File Number:
HR10-D-H

RECEIVED JUL 07 2014

U S. DEPARTMENT OF LABOR

JUN 27 2014

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

Date of Injury:
Employee:

Dear :

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 05/09/2014. 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 Chicago 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 10 CHI
LONDON, KY 40742-8300

Sincerely,

Rod Ries
Hearing Representative

PAUL FELSER
POST OFFICE BOX 10267
SAVANNAH, GA 31412

If you have a disability (a substantially limiting physical or mental impairment), please contact our office/claims examiner for information about the kinds of help available, such as communication assistance (alternate formats or sign language interpretation), accommodations and modifications.

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 telephone hearing was held on May 9, 2014.

The issue for determination is whether the evidence of record is sufficient to establish that the claimant has more than 5% permanent partial impairment (PPI) of her right upper extremity (RUE) and/or more than 5% PPI of her left upper extremity (LUE) for which she received previous schedule awards.

The claimant, born was employed as a by the The Office of Workers Compensation Programs (OWCP) has accepted that as a result of her performance of her duties, on or around the claimant developed bilateral lateral epicondylitis. The claim was later expanded to additionally accept myofascial pain syndrome of both of the claimant's upper extremities. By decision dated April 26, 2004 the Office compensated the claimant with a schedule award for 1% PPI to both her RUE and her LUE.

In January of 2006 the claimant filed a new occupational disease claim due to pain in her upper extremities which she attributed to The Office assigned a file number of 1 and a date of injury of to this claim and following a period of initial development it was accepted for the conditions of bilateral carpal tunnel syndrome (CTS). Claim number has been administratively combined with the present case file with the present case file being designated as the master file number. The record reflects that the claimant retired from federal service effective

By way of a decision dated October 6, 2008 the claimant received additional schedule award benefits in the amount of 4% RUE PPI and 4% LUE PPI, for a total of 5% impairment to each upper extremity.

The claimant appealed this decision and since that time a number of decisions have been issued in this case file ordering additional development on the part of the Office with regard to assessment of the claimant's upper extremity PPI. The most recent remand decision was issued in this case on July 22, 2011 by an Office hearing representative. The July 22, 2011 decision is hereby incorporated into this decision by reference.[1]

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[1] I note that the 7/22/2011 hearing decision incorrectly stated that the claimant had received schedule award benefits for 6% PPI of both her right and left upper extremities. This error started in paragraph 2 on page 2 of the 7/22/2011

In pertinent part the July 22, 2011 decision found that it was necessary for the Office to refer the claimant, her medical records and a corrected SOAF back to referee medical examiner Dr. for clarification of his opinion regarding his assessment of the claimant's PPI.

In response to the July 22, 2011 remand order the Office generated a new SOAF and referred the claimant to Dr. for a referee medical examination. Dr. examined the claimant on and in his report of this examination he documented his application of his findings to the 6th edition of the AMA Guides in arriving at 0% bilateral upper extremity impairment ratings.

Based upon the examination findings and PPI rating provided by Dr. the Office issued a decision dated March 21, 2013 wherein Ms. claim for additional schedule award benefits, above and beyond the 5% RUE and 5% LUE awards she had already received, was denied. The claimant disagreed with this decision and requested an oral hearing. A telephone hearing was held on May 9, 2014 at which the claimant was represented by Mr. Paul Felser.

The May 9, 2014 hearing began with a discussion of what level of upper extremity PPI the Office has accepted. Mr. Felser highlighted that the March 21, 2013 decision indicated that the claimant had received previous awards totaling 6% PPI to each of her upper extremities. He stated that the claimant had only received compensation for 5% PPI to each of her upper extremities and as such she was entitled to the other 1% for each upper extremity.

Mr. Felser continued his comments by stating that the Office made a procedural error in not referring referee examiner Dr. report to a DMA for review.[2] Mr. Felser stated that the same held true for the referee report of Dr. Mr. Felser also argued that the Office failed to make the corrections to the SOAF in this case that were called for by way of the July 22, 2011 remand order. Mr. Felser also argued that as the second opinion report that originally created the conflict in this case, that Dr. was tasked with resolving, was also based upon a deficient SOAF, all subsequent reports should be removed from the record and the evaluation of the claimant's impairment should in effect be started anew.

With regard to the evaluation of the claimant's upper extremity PPI Mr. Felser continued his argument by stating that it has never been explained in the record why the DBI rating method called for in the 6th edition of the Guides does not

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decision wherein it was incorrectly stated that the 10/06/2008 district office decision awarded benefits for an additional 5% PPI to each of the claimant's upper extremities when it actually awarded benefits for an additional 4% PPI to each of the claimant's upper extremities. This error carried through to the Office's 5/07/2012 and 5/08/2012 statements of accepted facts (SOAF) as well as the Office's 3/21/2013 decision.

[2] I note that while Mr. Felser referred to this physician as Dr. at the hearing, his name is actually Dr. I also note that Dr. acted in the capacity of a second opinion examiner, not a referee medical examiner

apply in this case. He stated that the claimant's case is accepted for the conditions of bilateral CTS. He stated further that the Office had issued no formal decision explaining a finding that such conditions no longer exist or never existed in the first place and that if they were to do so, such a determination would have to be made separate from a schedule award determination, with due process afforded.

Mr. Felser concluded his argument by stating that the claimant had also not received consideration of impairment due to additional conditions that her doctors have identified as being work-related. He stated that the Office had not developed these conditions and that they were not new additions to the case file. Mr. Felser requested that the Office's March 21, 2013 decision be reversed and the case file be remanded for proper development and the issuance of a *de novo* decision. Mr. Felser confirmed the presence in the record of an October 8, 2013 medical report from Dr. At Mr. Felser's request the record was left open for 30 days following the hearing for the submission of new evidence. To date, no new evidence has been received.

As required by Office procedures, a copy of the hearing transcript was forwarded to the employing agency to afford them the opportunity to provide comments. No comments have been received from the employing agency and the time allowed for such a submission has now expired.

The schedule award provision of FECA,[3] and its implementing federal regulations,[4] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP adopted the AMA Guides as the uniform standard applicable to all claimants.[5] For decisions issued after May 1, 2009, the 6th edition of the AMA Guides will be used.[6] In the 6th edition of the AMA Guides, the diagnosis-based impairment (DBI) rating method is the primary method of evaluation for the upper limb(s).[7]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to a district medical adviser (DMA) for a rationalized opinion concerning the nature and percentage of impairment in accordance with the AMA Guides.[8] The Procedure Manual states further that if a case has been referred for a referee evaluation to resolve the issue of permanent impairment, it is necessary to route the file to a DMA to review the calculations to ensure that

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[3] 5 U.S.C. § 8107

[4] 20 C.F.R. § 10.404.

[5] *Id.* at § 10.404(a)

[6] Division of Federal Employees' Compensation (DFEC) Procedure Manual, Part 3-0700, Exhibit 1.

[7] AMA Guides 387 (6th ed. 2009)

[8] DFEC Procedure Manual, Part 2-0808-6(f)

the referee physician appropriately used the AMA Guides.[9] The Employees' compensation Appeals Board (ECAB) has held that while a DMA may review the opinion of a referee specialist in a schedule award case, the resolution of the conflict is the specialist's responsibility. The DMA cannot resolve a conflict in medical opinion. If necessary, clarification of the referee examiner's opinion may be needed.[10]

After careful consideration of the evidence of record, as well as the argument provided at the May 9, 2014 hearing, I find that the decision of the Office dated March 21, 2013 must be set aside and the case file be remanded for additional development of the evidence.

In the present case multiple medical examiners have been involved in the assessment of the claimant's upper extremity impairment. In the Board's decision dated October 21, 2010 it was noted that a conflict in medical opinion existed between Office referral physician Dr and the claimant's physician Dr. and that in order to referee this conflict the claimant was referred to Dr. for a referee medical examination. The Board's decision continued, however, by explaining how and why referee examiner Dr. report was not sufficiently rationalized to resolve the identified conflict in medical opinion. The Board remanded the case file back to the district office with instructions to refer the claimant's records back to referee examiner Dr. for clarification regarding the claimant's bilateral upper extremity impairment.

Unfortunately, as discussed in the July 22, 2011 hearing decision, the Office did not go back to referee examiner Dr. but instead referred the claimant to Dr. r for a second opinion examination. The July 22, 2011 decision appropriately went on to explain that as the claimant was referred to Dr. in the capacity of a second opinion examiner his opinion could not be considered a referee opinion and the conflict of medical opinion between Drs. and remained unresolved. For this reason, the July 22, 2011 hearing decision went on to remand the case file back to the district office to refer the claimant and her records back to referee examiner Dr. in accordance with the direction provided by the Board in their October 21, 2010 decision. In doing so, the hearing representative also identified numerous corrections/modification to the SOAF that the Office was directed to make.

Review of the record reveals that following the issuance of the July 22, 2011 remand order the Office generated two SOAFs, one on May 7, 2012 and one on May 8, 2012. The record is unclear as to which of these SOAFs is the controlling SOAF of record. Additionally, factual and procedural errors continue to be present in the SOAFs.

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[9] *Id.* at Part 2-0808-6(g).

[10] *R L* , 56 ECAB 341 (2005)

As discussed by the previous hearing representative whenever a SOAF is modified the header should include the line "This SOAF supersedes all prior SOAFs."[11] This is of extra importance in the present case so that it is apparent which SOAF is the controlling SOAF of record. Additionally, the May 7 and 8, 2012 SOAFs remain to be devoid of a detailed explanation of the mechanism of injury in the claimant's two cases. While the Office did make reference to "repetitive activities" of the claimant's job and "work factors" being causative to her accepted conditions, no detailed description of what the repetitive activities and/or work factors were was provided. This is again of extra importance in the present case as the SOAFs also fail to contain a description of the duties of the claimant's federal job and the physical requirements of those duties The Office must make these corrections to the SOAF of record.

With regard to the section of the SOAFs that pertains to the claimant's bilateral CTS claim numbered the Office should identify such claim by its claim number and its date of injury; Reference to the date the claim was filed is unnecessary and confusing. Also in this section, the Office must correct the erroneous statement wherein it is noted that the claimant received a 6% schedule award in this claim.[12] The SOAF should simply state that the Office has accepted that the claimant has sustained 5% PPI of each of her upper extremities due to her accepted conditions. By decision dated April 26, 2004 she received a schedule award for 1% PPI of her right and left upper extremities and by decision dated October 6, 2008 she received a schedule award for an additional 4% PPI of each of her upper extremities.

Lastly, in addition to ensuring that the remainder of the SOAF is proper in accordance with Part 2-0809 of the DFEC Procedure Manual, the Office should also correct the spelling of Dr. Brecher's name in the SOAF and clearly indicate that he examined the claimant in the capacity of a second opinion examiner.

Upon receipt of the case file, the Office should generate a corrected SOAF in accordance with the direction provided above. The Office should then write back to referee examiner Dr. He should be advised of the corrections that were made to the SOAF that he relied on in the provision of his October 15, 2012 report and he should be asked if those corrections in any way change his previously stated opinions with regard to the assessment of the claimant's upper extremity PPI. In addition, referee examiner Dr. should be requested to provide a reasoned explanation of why he did not use the DBI rating method that the 6th edition of the Guides describes as the primary method of evaluation for the upper limb. Referee examiner Dr. touched on this issue in his previous report but he provided little rationale regarding why he did not rely on the preferred DBI rating method. If referee examiner Dr. feels the need to recall the claimant for examination to provide the addendum report that is being requested of him he should be advised that he is authorized to do so. If

[11] DFEC Procedure manual, Part 2-0809-4(c).

[12] *Supra* note 1

referee examiner Dr. is unwilling or unable to provide this addendum report the Office should refer the claimant to a new referee specialist to address the unresolved conflict in medical opinion between Drs. and

Following the Office's receipt of referee examiner Dr. addendum report the Office should refer it to a DMA for review. As stated earlier in this decision this DMA review is procedurally necessary to ensure that the referee physician appropriately used the AMA Guides. As highlighted by Mr. Felser at the hearing, this procedural requirement was not accomplished by the Office when they relied on referee examiner Dr. October 15, 2012 report in issuing the March 21, 2013 decision. This is another reason that the March 21, 2013 decision must be set aside.

With regard to Mr. Felser's argument at the hearing that all medical reports in this case file that were based on deficient SOAFs should be removed from the record and the assessment of the claimant's upper extremity impairment should start anew, I do not agree that actions necessary or prudent. The Office Procedure Manual describes the situations that call for the exclusion of medical reports[13] and the facts of this case do not constitute one of those situations. While Mr. Felser may be correct in his argument that the opinions of the Office referral physicians that were based on the prior SOAFs are of diminished probative value, the fact remains that an unresolved conflict in medical opinion exists in this case with regard to the assessment of the claimant's upper extremity PPI. Referee examiner Dr. has been tasked with resolving this conflict and following his review of the corrected SOAF that the Office will provide to him; if his opinion is sufficiently well-reasoned, his addendum report will accomplish this task.

Lastly, with regard to Mr. Felser's statements that the claimant has not received consideration of impairment due to additional conditions that her doctors have identified as being work-related, I find that any initial determination regarding the possible expansion of the allowed conditions in one of the claimant's cases must be made at the district office level. If the claimant and/or Mr. Felser are of the opinion that the allowed conditions in one of the claimant's case files should be expanded they should submit a written request for a formal decision from the district office on such an issue clearly identifying the medical evidence of record that is supportive of their position. If the allowed conditions in one of the claimant's case files are subsequently expanded to include additional medical conditions, the issue of possible entitlement to additional schedule award benefits as a result of PPI due to the newly accepted condition(s) can be addressed at that time.

[13] DFEC Procedure Manual, Part 2-0810-12

For the reasons set forth above, the March 21, 2013 decision is hereby set aside and the case file is remanded to the district office for completion of the corrective actions and additional development noted above, to be followed by any other development the Office deems necessary, and the issuance of a *de novo* schedule award decision.

Date: JUN 2 7 2014
Washington, D.C.

Rod Ries
Hearing Representative
for
Director, Office of Workers'
Compensation Programs