

File Number:
HR10-D-H

RECEIVED DEC 07 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 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,

[Electronically Signed]

Hearing Representative

PAUL FELSER, ESQ
FELSER LAW FIRM, PC
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, December 01, 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 Case No.

The issue for determination is whether the claimant has established additional entitlement to a schedule award.

The claimant, date of birth _____ is employed as an _____ by the
On _____, the claimant filed a timely claim of traumatic
injury, claiming a shoulder injury on _____. The office accepted the claim for a
right rotator cuff sprain. They later expanded the claim to include right bicipital tenosynovitis,
complete right rotator cuff rupture, right ganglion cyst and lesion of right ulnar nerve. The
claimant underwent right elbow and shoulder surgery on _____. He returned to
modified duty on _____. He underwent additional surgery on _____
and _____.

The claimant requested a schedule award via form CA7 received by the office on _____.
The office received an impairment report, dated _____, opining a 5
percent impairment for right lateral epicondylitis, a 5 percent impairment for right radial nerve
compression and a 7 percent right shoulder impairment, for a combined 17 percent
permanent partial impairment (PPI) of the right upper extremity. The report was completed
by a functional capacity evaluator and signed by _____ MD and _____
MD. No comment is provided by either physician nor do they indicate they have read and
concur with the report.

On _____ the office referred the claim to a District Medical Advisor for review of
the claimant's permanent impairment due to the injury. On _____ the DMA
concurred with the right lateral epicondylitis finding of 5 percent but requested additional
medical findings from the claimant's physician, including the claimant's range of motion
findings for the shoulders, as well as more information on the claimant's elbow symptoms.

By letter dated _____, the office forwarded the DMA report to the claimant and Dr.
_____, requesting additional evidence to establish the claimant's permanent impairment due
to the injury.

On _____ the claimant again requested a schedule award via form CA7.

On _____, the office forwarded the DMA report to the claimant and Dr. _____ for additional evidence regarding the claimant's permanent impairment.

On _____ the office again forwarded the DMA report to Dr. _____ requesting additional evidence regarding the claimant's permanent impairment.

On _____, the office advised the claimant that the medical evidence indicated he was not yet at maximum medical improvement and no additional action would be taken on the schedule award.

On _____ the office received additional medical evidence dated _____ from a physical therapist _____, regarding the claimant's right upper extremity findings. The report was not signed by a physician.

On _____, the office received a copy of the _____ impairment report co-signed by Dr. _____. The report separately opined a 5 percent right elbow impairment for epicondylitis and a 2 percent PPI of the right upper extremity due radial nerve entrapment of the elbow. Dr. _____ signatures are under a typed statement indicating concurrence with the report.

A separate co-signed report dated _____ was subsequently received opining a 19 percent PPI of the upper extremity due to the claimant's right shoulder condition. Dr. _____ signature is noted under a typed statement that he concurs with the findings.

A report dated _____ from _____ provided range of motion values for the shoulder. No report provided a total value for the claimant's combined right upper extremity impairment based upon the 6th Edition of the AMA Guides.

On _____ the office referred the claim to a District Medical Advisor for review of the claimant's permanent impairment due to the injury.

A Memorandum to the File, dated _____ from a claims examiner then indicated the DMA had previously reviewed the claim and concurred with a five percent impairment.

By decision dated _____ the office provided the claimant with a schedule award for a 5 percent PPI of the right upper extremity based upon the 5 percent previously noted for the epicondylitis.

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

Hearing was held on _____ The claimant was represented by Paul Felser. The claimant did not attend the hearing

At hearing, Mr. Felser was advised that hearing was being held to determine if he intended to provide updated medical evidence since the evaluations in the claim had been several

months old when the decision was issued. He indicated he had asked the claimant for such. Mr. Felser asked that the case record be held open for the submission of additional evidence.

A transcript was provided to the employer and the claimant's attorney. Both were afforded 20 days to respond to the transcript. No comment was received.

In addition, the case record was held open for 30 days in order to allow the claimant time to submit any additional medical evidence.

No new medical evidence was provided.

After a thorough review of the hearing testimony as well as the written evidence of record, I find that the decision dated [redacted] should be set aside and the claim remanded for referral to a District Medical Advisor.

The schedule award provision of the Federal Employees' Compensation Act compensates covered employees for the permanent impairment of specified members, functions and organs of the body. Before a formal evaluation of the employee's condition is carried out for the purpose of determining entitlement to a schedule award, an analysis of the history and course of the medical condition must support the conclusion that an impairment is permanent and well stabilized. Only then, when the evidence establishes that the employee has reached maximum medical improvement from the residuals of the accepted employment injury, can the extent of any impairment be considered "permanent," and only then can the employee's condition be evaluated for schedule award purposes.¹

Once an employee is permanent and stationary, the Employees' Compensation Appeals Board has held that, for consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The Board has concurred with the Office's decision to adopt the A.M.A. Guides for determining the extent of permanent impairments.² The current standard is the 6th Edition of the AMA Guides.

FECA Bulletin No. 17-6 states the following in cases where the rating physician used the DBI method in determining permanent impairment:

"If the rating physician provided an assessment using the DBI method and the Guides allow for use of ROM for the diagnosis in question, the DMA should independently calculate impairment using both the ROM and DBI methods and identify the higher rating for the CE."

In the present case, the DMA requested additional medical evidence to support a range of motion rating for the claimant's right shoulder and also requested additional evidence regarding the claimant's elbow symptoms. He did indicate concurrence with the 5 percent assigned for the claimant's right lateral epicondylitis. New evidence was then received.

¹ See *Orlando Vivens*, 42 ECAB 303 (1991) (a schedule award is not payable until MMI of the claimant's condition has been reached; maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further).

² James E. Archie, 43 ECAB 180 (191).

However, the office then issued a decision for the right upper extremity based upon the epicondylitis condition previously agreed upon by the DMA. As additional impairment is asserted for the right upper extremity, I find that the claim should be referred for additional review by a DMA with regard to the claimant's right shoulder and radial nerve impairment. Upon completion of that development, along with any other the office deems necessary, the office should issue a de novo decision.

Consistent with the above findings, the decision of the District office dated _____ is set aside and the case file remanded for the action described above.

ISSUED
WASHINGTON, D.C.

[Electronically Signed]

Hearing Representative
For
Director, Office of Workers'
Compensation Programs