

File Number:
HR11-D-H

RECEIVED OCT 01 2019

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:
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 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,

Division of Federal Employees' Compensation

PAUL FELSER
7393 HODGESON MEMORIAL DRIVE
STE 102
SAVANNAH, GA 31406

If you have a disability and are in need of communication assistance (such as alternate formats or sign language interpretation), accommodation(s) and/or modification(s), please contact OWCP.

Washington DC, September 27, 2019

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
(subsidiary file).

Merit Consideration of the case file was completed on Based on the review,
the decision of the district office dated is set aside for the reasons set forth below.

The issue for determination is whether the Office properly adjudicated claim for a
schedule award in their decision of

born is employed as a with the
She filed Form CA-2 for an Occupational Disease claimed to be related to
factors of her federal employment. She described repetitive motion including lifting and bending as
contributory. The claimant became aware of her condition and realized that it was related to her
employment on The claim was initially denied however it was approved on appeal for an
aggravation of lumbar degenerative disc disease with radiculopathy.¹ Appropriate medical and wage
loss benefits were paid.

On the Office received Form CA-7 for a schedule award. Upon receipt, the Office
wrote to advising her of the evidence needed to support her claim for an award. Specifically,
she was asked to submit an impairment rating in accordance with the *Sixth Edition of the AMA Guides to
the Evaluation of Permanent Impairment (the Guides)*.

In response, the Office received a Functional Capacity Evaluation dated This was
signed by She also completed an impairment rating report using the Exhibit 3-700-4 of
the Sixth Edition of the AMA Guides. According to the Rating Spinal Nerve Table, she qualified as Class
1 for a mild sensory deficit at L4 (right lower extremity). This equated to a mid-range of 1%. There was
a Class 1 mild sensory deficit at L5 (right lower extremity). This also equated to a default value of 1%.
The claimant had diminished sensation to Monofilament testing at the right lateral thigh, anterior thigh,
and anterolateral lower leg. However, stated that the claimant did not qualify for a motor deficit
for L4 or L5 because she had normal lower extremity strength and reflexes. She explained that a Grade
Modifier of 1 was assigned for Functional History. Physical Exam was not used per the Guides
Newsletter. For Clinical Studies, a Modifier of 1 was assigned. In conclusion, stated, "This
results in a lower extremity impairment rating of 1% for the sensory deficit at L4 and a lower extremity

¹ The instant claim is administratively combined with master file That claim was filed for an
Occupational Disease with a date of injury. It is approved for an acute lumbar sprain. File
number has also been combined, as a subsidiary case, with this master file. This case was
assigned for an Traumatic Injury. It is approved for a lumbosacral sprain and L3-4 herniated
disc.

impairment rating of 1% for the sensory deficit at L5 of the right lower extremity. Using the Combined Values Chart on page 604 (combining 1% with 1%), results in a total lower extremity impairment rating of 2%."

Additionally, a note dated _____ was received from _____ M.D. He reviewed the FCE along with the rating from _____. He stated that this represented a proper calculation of the claimant's work related impairment in accordance with the Guides, Sixth Edition. Specific reference was made to Exhibit 3-700-4 for spinal ratings.

The Office forwarded the case to the District Medical Advisor and a response dated _____ was received from _____ M.D. He opined that there was 0% impairment as there was no documented motor or sensory deficit in the lower extremities based upon the Guides and Guides Newsletter _____. He stated that Dr. _____ had agreed with the rating of _____ who assigned 2% lower extremity impairment. However, Dr. _____ stated, "There is no documented examination by Dr. _____ that independently calculates the claimant's impairment and I disagree with _____ and Dr. _____ because there is no documented sensory deficit on examination. Therefore, the claimant's impairment rating is 0%."

On _____ the Office forwarded the report of the DMA to Dr. _____ for review and comment. However, no response was forthcoming.

By decision dated _____ the Office formally denied the schedule award claim as there had been no medical evidence received which demonstrated permanent, measurable scheduled impairment.

The claimant disagreed with the decision of the District Office and an oral hearing was requested by her attorney. Based upon the written evidence of record, I find that the decision of the District Office dated _____ should be *SET ASIDE* and the claim *REMANDED* for further development.

Section 8107 of the Federal Employees' Compensation Act² authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.³

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁴ FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.⁵ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).⁶

² 5 USC § 8107.

³ 20 CFR § 10.404 (2002).

⁴ For a total or 100 percent loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

⁵ 20 C.F.R. § 10.404 (2012).

⁶ See Federal (FECA) Procedure Manual, Part 3 -- Medical, Schedule Awards, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, Schedule Awards & Permanent Disability Claims, Chapter 2.808.6a (February 2013).

The Sixth Edition of the *AMA Guides* does not provide a separate mechanism for rating spinal nerve injuries for extremity impairments. Recognizing that certain jurisdictions, such as FECA, mandate ratings for extremities and preclude ratings for the spine, the *AMA Guides* has offered an approach to rating spinal nerve impairments consistent with Sixth Edition methodology, pursuant to the *AMA Guides* Newsletter, July/August 2009. OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.⁷

The issue on appeal is whether the Office properly adjudicated Ms. _____ schedule award claim in their decision of _____

On review, I find that the decision of the District Office must be set aside. The instant case is approved for an aggravation of lumbar degenerative disc disease with radiculopathy. The claimant filed Form CA-7 for a schedule award. Following development, a rating report dated _____ and Functional Capacity Evaluation were received from _____. Using Exhibit 3-700-4 of the Sixth Edition of the *AMA Guides*, she assigned 2% impairment of the right lower extremity. The content of this report has been outlined in detail above. This rating was concurred upon by Dr. _____ in a report of _____. The case was reviewed by the District Medical Advisor however in a response of _____ opined that there was 0% impairment of the lower extremities. It was based upon this that the _____ schedule award denial was issued.

However, I find the issuance of the Office's decision to be premature as further medical development is required to properly assess schedule award entitlement. In Dr. _____ response, he stated that Dr. _____ had not supplied an independent impairment rating. This is noted however he did *review and concur* with the rating supplied by _____. The DMA proceeded to assign 0% impairment as he stated that there were no documented sensory deficits on exam. However, the rating report specifically assigned 1% impairment of the lower extremity for a sensory deficit at L4 and 1% for a sensory deficit at L5. This was not discussed by the District Medical Advisor therefore the Office should have requested clarification of this opinion prior to adjudicating the schedule award.

However, further review of the file reveals physical exam findings which are inconsistent with the findings documented by _____ (concurrent upon _____. As such, I find that a second opinion examination is warranted to further address this. Specifically, in more recent exams performed by the claimant's attending physician on _____ and _____ her strength and sensation in the upper and lower extremities was noted to be intact. Additionally, the neurologic exam from _____ was said to be normal. In contrast, _____ assigned impairment based upon mild sensory deficits at the L4 and L5 levels. Additional development is required in this regard.

Additionally, Chapter 2-0808 (5)(d) of the FECA Procedure Manual states that rated impairment should reflect the total loss as evaluated for the scheduled member (i.e. arm, leg, etc.) at the time of the rating examination.⁸ There are no provisions for apportionment under the FECA. As such, schedule awards include permanent impairment resulting from conditions accepted by the OWCP as job-related as well as and any non-industrial permanent impairment present in the same scheduled member at the time of the rating examination.

As long as the work-related injury has affected any residual usefulness, in whole or in part, of a scheduled member, a schedule award may be appropriate. Similarly, an increase in schedule award

⁷Federal (FECA) Procedure Manual, Part 3 -- Medical, Schedule Awards, Chapter 3.700 (January 2010) (Exhibits 1, 4). See also E.P., Docket No. 11-614 (issued November 2, 2011); P.M., Docket No. 11-1072, (issued November 23, 2011).

⁸ See Raymond E. Gwynn, 35 ECAB 247, 253 (1983).

may be appropriate as long as a material change in the work-related injury is at least in part contributory to an increase in impairment of the scheduled member.

The Procedure Manual outlines the following example: If an aggravation of left *hip* osteoarthritis is accepted as work-related but the claimant also suffers from non-industrial left *knee* osteoarthritis, both of which have resulted in permanent impairment, an assessment of impairment should reflect the *total* loss of the left leg, to include both the industrial and non-industrial injuries.

As outlined above, the instant case is combined with claims ending in 102 and 934, both of which have been accepted for back conditions. It is imperative that this information be supplied in the Statement of Accepted Facts. The SOAF in file dated _____ has been reviewed however no reference is made to either injury. It is the Office's responsibility to provide a complete and proper frame of reference for a physician by preparing a statement of accepted facts.⁹ When the District Medical Adviser, second opinion specialist or referee physician renders a medical opinion based on a Statement of Accepted Facts which is incomplete or inaccurate or does not use the Statement of Accepted Facts as the framework in forming his or her opinion, *the probative value of the opinion is seriously diminished or negated altogether.*¹⁰

When the District Medical Adviser, second opinion specialist or referee physician renders a medical opinion based on a Statement of Accepted Facts which is incomplete or inaccurate or does not use the Statement of Accepted Facts as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.¹¹

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.¹² While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence and has the obligation to see that justice is done.¹³

Upon return of the case file, the Office must update the Statement of Accepted Facts to include information relative to claims ending in 102 and 934. The claimant should then be referred for second opinion examination. The AMA Guides has offered an approach to rating spinal nerve impairments consistent with Sixth Edition methodology, pursuant to the AMA Guides Newsletter, July/August 2009. OWCP has adopted this approach for rating impairment to the upper or lower extremities caused by a spinal injury.¹⁴ Based upon this, the second opinion examiner should be asked to address whether the claimant has any measurable impairment attributable to the work injury. The Office must explain that rated impairment should reflect the total loss as evaluated for the scheduled member (i.e. arm, leg, etc.) at the time of the rating examination as there are no provisions for apportionment under the FECA. In support of his/her opinion, the examiner must be sure to reference the applicable criteria/tables found in the AMA Guides Sixth Edition and Guides Newsletter July/August 2009. In more recent treatment notes from the claimant's attending physician there were said to be no sensory or motor deficits. However, in the report of _____ concurred upon by Dr. _____, the claimant was said to have mild sensory deficits at the L4 and L5 level. Therefore,

⁹ Donald E. Ewals, 51 ECAB Docket No. 98-2180 issued April 3, 2000.

¹⁰ Federal (FECA) Procedure Manual, Part 3 -- Medical, Requirements for Medical Reports, Chapter 3.600.3 (October 1990); Willa M. Frazier, 55 ECAB 379 (2004).

¹¹ Federal (FECA) Procedure Manual, Part 3 -- Medical, Requirements for Medical Reports, Chapter 3.600.3 (October 1990); Willa M. Frazier, 55 ECAB 379 (2004).

¹² See Vanessa Young, 55 ECAB 575 (2004).

¹³ See Richard E. Simpson, 55 ECAB 490 (2004).

¹⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, Schedule Awards, Chapter 3.700 (January 2010) (Exhibits 1, 4). See also E.P., Docket No. 11-614 (issued November 2, 2011); P.M., Docket No. 11-1072, (issued November 23, 2011).

the second opinion examiner must be sure to address this. Lastly, the examiner must provide the date of Maximum Medical Improvement along with an explanation to support its selection. Upon receipt, the Office should forward this report, along with any other evidence deemed relevant, to the DMA for consideration.¹⁵ Upon receipt, the Office should take any further development action deemed appropriate and then issue a *de novo* decision on entitlement to a schedule award.

Consistent with the above, the decision of the district office dated _____ is hereby set aside and *remanded* for further development. The case file is returned for further processing as noted.

ISSUED:

WASHINGTON, D.C.

Hearing Representative
Branch of Hearings and Review
for
Director, Office of Workers'
Compensation Programs

¹⁵ The claims examiner must utilize the DMA if the claims examiner is adjudicating a schedule award claim and requires a calculation of the percentage of impairment in order to establish the schedule award.¹⁵ The DMA's opinion may constitute the weight of medical opinion in schedule award cases. If an opinion on the percentage of permanent impairment and a description of physical findings is on file from an examining physician, but the percentage estimate by this physician is not based on the AMA Guides, an opinion by the DMA which gives a percentage based on reported findings and the AMA Guides may constitute the weight of the medical evidence. As long as the DMA explains his or her opinion, shows values and computation of impairment based on the AMA Guides, and considers each of the reported findings of impairment, his or her opinion may constitute the weight. The CE must ensure, however, that the DMA properly considers all reported findings, gives rationale, and uses the AMA Guides correctly in computing the percentage. The DMA should also explain any difference between his or her findings and the findings of the AP report upon which the DMA is basing his or her opinion. This is necessary to determine whether weight can be assigned to the DMA or whether a conflict of medical opinion exists. If the AP misapplied the AMA Guides, no conflict would exist because the AP report would have diminished probative value and the DMA's opinion would constitute the weight of medical opinion. However, if the DMA and the AP disagreed on, for instance, the level of impairment in a sliding scale, this could constitute a conflict of medical opinion (Federal Employees' Compensation Act Procedure Manual 2-810-8(j)).