File Number:
HR10-D-H

RECEIVED JUN 2 9 2012

U.S. DEPARTMENT OF LABOR

JUN 2 6 2012

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. This is an amended decision, vacating the Office's decision of November 3, 2011, and not, as stated, the decision of May 11, 2012.

A hearing was held on 03/26/2012. 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 Chicago 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 10 CHI
LONDON, KY 40742-8300

Sincerely,

Debra Harvey
Hearing Representative

PAUL H FELSER
ESQ
FELSER LAW FIRM PC
PO BOX 10267
SAVANNAH, GA 31412

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.

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: . Telephonic hearing was held on March 26, 2012.

The issue is whether the evidence of record establishes impairment to the lower extremities in excess of that previously paid.[1]

The claimant was employed by the in , as a filed the Form CA-1, Notice of Traumatic Injury, on , stating injured low back after installing a compressor. The claim has been accepted for a lumbar strain and herniated lumbar disc. The claimant has filed the Form CA-7, Claim for Compensation, for schedule award benefits for permanent impairment.

An impairment rating was received from Dr. dated May 13, 2009, that provided a five percent impairment to the left lower extremity and no impairment to the right lower extremity. The Office's District Medical Advisor (DMA) reviewed Dr. report on September 25, 2011, and stated it was prepared under the fifth edition of the AMA *Guides to the Evaluation of Permanent Impairment*. The sixth edition of the AMA *Guides* became effective for all schedule award decisions issued on or after May 1, 2009. The DMA recalculated the award under the sixth edition and stated there was 11% impairment to the left lower extremity and no impairment to the right lower extremity. The Office issued a formal decision on November 3, 2011, for the 11% left lower extremity impairment and no impairment to the right lower extremity. The claimant disagreed with this decision and requested a hearing before an OWCP Hearing Representative.

The telephonic hearing was held on March 26, 2012. The claimant was not present at the hearing but was represented by Attorney, Paul Felser.

Mr. Felser argued that the instant case overlapped with the other accepted claim and suggested they be combined. He stated that Dr. had addressed both

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[1] The claimant has another claim under case number accepted for a left shoulder strain, cervical stenosis, adhesive capsulitis of the left shoulder, myalgia and myositis, dizziness and giddiness, and displacement of cervical intervertebral disc, C4-5. has received schedule award benefits for an impairment of the left upper extremity under this claim.

injuries in his reports and suggested there is a lower extremity impairment related to the cervical spine injury.

Mr. Felser stated that it appeared an April 12, 2010, report from Dr. may not have been considered in the instant case. He also stated that a prior medical report from a referee physician, Dr. , had also not been considered as Dr. findings had been confirmed by Dr. . He argued that both physicians had opined for lower extremity impairments due to cervical problems. He argued that the DMA had not reviewed or considered all the evidence. He stated the DMA appeared to be taking the role of a treating physician. He stated the DMA was making "substantive decisions as to the severity of the claimant's injury with respect to the proper classification under the guidelines." He argued the DMA did not examine the claimant and should not have been making medical observations and conclusions. He stated that the DMA failed to award a right lower extremity rating as he disagreed with Dr. findings. He stated the DMA had failed to consider lower extremity impairments that arose from additional conditions.

Mr. Felser closed by stating again Dr. April 2010, report had apparently not been reviewed by the DMA. He stated that the DMA, in his rating, applied the rating for the sciatic nerve, but Dr. had also opined for impairment at the L5 level. He argued this could yield an additional impairment. The record was left open for 30 days to allow for additional information for consideration.

A copy of the hearing transcript was sent to the Employing Agency for review and comment on April 4, 2012. There was no response.

A brief from Mr. Felser summarizing his arguments was received along with Dr. report of April 12, 2010, and an October 19, 2010, report from Dr.

Section 8107 of the Federal Employees' Compensation Act (FECA) provides that if there is a permanent disability involving the loss or loss of use of a member of function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function. Section 8107 also sets for the number of weeks of compensation to be paid for permanent loss of use of the members of the body that are listed in the schedule. Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. The Board has held, however, 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 Office has adopted the American Medical Association's *Guide to the Evaluation of Permanent Impairment* as the standard for determining the extent of permanent impairment and the Board has concurred such adoption of these *Guides*.[2]

[2] *A. George Lampo*, 45 ECAB 441 (1994)

The Employees Compensation Appeals Board has recognized that the method used in rating impairment for purposes of a schedule award is a matter, which rests in the sound discretion of the Director. In *Henry D. Butler*,[3] the Board addressed the Office's use of the A.M.A. *Guides* to evaluate impairment since the first edition single volume published in 1971. The Director has since adopted subsequent editions of the A.M.A. *Guides* and has stated the date specific when use of each edition should be made applicable to claims under the Act. Counsel has not established that the Director abused the discretion delegated to him under section 8107 and the implementing federal regulations to make the sixth edition of the Guides applicable to all claimants as of May 1, 2009.[4]

In this case, the impairment rating of 11% of the left lower extremity was based on Dr. report of March 31, 2009. His diagnoses were lumbar muscular and ligamental strains, deranged discs in the back, and a left L5 nerve root impingement. The DMA reviewed this report and noted Dr. reported the claimant had no surgery, a positive straight leg raise on the left, mild weakness on the left, and "very minimal" symptoms on the right that "are not objectively verified." The DMA calculated sciatic nerve impairment on the left with a mild motor deficit, which was a class 1 diagnosis with a default grade C rating of 9% impairment. Using the combined tables, the claimant had 11% impairment for this diagnosis on the left. The DMA stated due to the minimal symptoms on the right without objective verification, there was no impairment on the right. The DMA noted that Dr. had calculated his rating of 5% on the left and no impairment on the right from the fifth edition of the AMA *Guides*. The DMA calculated his rating from the sixth edition.

Dr. submitted an additional medical report dated April 12, 2010. This report was submitted to the other file but has been moved into the instant file. Dr. noted that the claimant had a spinal cord injury in the period claim, , and stated this injury caused "weakness in upper extremities and lower extremities with difficulty with the upper extremities and significant abnormalities with station gait disorders in the lower extremities."

Dr. stated:

> "When fell (in the second claim) caught himself with both arms. had tearing of the ligaments in left shoulder. This caused adhesive capsulitis in the left shoulder and the problems that is having in the left shoulder joint. also injured the C4-5 disc and caused compression of the spinal cord. Dr. and Dr. are to be commended on finding this early and performing surgery quickly to stop any further damage to spinal cord. That symptoms became much worse after

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[3] 43 ECAB 859 (1992).

[4] FECA *Procedure Manual*, Chapter 3-0700, Example 1 (January 2010) per the ECAB in *Heather Robards*, 10-1368, issued March 22, 2011.

the surgery is not due to an injury to the spinal cord during the surgery, but relief of the pressure described in the surgery. The original injury to the spinal cord occurred with the injury of 10/21/03.

The spinal cord injury is causing weakness in the upper extremities and abnormal sensation in the upper extremities. It is causing marked weakness in the trunk and lower extremities and causing marked instability. The spinal cord injury has also caused a balance problem due to inability to sense proprioception and keep lower and upper extremities and trunk stable. This causes the balance problem that had and contributes to the vertigo."

Dr. stated the claimant had reached maximum medical improvement on February 28, 2007. He stated the claimant had a right lower extremity impairment of 29% based on Table 13-12, page 336, of the sixth edition of the AMA *Guides,* and a 44% impairment of the left lower extremity based on the same page and table. He then stated that due to the instant claim, the claimant had a 7% impairment due to the left L5 and S1 spinal nerve root impairments, Table 16-12, page 535. He stated, "The two spinal nerve root impairments are separate from the spinal cord impairment causing the weakness and instability in the left lower extremity." The combined left lower extremity rating was 48% on the left. He provided the worksheets supporting his calculations.

Also transferred into the instant file from the second claim was a report of Dr. Office-directed referee evaluation. Dr. opined that the claimant has a lumbar radiculopathy that is not related to the instant injury, but is related to the October 21, 2003, injury. He stated the lower extremity conditions that are attributed to that injury are weakness, gait abnormality and stance abnormality. He opined for 38% impairment of each lower extremity as a result of the 2003 injury.

I find that the Office's decision dated November 3, 2011, must be SET ASIDE and the file returned for additional medical development. The case file has not been accepted for any lumbar spine condition. However, there is, at least, some evidence of a lumbar spine condition that arose from the injury of October 23, 2003. Upon return of the case file, the Office should undertake development as needed to determine if that claim should be expanded to include any accepted lumbar spine condition. A *de novo* decision should be issued for a lumbar condition under that case.

Once that determination has been made, the Office should again refer the file to the DMA for additional review concerning the percentage of impairment of the lower extremity or extremities. Even if the Office does not expand the prior claim, the DMA should review the April 10, 2010, report of Dr. and the report of Dr. and determine if the evidence supports additional impairment of the lower extremities based on the current injury. The DMA should review these reports

and calculate a new impairment rating. The DMA should select the medical report that contains all of the essential information concerning the impairment and then he "must give reasons for selecting a specific medical report over the other medical reports of record."[5] Once the Office has completed all necessary development a new decision on impairment of one or both of the lower extremities should be issued.

DATED: JUN 2 6 2012

WASHINGTON, D.C.

Debra W. Harvey

DEBRA W. HARVEY
Hearing Representative
For
Director, Office of Workers'
Compensation Programs

[5] *Louis Jackson, Sr.*, 47 ECAB ___ (Docket No. 94-0801, issued February 27, 1996)