

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
Date of Injury: 08/01/2005
Employee:

MAY 16 2011

RECEIVED MAY 19 2011

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 decisions issued by the District Office dated **October 6, 2010 and December 16, 2010** 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 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 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 Veterans Affairs; Case number _____ A hearing was held on February 7, 2011.

The issue for determination is whether additional conditions should be accepted as work-related and whether the claimant has greater permanent impairment than what has already been determined.

The claimant is employed by the Department of Veterans Affairs as a registered nurse. He filed a claim for traumatic injury for date of injury of August 5, 2005. On October 4, 2005, his case was accepted for L4-5 herniated disc.

The claimant filed a CA-7 claim for schedule award on August 12, 2008.

In a report dated March 31, 2008, Dr. David Lee, the claimant's physician, determined the claimant had a 13% permanent impairment.

The Office obtained a second opinion and a referee examination.

In accordance with Office procedures, the case was referred to a District Medical Advisor (DMA) to review the evidence and determine if the claimant had permanent impairment of a schedule member.

The DMA determined that the claimant had no permanent impairment. Therefore, by decision dated January 22, 2009, the Office denied compensation for schedule award.

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

By hearing decision dated September 23, 2009, the hearing representative set aside the decision and remanded the case for further development. The decision is incorporated into the instant case by reference.

A new referee examination was scheduled to resolve a conflict in medical opinion regarding permanent impairment. The doctor was also to determine if the claimant had additional spinal conditions that were due to the work injury. The doctor was to act as a second opinion on this issue.

The claimant was scheduled for examination with Dr. Charlton Barnes. The doctor found that the claimant had L4-5 nerve root radiculopathy and determined the claimant had a 9% permanent impairment of the lower extremity. Dr. Barnes recommended additional testing, which was completed.

On April 1, 2010 a myelogram was performed. The test results provided the following findings:

The nerve roots opacify normally bilaterally. There is irregularity of the course of the nerve roots extending from L4 to S1 suggesting the possibility of a mild arachnoiditis.

IMPRESSION:

1. MULTILEVEL DEGENERATIVE DISC DISEASE MOST PRONOUNCED AT L3-L4, LIKELY REPRESENTING MODERATE TO SEVERE CENTRAL SPINAL CANAL STENOSIS.

2. PARTIAL CLUMPING OF THE NERVE ROOT FROM L4 TO S1 SUGGESTING A MILD ARACHNOIDITIS.

An EMG/NCS was also performed. The NCS was normal but the EMG showed left L4-5 radiculopathy.

Dr. Barnes reviewed the testing and again determined that the claimant had a 9% permanent impairment of the lower extremity.

In accordance with Office procedures, the case was referred to the DMA for review of the referee's calculations of the permanent impairment. The DMA determined the referee did not properly apply the Guides and determined the claimant had an 8% permanent impairment of the left lower extremity.

On June 29, 2010 the Office issued a decision awarding compensation for an 8% permanent impairment of the left lower extremity.

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

The case was assigned to a hearing representative. The hearing representative did a preliminary review of the case and determined that the case was not in posture for a hearing. The hearing representative remanded the case for a decision on whether additional conditions should be accepted. The hearing representative also set aside the schedule award decision of June 29, 2010 until a decision could be made on additional work-related conditions.

By decision dated October 6, 2010, the Office determined that the evidence was insufficient to support that any additional spinal conditions were work-related. In the decision, the Office provided the following reasons:

Dr Barnes [in his] June 16, 2010, addendum medical report indicates that he believes the injury to your femoral nerve is work related if you did not have any problems prior to your August 1, 2005, work injury. However, this statement is speculative at best. Dr. Barnes failed to explain the reason for his conclusion, his statement is not rationalized and is therefore of little probative value. Therefore, the evidence received failed to establish that you sustained any other diagnosis other than the previously accepted conditions of herniated disc at L4 -L5 and lumbar radiculopathy.

By letter dated October 22, 2010, the Office wrote to Dr. Barnes and asked him additional questions, regarding his permanent impairment rating, but did not asked him for additional clarifications regarding the unaccepted spinal conditions.

In a letter dated November 15, 2010, Dr. Barnes responded to the Office questions posed to him. Dr. Barnes determined that the date of maximum medical improvement was August 1, 2007. The doctor noted that the claimant had pain in the lumbar area, left thigh and the top of his left foot. The doctor also found that the claimant had difficulty raising his left foot. He noted that the EMG studies were consistent with left L4-5 nerve root radiculopathy. In addition, the doctor provided a new rating that he based on the AMA Guides, 6th edition and the Guides' Newsletter of July/August 2009. The doctor determined that the claimant had a combined rating of 26% permanent impairment of the left lower extremity.

In accordance with Office procedures, the case record was sent to the DMA for review of the referee's calculations. In a memo dated December 10, 2010, the DMA noted that Dr. Barnes did not use the AMA Guides correctly in calculating the combined rating for the L4 and L5. The DMA determined that table 2 page 6 was the proper reference to use and not the page 3 paragraph 2 that Dr. Barnes indicated he used to calculate the combined rating. The DMA determined that the claimant had a combined rating of 24% permanent impairment of the left lower extremity.

By a separate decision dated December 16, 2010, the Office issued a new schedule award decision. The Office determined that the claimant had a total of 24% permanent impairment of the left leg. Since the claimant had already received compensation for 8% permanent impairment of the left lower extremity, the Office subtracted that amount and paid compensation for the additional 16% permanent impairment. The Board has often referred to the Office procedure manual that any previous impairment to the 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.¹

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

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

¹ D.H. ____ (Docket No. 08-1995 issued April 22, 2009); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2 808.7(a)(2)

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

The Board has long held that proceedings under the Act are not adversarial in nature nor is the Office a disinterested arbitrator. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of evidence.² The Office has the obligation to see that justice is done.³ The Board has stated that when the Office selects a physician for an opinion on causal relationship, it has an obligation to secure, if necessary, clarification of the physician's report and to have a proper evaluation made.⁴

After review of the evidence, I find the decisions of the District Office must be set aside and the case remanded for additional development.

On remand the Office should provide Dr. Barnes with a copy of the entire case record to include all new evidence entered into the file since he last examined the claimant. The Office should write to Dr. Barnes and asked him to provide a reasoned medical opinion, within a reasonable degree of medical certainty, as to whether any of the non-accepted spinal conditions are medically connected to the work injury by way of direct cause, aggravation or acceleration. If Dr. Barnes needs to reexamine the claimant, this should be authorized. If he fails to provide an adequate report or if he is not willing to provide additional information, the Office should refer the claimant for another second opinion evaluation to obtain a proper report.

If the claimant is referred to a new second opinion physician, the new permanent impairment rating should be deferred until a proper second opinion evaluation can be obtained and a new decision reached on the issue.

Regarding permanent impairment of the left lower extremity, Dr. Barnes is considered a referee physician. The case file should be referred back to Dr. Barnes to obtain additional clarification regarding permanent impairment. The doctor should be asked if any of the non work-related conditions caused an impairment of the left leg that pre-existed the work injury. If non work-related impairments of the left leg pre-existing the work injury (whether the conditions are work-related or not) the pre-existing impairments must be combined with the work-related impairments and a new combined rating provided. It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, pre-existing impairments of the body are to be included.⁵ In addition, if other spinal conditions are determined to be work-related by Dr. Barnes or by a new second opinion physician, Dr. Barnes should provide an opinion as to whether any of those conditions caused additional permanent impairment to the left leg and, if so, the impairments should also be included in the new combined rating for the left lower extremity. If the new work-related conditions caused impairment to other extremities, the doctor should provide a new rating for those extremities, as well.

² *Rebel L. Cantrell*, 44 ECAB 660 (1993).

³ *id.*

⁴ *Steven P. Anderson*, 51 ECAB 525 (2000)

⁵ *Walter R. Malena*, 46 ECAB ___ (Docket No. 94-472, issued August 18, 1995)

If Dr. Barnes is not willing to provide the impairment rating as a referee physician or provides an inadequate report that does not resolve the issues, a new referee physician evaluation should be obtained.⁶

Once all appropriate development is completed, new decisions should be issued on whether additional conditions should be accepted and whether the claimant has greater permanent impairment of a schedule member beyond what has already been determined.

In accordance with the above findings, the decisions of the District Office dated October 6, 2010 and December 16, 2010 are set aside and the case record **remanded** for additional development.

Date: MAY 16 2011
Washington, D.C.



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

⁶ FECA Procedure Manual Part-2-810-11e; *Charles Feldman*, 28 ECAB 314, *April Ann Erickson* 28 ECAB 336.