File Number:
HR10-D-H

RECEIVED SEP 05 2017

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 hearing was held on 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 Cleveland 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 9 CLE
LONDON, KY 40742-8300

Sincerely,

Electronically Signed

Hearing Representative

PAUL H FELSER
ATTORNEY AT LAW
7393 HODGSON MEMORIAL DRIVE
SUITE 102
SAVANNAH, GA 31406

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.

Washington DC, August 31, 2017

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 in
Case no.

Hearing was held by telephone on . As a result, the decisions of the Office dated and are hereby set aside, and the case is remanded for additional actions, for the reasons set forth below:

The issues for consideration are (1) whether the claim should be expanded to include additional work-related medical conditions; (2) whether the claimant is entitled to a schedule award.

The claimant is an employee of the She filed form CA-2 "Notice of Occupational Disease" on alleging that she developed back problems due to heavy lifting, pushing and carrying in the course of her work for the where she worked as both a and for over 23 years. The claim was accepted for exacerbation and permanent aggravation of lumbar disc disease; and cervical herniated disc. Cervical disc surgery was approved and performed in 1988.

On Dr. MD, examined the claimant. He noted that the claimant had a work injury in He stated that the claimant had neck pain and difficulty ambulating. He stated that the claimant had lumbar and cervical issues related to her work injury, and hip issues that were not.

On Dr. stated that the claimant had chronic radiculopathy in the upper extremity, C8 bilaterally due to neck cervical stenosis. He stated that the claimant had 15% whole person impairment, or 25% impairment to the right upper extremity. He stated that the claimant also had chronic lower extremity radiculopathy due to lumbar stenosis post surgery. He stated that she had 17% whole person impairment or 42% lower extremity impairment. Dr. stated that the claimant had bilateral hip osteoarthritis, bilateral knee osteoarthritis, and bilateral carpal tunnel syndrome. He stated that the hip and knee conditions were not related to the claimant's employment.

On the claimant filed a claim for Schedule Award.

In a report dated Dr. stated, in part, that he believed the carpal tunnel syndrome was related to the claimant's employment.

Washington DC, August 31, 2017

On Dr. wrote that the claimant had reached maximum medical improvement. He stated that the claimant had permanent impairment due to residuals of her aggravation of degenerative disc disease and herniated cervical disc. He stated that the claimant had a degenerative progressive process that was persistent prior to and had continued.

The claimant was referred for a directed "second opinion" examination with MD, on In his narrative report, Dr. discussed the history of injury, past medical records and his own examination findings. He noted that the claimant had markedly limited range of motion in her neck and back related to the original work injury, but her principal problems were her lower extremity osteoarthritis, which was not work related. He stated that the claimant had a 2% whole person impairment based on her pain questionnaire.

On Dr. added that he found that carpal tunnel syndrome, bilateral adhesive capsulitis, and hip and knee arthritis; but he opined these were not related to the work injury because the claimant had not worked since 1992, and there was no evidence whatsoever linking these conditions to the workplace.

In an report. Dr. stated that he believed that the conditions of adhesive capsulitis, hip and knee arthritis, and right carpal tunnel syndrome were work related. He also stated that he did not believe the lower extremity arthritis was work related.

The Office's District Medical Advisor (DMA) reviewed the case on He opined that the evidence did not establish ratable impairment of a scheduled member due to the accepted work injury. He further opined that the evidence did not support expansion of the claim to include additional work-related conditions.

The District Office declared a conflict in medical opinion between Drs. and pertaining to the issues of whether the claim should be expanded to include additional medical conditions; and whether there was ratable impairment of a scheduled member due to the accepted work injury. As such, the Office arranged for the claimant to undergo an impartial "referee" examination to resolve the conflict. For this purpose, the claimant was referred to the selected referee physician, Dr. , MD, who examined the claimant on

In his report dated Dr. discussed the medical history, medical records and his examination findings. He found that the claimant did not have adhesive capsulitis of the shoulders, as she had range of motion greater than 30 degrees. Dr. found that the claimant suffered from carpal tunnel syndrome, bilateral hip arthritis, and bilateral knee arthritis; however, he opined that these conditions were not related to the work injury. Dr. indicated that the claimant had chronic degenerative conditions, and there was no evidence prior to to support that the claimant had any major complaints during the relevant employment period, except for those pertaining to her spine.

On the DMA reviewed the file. He opined noted that the claimant resigned

from federal employment in due to spinal issues. He concurred with Dr. that prior to retirement, there was no evidence relating the claimant's numerous other conditions to her employment. There was no evidence of complaints of arthritis at that time. He found no basis for a permanent impairment rating based on the accepted conditions.

On the Office issued a formal decision denying the claimant's request to expand the claim to include additional work-related medical conditions: bilateral adhesive capsulitis, bilateral hip arthritis, bilateral knee arthritis, and bilateral carpal tunnel syndrome.

In a separate formal decision dated , the Office denied the claim for schedule award.

A report from Dr. MD, dated , was submitted in which he discussed the claimant's history, and noted her work injuries to the spine. He asserted that the claimant had been having pains in the elbows, wrists, hips and knees prior to the back and neck problems. He maintained that the work injury had contributed to or aggravated many other medical conditions including arthritis in the shoulders, hips and knees, carpal tunnel syndrome and epicondylitis. Dr. provided impairment assessments for both upper extremities and both lower extremities. He identified spinal nerve root impairment as a component in the ratings.

As Dr. was no longer available, the District Office arranged for evaluation of the claimant by a new referee physician, Dr. DO. He was provided with a copy of the Statement of Accepted Facts and the medical evidence of record to use in making his determination between the conflicting opinions of Dr. and Dr.

Dr. provided his report dated discussing the history of injury, review of the medical records and his examination findings. He provided an impairment rating of 15% to the whole person based upon conditions present in the cervical spine. He opined that the claimant was at maximum medical improvement for the cervical condition in 1990 based on reports she was able to work without restrictions. He opined that she reached MMI for the lumbar spine in 1992, when she retired, due to her ability to work full time, full duty until the date of retirement. He further opined that the additional conditions of bilateral hip and knee arthritis, bilateral carpal tunnel syndrome, and bilateral adhesive capsulitis of the shoulders were not work related.

Following receipt and review of Dr. s report, an addendum was requested in an attempt to secure an opinion on a single date of maximum medical improvement for the accepted conditions, as well as clarification of the permanent impairment rating, since whole person impairment is not utilized for schedule awards under the FECA. Dr. was provided reference to the *AMA Guides* July/August 2009 Newsletter to calculate impairment from the accepted spinal conditions.

Dr. responded on August 9/2016 with handwritten notes added into the margins of the addendum request and his prior report. A permanent impairment rating

argument on the record. There was no representative from the employing agency present to observe the proceedings.

At the Hearing, Attorney Felser argued that the Office improperly denied the request to expand the claim to include additional accepted work-related conditions, and this had adversely impacted the impairment rating and claimant's schedule award entitlement. Attorney Felser argued that the opinion of the referee physician Dr. was of lessened probative value, as it was based on a flawed Statement of Accepted Facts (SOAF). He explained the newest version of the SOAF that was provided to Dr. omitted relevant information that was present in prior iterations of the SOAF, as shown by the record. He also argued that the opinion of Dr. was not well-reasoned.

Attorney Felser explained that the version of the SOAF clearly noted the claimant worked as both a Clerk and a Letter Carrier prior to her retirement. She worked in a small post office, and performed dual functions. He argued that a Letter Carrier's duties are significantly different from the duties of a Clerk. It would have been relevant and material to the issue under consideration, as to whether the claimant had sat as a desk as a Clerk for years, or if she had performed the lifting, carrying and other heavy duties of a Letter Carrier. This was necessary information to determine whether work duties had caused additional stress or strain on the shoulder, neck, or back. However, the newest SOAF did not provide this information for the physician.

Attorney Felser further noted that the earlier versions of the SOAF advised that the claimant worked for the for 30 years before she retired in 1992, but that information was not carried forward to the newest SOAF. Dr. therefor did not know how long the claimant had been working.

Attorney Felser argued that there was no explanation why this relevant information that was contained in prior SOAF's had been deleted from the current version of the SOAF that was provided to Dr. The deficient SOAF was also provided to the second opinion physician, and this also called into question the probative value of that report, and called into question whether the Office had properly declared a conflict in medical opinion requiring a referee exam, as the opinion of the second opinion physician based on a flawed SOAF is also of lessened probative value.

Attorney Felser criticized the report of Dr. directly, arguing that Dr. engaged in "loose language" that appeared to speak as if this matter pertained to some kind of traumatic injury, when it was in fact an occupational disease claim. There were also numerous factual inaccuracies in his report; the cumulative total effect was to render it of lessened probative value. Of concern, Dr. had indicated he was in agreement with Dr. when the Office had already found the opinion of Dr. to be inaccurate and incomplete, and of lessened probative value.

Attorney Felser argued that Dr performed an impairment rating with a finding the claimant sustained 15% impairment to the body as a whole. He failed to address the report provided by Dr. in which he identified additional work-related medical conditions and

provided an impairment rating based on the *AMA Guides*. Neither Dr. nor the Office explained why the opinion of Dr. was inaccurate, incorrect, or not sufficiently rationalized.

Attorney Felser added that had discovered some information that called the character of Dr. into question, consisting of an article pertaining to malpractice, implying that Dr. did not hold full spinal surgery privileges at either hospital he worked at. He argued the Office had an obligation to further investigate whether this was true.

Attorney Felser also argued that, even if Dr. opinion was to stand, he identified additional work-related conditions in his report: cervical disc herniation with cervical spondylosis and degenerative disc disease. These were permanent conditions, and the District Office should have acknowledged these additional work-related conditions and expanded the claim to include them. He added that additional diagnoses from the report of Dr. identified as work-related were not addressed by Dr. with any specificity.

Attorney Felser asked that the record remain open for 30 days to allow for the submission of additional evidence for the appeal. The request was granted, and the record held open. Copies of the transcript were released to the claimant and the employing agency, and their comments were invited.

As of this date, no comments on the transcript have been received to the record from the claimant or the employer. No additional factual or medical documentation has been received, relevant to the issues under consideration.

Based on my careful consideration of the evidence of record at this time, I find the decisions of the Office dated and should be set aside. The opinions expressed by the referee physician, Dr. were insufficiently reasoned, and therefore of lessened probative value, and insufficient to represent the weight of medical evidence on that basis.

Where opposing medical reports of virtually equal weight and rationale exist, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, is sufficiently rationalized and based upon a proper factual background, must be given special weight.[1] However, the Board has found that the report obtained from the impartial medical specialist failed to resolve the conflict in medical opinion as to whether appellant's tendinitis of the upper extremities was causally related to factors of his federal employment. The responses provided by the specialist to the inquiries of the Office were not definitive, were vague, and were equivocal in nature. The Office should have requested the impartial specialist to clarify his opinion. The Board notes that the specialist recognized in his report his inability to clarify his opinion further; therefore, the Office should have referred appellant for a second impartial medical examination. The case was remanded for that purpose.[2]

---

[1] *Brady L. Fowler*, 44 ECAB 343 (1992.); *Nancy Lackner Elkins (Jack D. Lackner)*, 44 ECAB 840 (1992.)
[2] *Ramon K. Farrin*, Jr., 39 ECAB ___ (1988).

Dr. was asked to provide his reasoned opinion explaining whether additional diagnosed medical conditions were related to the claimant's federal work duties. Although Dr. opined that additional conditions were not work-related, he provided a vague response, and little in the way of medical reasoning to explain how he reached his conclusions. He did not explain how he arrived at his conclusion that pre-existing cervical skeletal hypertosis and persistent lumbar degenerative disk disease, both resulting in additional spinal stenosis, were not work-related, especially given the allowances in the claim and approved surgery already affecting the cervical and lumbar spine. His opinion that carpal tunnel diagnosed by EMG in 1988 was not treated or recognized, and therefore was not work-related, is not a sufficiently reasoned or particularly logical statement. His vague statement that there were no complaints relating to the hip, knee or shoulder prior to 1992, and therefore no work-related conditions, is also largely unreasoned. He provided no explanation as to why the claimant's specific work duties as a Clerk or Letter Carrier performed prior to her retirement did nor did not cause or contribute to any of these diagnosed conditions, even by aggravation, even to a minor extent.

It is not necessary for the employment injury, by itself, to have caused appellant's condition, in order for it to be compensable. It needs only to have contributed to it. Where a person has a preexisting condition which is not disabling but which becomes disabling because of aggravation causally related to the employment, then regardless of the degree of such aggravation, the resulting disability is compensable. It is not necessary to prove a significant contribution of factors of employment to a condition for the purpose of establishing causal relation. If the medical evidence reveals that an employment factor contributes in any way to the employee's condition, such condition would be considered employment related for purposes of compensation under the Act.[3]

Under FECA, when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation.[4] Where the medical evidence supports an aggravation or acceleration of an underlying condition precipitated by working conditions or injuries, such disability is compensable.[5] However, the normal progression of untreated disease cannot be stated to constitute aggravation of a condition merely because the performance of normal work duties reveals the underlying condition.[6] For the conditions of employment to bring about an aggravation of preexisting disease, the employment must cause acceleration of the disease or precipitate disability. When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation ceased.[7]

The rationalized medical opinion must include a discussion of the nature of the underlying conditions; their natural or traditional course; how the underlying conditions may have been affected by appellant's employment as determined by medical records covering the period of employment; whether such affects, if any, caused material changes in the underlying

[3] *Arnold Gustafson*, 41 ECAB ___ (Docket No. 89-0438 issued October 30, 1989).
[4] *Raymond W. Behrens*, 50 ECAB 221 (1999); *James L. Hearn*, 29 ECAB 278 (1978).
[5] *A.C.*, Docket No. 08-1453 (issued November 18, 2008).
[6] *Glenn C. Chasteen*, 42 ECAB 493 (1991).
[7] *Raymond W. Behrens*, 50 ECAB 221 (1999).

conditions; or, if no material changes occurred, would the symptoms or changes indicative of a temporary aggravation have subsided or resolved immediately upon appellant's removal from the employment environment and, if not, at what point would such symptoms or changes have resolved; and whether any aggravation of appellant's underlying conditions caused by factors of his or her employment caused disability during or subsequent to appellant's employment.[8]

Regarding the issue of permanent impairment, FECA does not authorize the payment of schedule awards for the permanent impairment of the whole person.[9] Payment is authorized only for the permanent impairment of specified members, organs or functions of the body. No schedule award is payable for a member, function or organ of the body not specified in FECA or in the regulations.[10] Because neither FECA nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or spine,[11] no claimant is entitled to such an award.[12] Amendments to FECA, however, modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to a limb even though the cause of the impairment originated in the spine.[13]

The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as extremity impairment. Recognizing that certain jurisdictions, such as federal claims under FECA, mandate ratings for extremities and preclude ratings for the spine, the A.M.A., *Guides* has offered an approach to rating spinal nerve impairments consistent with sixth edition methodology.[14] For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP's procedures provide that *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment using the sixth edition (July/August 2009) is to be applied as provided in section 3.700 of its procedures.[15] Specifically, OWCP will address lower extremity impairments originating in the spine through Table 16-11[16] and upper extremity impairment originating in the spine through Table 15-14.[17] In addressing lower extremity impairments, the sixth edition requires identifying the impairment Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS). The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[18]

Dr. has provided his impairment rating in terms of whole person impairment, which is not acceptable under the FECA. After several requests for clarification of his

[8] *Newton Ky Chung*, 39 ECAB ___ (1988).
[9] *W.D.*, Docket No. 10-274 (issued September 3, 2010); *Ernest P. Govednick*, 27 ECAB 77 (1975).
[10] *William Edwin Muir*, 27 ECAB 579 (1976).
[11] FECA itself specifically excludes the back from the definition of organ. 5 U.S.C. § 8101(19).
[12] *Timothy J. McGuire*, 34 ECAB 189 (1982).
[13] *Rozella L. Skinner*, 37 ECAB 398 (1986).
[14] FECA Transmittal No. 10-04 (issued January 9, 2010).
[15] Federal (FECA) Procedure Manual, Part 3 – Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1, 4 (January 2010).
[16] A.M.A., *Guides*, 533, Table 16-11.
[17] *Id.* at 425, Table 15-14.
[18] *Id.* at 521, Table 15-14. *J.B.*, Docket No. 09-2191 (issued May 14, 2010).

opinion, he indicated the claimant has 0% impairment due to her accepted injuries based on the *The Guides Newsletter*, Rating Spinal Nerve Extremity Impairment using the sixth edition (July/August 2009); however, he offered no explanation as to how he applied the principles therein to his specific examination findings to arrive at this figure. He also indicated his figures were in line with those provided by Dr. however, Dr. found significant permanent impairment to the upper and lower extremities.

The DMA who reviewed the impairment rating provided by Dr. also provided no specific calculations and no medical reasoning to explain why the impairment rating provided by the referee physician was correct.

The conflict in medical opinion regarding whether the claim should be expanded to include additional work-related medical conditions; and whether the claimant has sustained permanent impairment of a scheduled member due to the accepted work injury; remains unresolved. Since several attempts have been made to obtain a sufficiently reasoned opinion from Dr. to no avail, referral of the claimant for a new referee opinion is warranted at this time, to resolve the conflict.

Prior to referral of the claimant for a new referee opinion, the Office should amend the SOAF to reflect the claimant's work duties as both a Letter Carrier and a Clerk, and describe the employment periods the claimant held each of these positions. This is critical information for an examining physician to consider when rendering an opinion as to whether those specific work duties caused or contributed to a diagnosed medical condition in an occupational disease claim. Furthermore, I find that the section of the SOAF identifying additional "concurrent conditions" that have not been accepted as work-related should be omitted from the SOAF, as this could potentially influence the opinion of the referee physician, who will be considering the specific issue of whether or not additional conditions are, in fact, work-related.

The Office provides a physician with a SOAF to assure that the medical specialist's report is based upon a proper factual background.[19] The SOAF must include the date of injury, claimant's age, the job held on the date of injury, the employer, the mechanism of injury and the claimed or accepted conditions.[20]

Upon receipt of the report of the new referee physician, the Office will undertake any additional development of the evidence such as it finds warranted, and issue a de novo decision on the issues of whether the claim should be expanded to include additional work-related medical conditions; and whether the claimant is entitled to a schedule award.

For the reasons set forth above, the decisions dated and are hereby set aside, and the case is remanded to the District Office for actions consistent with this decision.

[19] *Helen Casillas*, 46 ECAB 1044 (1995).

[20] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.12 (June 1995); *see also Darletha Coleman*, 55 ECAB ___ (Docket No. 03-868, issued November 10, 2003).

Issued:
Washington, D.C.

Electronically Signed

Hearing Representative
for
Director, Office of Workers'
Compensation Programs

Washington DC, August 31, 2017