

U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 16 DAL
LONDON, KY 40742-8300
Phone: (214) 749-2320

September 17, 2019

Date of Injury:
Employee:

Dear

This concerns your compensation case and your request for reconsideration received on

We have evaluated the evidence submitted and have reviewed the merits of your case under 5 U.S.C. 8128. As the new evidence is sufficient to support vacating the decision dated in part, modification of the decision is warranted. However, as the evidence is not sufficient to overturn the entire decision, it is also affirmed in part.

The reasons for this decision are outlined in the enclosed Notice of Decision.

If you disagree with this decision read the following instructions carefully.

Sincerely,

Division of Federal Employees' Compensation

Enclosures: Appeal Rights, Notice of Decision

PAUL FELSER
FELSER LAW FIRM, P.C.
7393 HODGSON MEMORIAL DRIVE
SUITE 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.

File Number:
Merit Review3-D-RECO

NOTICE OF DECISION

Claimant Name: _____
Case Number: _____

ISSUE: The issue for determination is whether the evidence presented is of sufficient probative value to modify the decision dated _____

REQUIREMENTS FOR ENTITLEMENT: In accordance with the regulations set forth in 20 CFR § 10.609, if an application for reconsideration is accompanied by new and relevant evidence or by an arguable case for error, OWCP will conduct a merit review of the case to determine whether the prior decision should be modified.

5 U.S.C. 8107 and 20 C.F.R. 10.404 provide for payment of a schedule award for permanent loss, or loss of use, of a listed member or function of the body. To support a schedule award, the file must contain competent medical evidence as follows:

(1) A statement that the impairment has reached maximum medical improvement, which is a permanent and fixed state, and indicates the date on which this occurred.

(2) A description of the impairment in sufficient detail to visualize the character and degree of loss. This should include, where applicable the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent description of the impairment.

(3) All findings and conclusions must be reported in accordance with the Sixth Edition of the AMA's Guides to the Evaluation of Permanent Impairment.

BACKGROUND: On _____ you filed a claim for Traumatic Injury indicating you sustained an injury or medical condition on _____ as a result of your employment.

Your claim was accepted for INCOMPLETE ROTATOR CUFF TEAR OR RUPTURE OF LEFT SHOULDER, NOT SPECIFIED AS TRAUMATIC; STRAIN OF MUSCLE(S) AND TENDON(S) OF THE ROTATOR CUFF OF LEFT SHOULDER, INITIAL ENCOUNTER.

You filed a schedule award claim by form CA7 dated _____ On _____ the Office referred Dr. _____ report to our District Medical Advisor (DMA); Dr. _____ for review and comment on the degree of impairment. Dr. _____ concludes you sustained 3% permanent partial loss of use of the left upper extremity.

By decision dated _____, the Office issued an award of compensation for 3% permanent partial loss of use of the *left* upper extremity.

You disagreed with the _____ decision and requested reconsideration through your attorney by letter/appeal dated _____ which was received by the Office on _____

By letter dated _____ the Office advised your employing agency that you had timely petitioned for reconsideration of the Office's decision of _____ per the requirement _____

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of 20 C.F.R. § 10.609(a) and advised a response was not necessary as the issue was medical in nature.¹

DISCUSSION OF EVIDENCE: The evidence reviewed in support of your reconsideration request includes .

Your attorney's letter dated _____ request for reconsideration.

A report of impairment by Dr. _____ dated _____

Your reconsideration request is considered timely filed as it is within the 1 year time limitation for such requests and you submitted additional evidence and argument. Therefore, a Merit Review was undertaken.

On _____, the Office referred Dr. _____ report to our DMA for review and comment on the degree of impairment. On _____ Dr. _____ (20% minus the 3% previously awarded equated to an additional 17%) permanent partial loss of use of the left upper extremity.

On _____, a letter was sent you to share with Dr. _____ regarding findings by the DMA review.

On _____, your attorney's letter states please accept this letter as the claimant request that the Office move forward to issue a new award of compensation based on the DMA memo. The claimant is not expecting a further response from Dr. _____

The DMA cited the proper tables in the 6th Edition of the AMA Guides to the Evaluation of Permanent Impairment and followed OWCP procedure. On review you are entitled to an additional award of 17% for the left upper extremity.

BASIS FOR DECISION: The FECA² provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her

¹ Effective 08/29/2011 20 C.F.R 10.609 has been modified to note that OWCP will not wait for comments from an employing agency regarding a request for reconsideration when comments from the agency are not germane to the issue being resolved on reconsideration. Where a reconsideration request pertains only to a medical issue (such as disability or a schedule award) not requiring comment from the employing agency, the employing agency will be notified that a request for reconsideration has been received, but OWCP is not required to wait 20 days for comment before reaching a determination.

² 5 U.S.C. § 8101 *et seq.*

³ 20 C.F.R. § 10.605.

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application for review within one year of the date of that decision.⁴ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.⁵

As your request was filed within 1 year of the last merit decision and you submitted new argument not previously considered a merit review was performed.⁶ Section 8107 of the FECA and its implementing regulations set forth the number of weeks of compensation to be paid for the permanent loss or loss of use of specified members, functions and organs of the body known as permanent impairment. 20 C.F.R. 10.404; see also 20 C.F.R. Part 10. The commencement period of the schedule award is usually the date of maximum medical improvement, the date that the physical condition of the injured member has stabilized and is not expected to improve further.

The FECA, however, does not in most instances 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 American Medical Association, Guides to the Evaluation of Permanent Impairment, as the appropriate standard for evaluating schedule losses. Currently, schedule awards are calculated using the Sixth Edition of the AMA Guides.

The evidence discussed above supports that there is a ratable impairment to your right and left lower extremities due to the accepted work injury. The DMA properly applied the Guides to Dr. findings. The DMA provided a report that is in accordance with the Guides. The date of maximum medical improvement was determined by the DMA based on the medical evidence of record.

CONCLUSION: Therefore, the evidence is sufficient to AFFIRM, in part, the decision dated and to MODIFY the prior award to reflect an additional 17% permanent partial loss of use of the *left upper* extremity. A de novo decision will be issued awarding an additional compensation award of 17% permanent partial loss of use of the *left upper* extremity.

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⁴ 20 C.F.R. § 10.607(a).

⁵ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ Effective 08/29/2011 C.F.R. 10.607 modified the date of the reconsideration request for timeliness purposes from the date mailed to the date received by OWCP.