

File Number:
HR10-D-H

U.S. DEPARTMENT OF LABOR

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

JUL 13 2010

Date of Injury:
Employee:

RECEIVED JUL 19 2010

Dear Ms. :

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 04/19/2010. 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,



Carol E. Adams
Hearing Representative

PAUL H FELSER
FELSER LAW FIRM, P.C.
POST OFFICE 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 _____ A
hearing was held on April 19, 2010.

The issue for determination is whether the claimant has a permanent impairment to her upper extremities that resulted from her work injury of July 30, 2004.

_____ is employed as a nurse with the _____. She filed a claim for traumatic injury for date of injury of _____. The claim was accepted for bilateral shoulder impingement. On April 20, 2005, the claimant had right arthroscopic shoulder subacromial decompression for impingement. On September 10, 2008, the claimant had left shoulder arthroscopic decompression and AC joint resection and debridement.

On June 23, 2009, the claimant filed a claim for compensation for permanent impairment. The Office determined there was insufficient medical evidence to support that the claimant sustained a permanent impairment as the result of the July 30, 2004, work injury. Therefore by development letters dated July 6, 2009, and November 3, 2009, the claimant was advised of the deficiencies of her claim and was provided thirty days to provide additional medical evidence to support permanent impairment.

On December 8, 2009, the Office denied the claim for schedule award for permanent impairment on the basis that the claimant had not provided evidence to support she sustained a permanent impairment that resulted from her work injury. The claimant disagreed with the decision and requested, through her attorney, a hearing before an OWCP representative.

A hearing was held on April 19, 2010. The claimant was represented at hearing by attorney Paul Felser. The attorney argued that the Office had already determined that the claimant had 1% impairment under the *AMA Guides*, 5th edition. The attorney pointed out that the impairment was established by the District Medical Advisor (DMA). The attorney stated that when the claim form came in for the scheduled award the Office began development again.

The employing agency was sent a copy of the transcript and afforded twenty days to submit comment or evidence. Additional comments were submitted, by letter dated March 24, 2010. The employer argued that the claimant had returned to full regular duty, therefore, had no permanent impairment. The employer certified that a copy of their comments was sent to the claimant or her attorney.

Under the FECA, impairment is defined as the anatomical or functional loss or reduction of a function of an organ of the body in reference to the activities of normal life; it pertains solely to the claimant's medical condition. Disability is defined, on the other hand, in terms of the claimant's ability to perform the duties of his or her job. See PM 3-600-2

I have reviewed the evidence, and the records show that the claim was developed for a schedule award, first in 2008. The case was sent to the DMA on December 18, 2008, to review the evidence to determine if it was sufficient to support a permanent impairment rating. The doctor reviewed the evidence and used the report dated August 20, 2005, to arrive at a rating. The DMA determined, based on the *AMA Guides*, 5th edition, that the claimant had a 1% permanent impairment of the right upper extremity based on the loss of range-of-motion (ROM). The DMA noted that the attending physician had provided a rating of 10% for the right upper extremity. However, the DMA indicated that the doctor used the wrong tables to arrive at the rating. The DMA did not provide any rating for the left upper extremity.

A review of the August 30, 2005, report of Dr. _____ noted that the claimant's impingement of the left shoulder was resolved. He only provided findings and impairment rating for the right shoulder.

By letter dated March 3, 2009, the Office wrote to the claimant, advising her that she had a permanent impairment of the right upper extremity and included a claim form for the claimant to complete and take to her employer to file for her schedule award.

The claim form was received on June 29, 2009, after the Office had switched to the 6th edition of the *AMA Guides*. Therefore, by letter dated July 6, 2009, the Office sent a standard development letter to the claimant, requesting that a medical report be submitted with a rating using the 6th edition of the *Guides*.

The claimant in a telephone conversation of July 30, 2009, advised the Office that her doctor would not provide a rating without a letter from the Office. Therefore, on November 3, 2009, a second letter was sent to the claimant so she could take it to her physician and obtain a rating.

No additional relevant medical evidence was received.

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 functions, 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 of 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.¹

¹ *John H. Smith*, 41 ECAB ____ (Docket No. 89-1756, issued January 31, 1990).

When a medical report is received from the attending physician, the examining physician is not responsible for calculation of the percentage of impairment.² The DMA is responsible for taking the calculations provided by the examining physician and arriving at an overall impairment percentage rating.³

The Board has long held that proceedings under the Federal Employees' Compensation Act are not adversarial in nature and OWCP is not a disinterested arbiter. While a claimant has the burden to provide evidence of entitlement to compensation, OWCP has the obligation to see that justice is done.⁴

I have reviewed the evidence, and I find the decision of the Office must be set aside and remanded for further development.


The DMA determined there was sufficient evidence in the August 30, 2005, report to determine permanent impairment. Therefore, the claimant has met her burden to provide a sufficient report to determine a rating. Therefore, the Office should refer the case back to the DMA for him to review the record and the report of August 30, 2005, and provide a rating based on the AMA *Guides*, 6th edition.

Upon completion of the above development and after any other development the Office deems necessary, a new decision should be issued.

In accordance with the above finding, the decision of the Office dated December 8, 2009, is set aside, and the case record **remanded**.

Dated: JUL 13 2010

Washington, D.C.


Carol Adams
Hearing Representative
for
Director, Office of Workers'
Compensation Programs

² FECA Bulletin Number 96-17.

³ FECA Bulletin Number 96-17.

⁴ *Donald L. Bantz*, 45 ECAB ____ (Docket No. 92-1923, issued May 5, 1994).