extremities.

Based on the DMA's recommendation, by decision dated October 4, 2010, the Office again determined that the claimant did not have any permanent impairment of the upper extremities and denied the schedule award claim.

The claimant disagreed with the decision and requested a hearing before an OWCP representative.

A hearing was held on February 7, 2011. The claimant did not attend but was represented by attorney Paul Felser.

Mr. Felser focused some of his comments on the second opinion evaluation. He believed that the second opinion evaluation did not establish a conflict of medical evidence because the doctor incorrectly interpreted a psychological evaluation. He believed that the second opinion evaluation should be cast out on the issue of permanent impairment.<sup>1</sup> Mr. Felser argued that the second opinion evaluator got all caught up in emotional condition issues, which was not his area of expertise. Mr. Felser believed that the second opinion doctor grossly misinterpreted a psychological evaluation performed by a Board-certified psychologist<sup>2</sup>. He argued that there was no conflict to warrant a referee evaluation and that a new medical report from the claimant's physician should be the basis for an impairment rating.<sup>3</sup> He also argued, at the very least, that the referee physician should be asked to provide a complete evaluation.<sup>4</sup>

A copy of the hearing transcript was sent to the employer for comment. No comments were submitted.

A review of the record has been undertaken.

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<sup>1</sup> See page 8 of the February 7, 2011 hearing transcript

<sup>2</sup> *id.*

<sup>3</sup> See page 9 of the February 7, 2011 hearing transcript.

<sup>4</sup> See page 10 of the February 7, 2011 hearing transcript.

The second opinion physician ordered psychological testing. The claimant was seen by Dr. Bruce E. Atkinson, a licensed psychologist. Dr. Atkinson performed an MMPI-2 test and provided his interpretation of the test results. There was a disclaimer at the beginning of the test results which stated, "This report is based upon the test taker's responses to a particular test inventory. Because the concept of personality is very complex, no decision should be made based upon this data alone." The doctor in his test results report stated, "The best diagnostic fit for this profile pattern is a somatoform disorder such as Pain Disorder Associated With Both Psychological Factors and General Medical Condition. A Conversion Disorder also needs to be ruled out. There is no clear evidence of posttraumatic stress, clinical depression, or psychosis." Also, Dr. Atkinson, under the malingering portion of his report, stated that "There is a mild risk of malingering, but there is a much greater probability of neurosis with unconscious secondary gain (see below)."

No psychological examination was done or any other testing of the claimant to support the MMPI test indicators on personality.

The second opinion doctor discussed the MMPI evaluation in his report. The doctor provided his synopsis of the report and stated, "The MMPI showed marked abnormalities. There is a pre-occupation with somatic complaints. This patient has an elevated malingering scale. He was noted to be self centered and self protective. There was a mild risk of malingering based on the MMPI evaluation alone. There was a much greater probability of neurosis with unconscious secondary gain. There was a probability of some hysterical conversion reaction as well." The doctor then in response to the Office question three (3) stated, "Mr. Boone does not experience any residuals from the January 22, 2007 work injury. His complaints are not related to the work injury. The rationale for this is supported by the detailed MMPI evaluation, which is enclosed with this report and should be carefully reviewed. The MMPI report is consistent with this examiner's findings that this gentleman's subjective complaints are not explainable on an anatomical or objective basis. The MRI studies were quite unremarkable prior to the surgery. The surgery was not able to result in any significant relief of his overall condition as this patient appears unwilling and unable to accept objective relief of his condition with an excellent and well performed surgical procedure done arthroscopically with no objective impairment. The objective studies, including nerve conduction velocity studies, were also entirely normal."

It clearly appears that the second opinion physician incorrectly relied, in part, on a single personality test, the MMPI, to help form his opinion. However, there still remains a clear unresolved conflict between the ROM findings of the claimant's physician and the second opinion physician's findings, which can only be resolved through a referee evaluation. It should be pointed out that Dr. Atkinson noted, on the MMPI interpretation report, that there was only a mild possibility that the claimant was malingering. Therefore, an unresolved conflict remains.

After reviewing the evidence, I find the decision of the Office must be set aside and the case remanded for additional medical development.

The Procedure Manual 2-810-11d (2) states as follows:

The referee specialist's report, once received, must actually fulfill the purpose, for which it was intended, i.e., it must resolve the conflict in medical opinion.

The ECAB has stated that "an impartial specialist's report is entitled to greater weight than other evidence of record as long as his conclusion is not vague, speculative or equivocal and is supported by substantial medical reasoning" (James P. Roberts, 31 ECAB 1010). Therefore, the [claims examiner] CE must ensure that the referee specialist's report is comprehensive, clear and definite, and that it is based on current information and supported by substantial medical reasoning, as well as a review of the entire case file (see Billie M. Gentry, 38 ECAB 498).

If the report is vague, speculative, incomplete or unrationalized, it is the responsibility of the CE to secure a supplemental report from the referee specialist to correct the defect.

However, if the impartial specialist is unable or unwilling to give a supplemental report, or the supplemental report is also defective, i.e., it is still incomplete, vague, speculative or unrationalized, the OWCP should arrange for a second impartial evaluation (Charles Feldman, 28 ECAB 314 and April Ann Erickson, 28 ECAB 336). This measure should be undertaken with care; a premature or inappropriate second impartial examination would defeat the intent of 5 U.S.C. 8123(a) and could lead to the suspicion that OWCP is "doctor shopping "

Since Dr. Yusufji has not had an opportunity to provide the complete ROM findings, the Office should send a copy of the entire case file (to include all the new documents submitted since the doctor last examined the claimant) and ask Dr. Yusufji to provide detailed ROM findings, as required by the AMA Guides, 6<sup>th</sup> edition. He should also provide a DBI rating. If the doctor uses the ROM method, using the stand alone tables, rather than the DBI rating method to establish the claimant's degree of impairment, he should provide reasoning and references from the AMA Guides to support his choice of methods. If the doctor needs to reexamine the claimant, in order to obtain the information, the examination should be authorized. If Dr. Yusufji is unwilling or unable to provide the information needed, a new referee examiner should be selected and an examination conducted to obtain the rating. The DMA's rating cannot hold the weight of medical evidence because this is a matter of physical findings that can only be obtained by examination. Therefore, if a proper ROM is provided by the referee evaluator, the referee findings would hold the weight of medical evidence over the findings of the second opinion or the claimant's physician or the DMA's preferences. Section 8123(a) of the Act provides in pertinent part: "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."<sup>5</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>6</sup>

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<sup>5</sup> Federal Employees' Compensation Act § 8123(a)

<sup>6</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980)

In accordance with the above findings, the decision of the Office dated October 4, 2010 is set aside and the case **remanded** for additional development.

Date: MAY 16 2011  
Washington, D.C.



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