

File Number:
D-H

U.S. DEPARTMENT OF LABOR

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

NOV 3 2006

RECEIVED NOV 09 2006

Date of Injury:
Employee:

Dear Mr. .

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 your Hearing, it has been determined that the decision issued by the District Office should be set aside, and the case remanded to the District Office for further action as explained in the enclosed copy of the Hearing Representative's Decision.

Future correspondence should be addressed to: U.S. Department of Labor, Office of Workers' Compensation Programs:

US DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 6 JAC
LONDON, KY 40742-8300

Sincerely,

HEARING REPRESENTATIVE

DEPARTMENT OF THE AIR FORCE
78 MSG-DPCE
CIVILIAN PERSONNEL INJURY COMP OFFICE
215 PAGE ROAD SUITE 325
ROBINS AFB, GA 31098

PAUL FELSER, ESQ
7 EAST CONGRESS ST, SUITE 400
PO BOX 10267
SAVANNAH, GA 31412

**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

Hearing was held in Atlanta, GA on March 31, 2006. Based on this Hearing; the
decision of the District Office dated August 19, 2005 is hereby set aside, and the case
remanded for further action, for the reasons set forth below:

The issue for determination is whether the claimant is entitled to a schedule award
under the provisions of the Act

The claimant, born _____ was employed as an Aircraft Mechanic for the
_____ The claimant sustained an injury
at work on _____ which was accepted for lumbar strain, displacement of
lumbar intervertebral disc without myelopathy and thoracic or lumbosacral neuritis or
radiculitis.

On _____ the claimant filed a form CA-7 "Claim for Compensation"
requesting authorization of a Schedule Award. In support of this, the attending
physician _____ MD, provided an impairment rating dated _____ in
which he recommended that the claimant had sustained 28.8% lower extremity
impairment due to impairment for motor and sensory loss to the peroneal and sural
nerves, and dysesthesia.

In accordance with established procedure, the case file record was referred to the
District Medical Advisor (DMA), who was asked to provide an opinion on Dr.
assessment of the claimant's work-related permanent partial impairment. In a report
dated _____ the District Medical Advisor indicated that he disagreed with Dr.
Watson's assessment on the basis that a proper impairment rating would identify and
grade spinal nerves anatomically related to the accepted work injury. As such, the
District Medical Advisor felt that Dr. _____ had improperly applied the *AMA Guides to
the Evaluation of Permanent Partial Impairment, 5th Edition* when he rated the claimant's
impairment.

A letter was sent to Dr. _____ on _____ requesting that he supply the
information identified by the District Medical Advisor. In an undated report, received
_____, Dr. _____ gave a very detailed account of how he used the *AMA
Guides to the Evaluation of Permanent Partial Impairment, 5th Edition* and the medical
evidence of record to determine the claimant's lower extremity impairment. He cited the
tables and pages he used, and opined that the claimant had suffered a total 44% lower

extremity impairment due to sensory and motor deficits. It was noted that nerve deficits were based on results from EMG studies performed on

The case file record was sent back to the District Medical Advisor, who evaluated the evidence of record on and opined that the claimant had no impairment to the lower extremities based on a functional capacity evaluation of

On the District Office released a formal notification letter to the claimant advising that he was not entitled to a schedule award under the provisions of the Act, because he had not sustained a ratable, work-related impairment based upon the weight of medical evidence of record, represented by the District Medical Advisor.

The claimant disagreed with the schedule award decision and, through his attorney, requested an appeal in the form of an Oral Hearing before the Branch of Hearings and Review. The Branch found that the case was not in posture for a decision on the issue at that time because the District Medical Advisor had not properly considered Dr. most recent report, noted above. The record was remanded back to the District Office, to be sent back to the District Medical Advisor for new file review, with specific attention to Dr. newest report, and a *de novo* decision on the issue of schedule award entitlement.

In accordance with this directive, the District Office forwarded the case back to the District Medical Advisor. In a memo dated the DMA opined that the EMG studies used by Dr. in support of his impairment rating were several years old and no longer accurate, and their findings did not correlate with the more recent physical findings shown by the Functional Capacity Evaluation. He recommended that new EMG studies should be obtained.

On the District Office issued a *de novo* decision on the issue of schedule award entitlement, with a finding that the claimant was not entitled to a schedule award since the evidence of record did not support he had sustained ratable work-related impairment. The claimant disagreed with this decision and again requested an Oral Hearing before the Branch of Hearings and Review.

As such, a Hearing was scheduled and held on At the Hearing, the claimant was represented by his attorney, Paul Felser.

At the Hearing, the claimant and his attorney argued that the Office prematurely decided the issue of schedule award. He felt that the evidence of record, including Dr. report and the FCE, were supportive of a work-related permanent impairment. He noted that, in the most recent DMA report, it was recommended that updated EMG studies be obtained; however, this was not done. He opined that the DMA has still not properly considered the information in Dr. most recent report, as was ordered as a result of the prior Hearing Representative's decision.

The claimant testified that it is his opinion that he does have permanent injury in his lower extremities. He can't walk the way he did before, and he doesn't have the same level of function as he did prior to the injury at work. The claimant was asked, specifically, what his current symptoms were, or describe the nature of his current disability. He noted chronic pain down his legs, the left being worse. He noted

numbness in his legs and feet. He noted weakness and hypersensitivity to touch, of the feet.

At the conclusion of the Hearing, Attorney Felser requested that the record be held open so that he would have an opportunity to supplement the record with additional evidence after the Hearing. The request was granted, and the record held open for 30 days. After the Hearing, Attorney Felser and the employer were provided copies of the transcript, and their comments were invited.

After the Hearing, a "Post-Hearing Brief" was submitted by Attorney Felser, dated _____, with a summary of the evidence and arguments he had provided in support of the appeal.

Based upon the claimant's testimony, the arguments presented by the attorney at the Hearing, and the evidence of record, I find that the issue of schedule award entitlement is not in posture for a decision at this time. Additional medical development of the claim is required before that issue can be properly considered.

The schedule award provisions of the Federal Employees' Compensation Act (FECA) provide for compensation to employees sustaining impairment from loss, or loss of use of, specified members of the body. The FECA, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office.¹ For consistent results and to ensure equal justice, the Employees' Compensation Appeals Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The *AMA Guides* has been adopted by the Office as a standard for evaluation of schedule losses and the Board has concurred in such adoption.²

The Office's Federal (FECA) Procedure Manual provides that in obtaining medical evidence required for a schedule award the evaluation made by the attending physician must include a detailed description of the impairment including, 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. This description must be sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.³ The FECA Procedure Manual also clearly instructs that injuries sometimes leave objective or subjective impairments which cannot easily be measured by the *AMA Guides*. Some examples are:

- (a) Pain
- (b) Atrophy
- (c) Deformity
- (d) Loss of sensation
- (e) Loss of strength
- (f) Marked sensitivity to heat or cold
- (g) Soft tissue damage (scarring, discoloration)

¹ Daniel C. Goings, 37 ECAB 781 (1986)

² Luis Chapa, Jr., 41 ECAB 159 (1989)

³ John H. Smith, 41 ECAB ____ (Docket No. 89-1756 issued January 31, 1990).

The effects of any such factors should be explicitly considered along with the impairment measurable by the *AMA Guides* and correlated as closely as possible with the factors set forth there. This approach, combined with thorough rationale from the DMA as to the percentage of loss chosen, has been supported by the ECAB in decisions concerning schedule award determinations for factors not defined in the *Guides*.⁴ Whenever pain, discomfort, or loss of sensation is present due to nerve injury or nerve dysfunction (e.g. leg impairment due to a spinal disc injury), the evaluating physician should include these factors in arriving at a percentage of impairment. Chapter 15 of the *Guides* discusses evaluations of pain in general.

In this instance, the file contains disparate medical opinions of record, from qualified physicians, which utilize the *AMA Guides to the Evaluation of Permanent Partial Impairment, 5th Edition* to arrive at their respective figures, citing tables and pages used, and describing how the findings upon examination were applied to arrive at these figures. The attending physician, Dr. Watson, has maintained that the claimant suffers from permanent impairment of the lower extremities, and has provided his detailed calculations in support of this. The District Medical Advisor has maintained that the evidence of record does not support a finding of permanent impairment of the lower extremities. I find that these two medical opinions regarding impairment are roughly equivalent in terms of probative value.⁵ Section 8123(a) of the Act provides that when there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist to resolve the conflict in medical opinion.⁶

Given the nature of the claimant's injuries, and description of his current symptoms, it seems likely that the claimant may have sustained some permanent impairment to his lower extremities. It is not clear whether these were considered in proper fashion. The District Medical Advisor has recommended that updated EMG studies would be helpful in determining the current level of permanent impairment.

As such, I find that additional medical development is necessary to resolve the outstanding conflict in medical opinion, to determine the extent of the claimant's permanent impairment due to his accepted injury, and to determine whether the claimant is entitled to additional schedule award compensation due to pain, numbness, atrophy, loss of strength, or any other relevant factor.

Upon its return to the District Office, to resolve the conflict in medical opinion, in accordance with established procedures, the claimant should be referred for an impartial ("referee") medical evaluation with a Board-Certified Medical Specialist in the appropriate specialty. The Specialist should be specifically requested to examine the claimant, and the medical evidence of record, and then to provide a reasoned medical

⁴ See FECA Procedure Manual Chapter 2-808-6 and *Thomas F. Gauthier*, 34 ECAB 1060, and *Arnulfo Aguayo Zepeda*, Docket No. 84-1590, as discussed in Procedure Manual Chapter 3-700, Exhibit 2.)

⁵ In assessing medical evidence, the number of physicians supporting one position or another is not controlling. The weight of such evidence is determined by the reliability of the medical report obtained; its probative value; its convincing quality; the care of analysis manifested; and the medical rationale expressed in support of the doctor's opinion. *John A. Ceresoli, Sr.*, 40 ECAB ___ (1988) [88-1565 issued November 28, 1988].

⁶ *William C. Bush*, 40 ECAB ___ (1989) [89-0449 issued July 10].

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opinion on the extent of the claimant's permanent partial impairment of his left and right lower extremities, due to the accepted work injury. Prior to this, however, the claimant should be referred for updated EMG studies, and the results should be made available to the impartial medical specialist.

Based upon his examination of the claimant and the medical records, the Impartial Specialist should provide an impairment rating for the appropriate member(s), according to the *AMA Guides to the Evaluation of Permanent Impairment, 5th Edition*, with specific discussion describing how the specific pages and tables were used, along with the evidence of record, to arrive at the figure provided. All relevant issues identified above should be addressed. If the claimant is entitled to additional impairment consideration for any subjective factor such as pain, loss of sensation or loss of strength, this should be explained. The physician should also take care to explain the nerve roots involved and their impact on the impairment rating.

Once that information is received, the Office should undertake any additional development as necessary, and issue a *de novo* decision on the issue of schedule award entitlement.

Accordingly, the Office's decision of _____ is hereby SET ASIDE, and the case file record is REMANDED to the District Office for actions consistent with this decision.

Dated: NOV 3 2006
Washington, D.C.

Hearing Representative
for
Director, Office of Workers'
Compensation Programs