

U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 6 JAC
LONDON, KY 40742-8300
Phone: (904) 366-0100

February 11, 2019

Date of Injury:
Employee:

DE NOVO DECISION

Dear

Under the schedule award provisions of the Federal Employees' Compensation Act (FECA) at 5 U.S.C. 8107, the Office of Workers' Compensation Programs makes the following:

ADDITIONAL AWARD OF COMPENSATION

1. Degree and Nature of Permanent Impairment: 1% additional permanent partial impairment Right Arm
2. Date of Maximum Medical Improvement: 01/08/2019
3. Period of Award: 01/08/2019 thru 01/29/2019
4. Number of Weeks of Compensation: 3.12
5. Weekly Pay: \$1043.40 X Compensation Rate: 75 % = \$1043.40
6. Effective Date of Pay Rate:
7. After Cost-of-Living Adjustments, Your Weekly Compensation is: \$0.00
8. Your Payment and the Period Covered: \$2,729.22 01/08/2019 – 01/29/2019
9. Your Continuing Payment each Four Weeks: \$0.00

Payment of your award ends when you have been paid for the last day shown in item 3 above.

Section 8107 of the FECA and its implementing regulations set forth the number of weeks of compensation to be paid for the permanent loss or loss of use of specified members, functions and organs of the body known as permanent impairment. 20 C.F.R. 10.404; see also 20 C.F.R. Part 10. The commencement period of the schedule award is usually the date of maximum medical improvement, the date that the physical condition of the injured member has stabilized and is not expected to improve further.

The FECA, however, does not in most instances specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, as the appropriate standard for evaluating schedule losses. Currently, schedule awards are calculated using the Sixth Edition of the *AMA Guides*.

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.

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A schedule award is payable consecutively but not concurrently with an award for wage loss for the same injury. On 05/24/2017, you were paid a schedule award from 03/30/2016 through 10/12/2016 for 4% Right Arm and 5% Left Arm; therefore, the starting date for the additional schedule award was adjusted to begin 10/13/2016.

On 10/30/2014, Dr. _____ assigned an 18% or 23% impairment rating according to the Fifth Edition of the AMA Guides. Therefore, you were referred to an Office-directed examination to determine whether there was permanent impairment due to the work injury of _____. The second opinion physician, Dr. _____ provided an impairment rating of 1% to your right arm. Dr. _____ also indicated there was no impairment to the cervical spine due to no spinal nerve impairment from the work injury.

On 03/06/2015, your case was referred to the District Medical Advisor (DMA), to review the medical in the record and to calculate the impairment to the upper extremities. The DMA opined:

“Reflects 3 years post-op with right shoulder stabilized with no change expected.
Injured right shoulder and neck on the job _____ Severe neck pain and headaches and right shoulder pain. Required right shoulder arthroscopic SAD 07/12/2011 for impingement syndrome and ACDF C5-7 in 2012 with residual neck pain.”

Based on AMA 6 Guides, Table 15-5, page 402, a 1% schedule award right upper extremity is assigned for Class 1C impingement syndrome for post-op right shoulder pain”

By decision dated 04/08/2015, you were awarded compensation for 1% permanent impairment of your right arm as a result of your injury.

You disagreed with the decision and requested a hearing with the Branch of Hearings & Review. The telephonic hearing was conducted on 12/7/2015. Subsequently, a decision was issued on 01/08/2016, which affirmed the original schedule award decision of 1% permanent impairment of the right arm.

Through your attorney, you stated that you disagreed with the 01/08/2016 decision and requested reconsideration by letter/appeal request form received on 12/15/2016.

On 12/22/2016, a formal decision was issued in your case finding that the evidence presented was insufficient to modify the decision dated 01/08/2016.

By letter dated 01/19/2017, your attorney requested a reconsideration of the denial decision issued 01/08/2016 and requested a referral to a second opinion examiner to calculate the impairment for the accepted cervical conditions.

By decision dated 03/16/2017, the reconsideration request was denied for the reason that the evidence presented was not sufficient to warrant review of the decision dated 12/22/2016.

By letter dated 03/27/2017, your attorney requested a reconsideration of the denial decision issued 03/16/2017.

On 04/07/2017, your case was forward to the DMA for review of the medical evidence for the schedule award. The DMA opined:

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"The claimant's impairment rating is 5% (Class 1) for the non-dominant left upper extremity and 5% (Class 1) for the dominant right upper extremity and this 5% represents an additional 4% that was added to the initial 1% that was already awarded to the claimant. This number was arrived at using Table 13-11 in the guidelines to the evaluation of permanent impairment 6th edition page 335. This table was utilized because it represents impairment of upper extremity due to central nervous system (CNS) dysfunction as the impairment is as a result of spinal cord compression that was treated surgically. The diagnosis-based impairment (DBI) cannot be used as it involves injury to soft tissue, muscle/tendon and ligament/bone/joint.

By decision dated 05/24/2017, you were paid a schedule award of 5% for the left arm and an additional 4% for the right arm.

By letter dated 05/31/2017, your attorney requested an oral hearing be scheduled in reconsideration of the schedule award decision issued 05/24/2017.

As a result of the hearing held on 11/08/2017, your case was returned to the district office for further development with the DMS. The DMA was asked to review and analyze the medical evidence of record in association with the July/August 2009 AMA Guides Newsletter for Rating Spinal Nerve Impairment under the Sixth Edition (PM 3-700, Exhibit 4).

On 01/10/2018, your case was referred to the DMA for review. The DMA opined:

"1. What is the claimant's impairment rating for the left and right arm? Please show how you applied the criteria in the AMA guides and please show charts/tables explaining your calculations.

The claimant's impairment rating is 5% (Class 1) for the non-dominant left upper extremity and 5% (Class 1) for the dominant right upper extremity and this 5% represents an additional 4% that was added to the initial 1% that was already awarded to the claimant. This number was arrived at using Table 13-11 in the guidelines to the evaluation of permanent impairment 6th edition page 335. This table was utilized because it represents impairment of upper extremity due to central nervous system (CNS) dysfunction as the impairment is as a result of spinal cord compression that was treated surgically. The diagnosis-based impairment (DBI) cannot be used as it involves injury to soft tissue, muscle/tendon and ligament/bone/joint.

2. Specifically comment on the impairment rating provided by the treating physician. Please discuss any points of disagreements thoroughly.

The treating physician states that the impairment rating is 30% (Class IV) and has utilized impairment of specific spinal nerves and grades motor strength at C5, C6, C7, C8 and T1 to be 4/5. This is not consistent with the physical examination that only shows 4/5 grip strength on the left. C5 and C6 do not contribute to grip strength.

3. Please provide date that the claimant attained maximum medical improvement (MMI) and explain the basis for assigning that date. If you select retroactive MMI date, you must provide contemporaneous retroactive medical evidence to support such date.

The date the claimant attained maximum medical improvement is 3/30/2016 because this is the encounter date that there was a physical examination recorded. I used this physical examination to determine disability.

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4. Also review and specifically comment on the impairment rating provided by Dr. _____ in the report dated 03/30/2016. If you disagree with the findings regarding the degree of impairment, please thoroughly discuss any points of disagreement. If there are differences noted between the figures that you arrive at and those of the physician, please explain thoroughly.

I have reviewed Dr. _____ note dated 3/30/16 and he states that the claimant has 30% impairment rating to her upper extremities. I do not agree with this assessment because his chart states that there is 4/5 strength at C5, C6, C7, C8 and T1 but this is not consistent with the physical examination provided during office visits.

5. The claimant's treating physician, Dr. _____ has indicated in medical reports of March 30, 2016 and June 24, 2016, that the claimant possesses a 30% permanent partial impairment of the upper extremities, based on her having Class IV impairment to the upper extremities utilizing table 17.2, on page 565 of the AMA Guides of the Evaluation of Permanent Impairment, 6th Edition. He has provided little in the way of a rationale to support the opinion rendered except to state such is based on "spinal nerve impairments as a result of the injury to the cervical spine."

Although the District Medical Advisor reviewed the case file on May 1, 2017, and indicated the claimant to have a 5% permanent partial impairment to each upper extremity based on Class I, Table 13-11, p 335, of the Guides, he has failed to display review of the currently utilized criteria by the Office when determining entitlement to scheduled awards for permanent spinal nerve impairment.

Based on the examination provided, the claimant has 5/5 strength in the right upper extremity and 4/5 in the left upper extremity and there is decreased sensation in the left upper extremity in the C6 distribution. According to the July/August 2009 AMA Guides Newsletter for rating spinal nerve impairment-under the Sixth Edition, Table 1 states that a mild sensory and motor deficit is characterized as a Class i impairment with a sensory Grade of 4 described as 1-25% sensory deficit and a motor Grade of 4 which represents 1-25% motor deficit. Table 1 also shows that for a Class 1 impairment with a mild motor deficit, the default impairment rating for the C6 nerve is 9%; therefore, this claimant based on July/August 2009 AMA Guides Newsletter for rating spinal nerve impairment-under the Sixth Edition has an impairment rating of 9% in the left upper extremity".

Based on the medical opinion of the DMA's report dated 01/12/2018, you are awarded and additional 4% for the left upper extremity. The additional 4% impairment rating gives a total of 9% impairment for the left upper extremity, which 5% was previously awarded/paid on 05/24/2017.

By Remand Order dated 11/21/2018, it was determined additional development was needed. The Remand Order advised you should be referred for a directed second opinion examination with a Board-certified specialist in the appropriate medical specialist who is familiar with the 6th edition AMA Guides to determine permanent impairment to the right arm.

On 01/08/2019, you attended the second opinion examination performed by Dr. _____ a Board-certified Orthopaedic Surgeon. Dr. _____ opined:

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"1. This lady has reached maximum medical improvement. Maximum medical improvement has been reached as of today's examination on 01/08/2019.

2. The diagnosis on which an impairment is based is the rotator cuff tendinopathy of the right shoulder. This is based upon the MRI findings, as well as the operative report findings.

3. A detailed description of permanent impairment of the right upper extremity is performed. This is a diagnostic based impairment. This is based upon the AMA Guidelines to the evaluation of permanent impairment. Sixth Edition table I5-5 page 402. This is a class 1 injury. The default grade C is utilized. The functional history and clinical studies are grade I severity resulting in no shift. This results in a 1% impairment to the right upper extremity. There is no impairment based on range of motion criteria as range of motion is full.

4. There is no impairment of the right or left upper extremity due to spinal nerve injury caused by the accepted work injury involving the neck. The rationale for this is because the detailed electrodiagnostic studies performed by Dr. [redacted] on 07/12/2015 showed no evidence of carpal tunnel syndrome and no evidence of cervical radiculopathy on either the left or the right side.

5. There is no non-occupational condition that is contributing to the permanent partial impairment of the right or left upper extremity.

Per the Remand Order your case file was referred back to the District Medical Advisor for review of the impairment calculations. The District Medical Advisor opined:

"The claimant's impairment rating is 5% (Class 1) for the non-dominant left upper extremity and 5% (Class 1) for the dominant right upper extremity and this 5% represents an additional 4% that was added to the initial 1% that was already awarded to the claimant. This number was arrived at using Table 13-11 in the guidelines to the evaluation of permanent impairment 6th edition page 35. This table was utilized because it represents impairment of upper extremity due to central nervous system (CNS) dysfunction as the impairment is as a result of spinal cord compression that was treated surgically. The diagnosis-based impairment (DB1) cannot be used as it involves injury to soft tissue, muscle/tendon and ligament/bone/joint.

The treating physician states that the impairment rating is 30% (Class IV) and has utilized impairment of specific spinal nerves and grades motor strength at C5, C6, C7, C8 and T1 to be 4/5. This is not consistent with the physical examination that only shows 4/5 grip strength on the left. C5 and C6 do not contribute to grip strength.

The date the claimant attained maximum medical improvement is 3/30/2016 because this is the encounter date that there was a physical examination recorded. I used this physical examination to determine disability.

I have reviewed Dr. [redacted] note dated 3/30/16 and he states that the claimant has 30% impairment rating to her upper extremities. I do not agree with this assessment because his chart states that there is 4/5 strength at C5, C6, C7, C8 and T1 but this is not consistent with the physical examination provided during office visits.

The claimant's treating physician, Dr. [redacted] has indicated in medical reports of March 30, 2016 and June 24, 2016, that the claimant possesses a 30% permanent partial impairment of the upper extremities, based on her having Class IV impairment to the upper

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extremities utilizing table 17.2, on page 565 of the AMA Guides of the Evaluation of Permanent Impairment, 6th Edition. He has provided little in the way of a rationale to support the opinion rendered except to state such is based on "spinal nerve impairments as a result of the injury to the cervical spine."

Although the District Medical Advisor reviewed the case file on May 1, 2017, and indicated the claimant to have a 5% permanent partial impairment to each upper extremity based on Class I, Table 13-11, p 335, of the Guides, he has failed to display review of the currently utilized criteria by the Office when determining entitlement to scheduled awards for permanent spinal nerve impairment.

Based on the examination provided, the claimant has 5/5 strength in the right upper extremity and 4/5 in the left upper extremity and there is decreased sensation in the left upper extremity in the C6 distribution. According to the July/August 2009 AMA Guides Newsletter for rating spinal nerve impairment under the Sixth Edition Table 1 states that a mild sensory and motor deficit is characterized as a Class 1 impairment with a sensory Grade of 4 described as 1-25% sensory deficit and a motor Grade of 4 which represents 1-25% motor deficit. Table 1 also shows that for a Class 1 impairment with a mild motor deficit, the default impairment rating for the C6 nerve is 9%; therefore, this claimant based on July/August 2009 AMA Guides Newsletter for rating spinal nerve impairment-under the Sixth Edition has an impairment rating of 9% in the left upper extremity.

After review of Dr. [redacted] report and the EMG report by Dr. [redacted] I am in agreement that there is no impairment from the spinal nerves as a result of a work injury and the impairment is 1% as a result of the right rotator cuff tear and therefore, the total impairment is 1% due to right upper extremity impairment.

The claimant has reached maximum medical improvement and the date of MMI is 01/08/2019 which is the date of the most recent comprehensive physical examination performed by Dr. [redacted]

The claimant has no permanent partial impairment of the right or left upper extremity due to spinal nerve injury caused by the accepted work-related cervical injury or approved cervical spine surgery because the claimant's EMG does not show nerve root injury.

Non-occupational conditions such as carpal tunnel syndrome are not causing or contributing to permanent partial impairment of the right or left upper extremity according to the 6th Edition AMA Guides because the EMG does not support this. The claimant does have an occupational impairment rating of 1% which is as a result of the torn right rotator cuff.

The claimant has previously been awarded compensation for:

4/8/2015: 1% right arm
5/24/2017: 5% left arm and additional 4% right arm and
2/28/2018: 4% additional impairment left arm additional = 9% total left arm impairment minus 5% previously paid.

The current impairment is 1% and this is calculated based on the right torn rotator cuff and this is based on Table 15-5 on page 402 of the 6th Edition of the guides to the evaluation of

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permanent impairment and this is a Class 1 impairment with a default Grade of C which carries a 1% impairment and this should be in addition to the prior percentage awarded”

The percentage of impairment shown above was calculated by a District Medical Advisor, who applied the Guides to the medical findings provided by the second opinion examiner, Dr. _____ and determined the date of maximum medical improvement based on the medical evidence on record.

A copy of the District Medical Advisor's calculation, which explains this discrepancy and the second opinion report is attached.

IMPORTANT INFORMATION

Please read the following information carefully. Keep this award letter so you can refer to it when necessary. If you have questions concerning this award, write to the address shown in the letterhead.

- 1. HOW COMPENSATION IS PAID** - Direct deposit is the fastest and most secure way to receive your award payments. We strongly encourage you to submit a **Standard Form 1199A**, which will enable us to direct deposit your payment(s) into your bank. Your first payment will be issued within 30 days. If further payments are due, they will be made every four weeks until the expiration of the award.
- 2. LUMP SUM PAYMENTS** - If you are currently working, or if you are receiving retirement benefits from the Office of Personnel Management, you may be entitled to a "lump-sum" payment of your schedule award. Please contact the District Office at the address listed on the first page of this letter and specifically request information concerning this option.
- 3. CHANGE OF ADDRESS** - Notify this office immediately of any change of address either for correspondence or for direct deposit. Notification must be in writing, signed by you, to the address shown on the first page of this letter. Include your file number, your old address, and your new address.
- 4. CHANGE IN STATUS OF DEPENDENTS** - If your award is paid at the augmented rate of 3/4 because you have one or more dependents, you are required to provide written notification immediately of any change in status of your dependents, to the address on the first page of this letter. The notice must be signed by you and include your file number, the name of the dependent whose status changed, the effective date of the change, and the nature of the change in status. If you originally claimed only one dependent, and there is a change in the status of your sole dependent, do not cash any checks you receive after the change in status of that dependent. Return the checks promptly for adjustment by this Office.
- 5. RETURN TO WORK** - You may work or receive retirement benefits from the Office of Personnel Management (OPM) during the period of this award without any effect on your schedule award payments.
- 6. SOCIAL SECURITY DISABILITY BENEFITS** - Please contact your local Social Security Office regarding this award if you are receiving or have filed for Social Security Disability Benefits.

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7. VA BENEFITS - You are required to notify this office if you have received, or are receiving any VA benefits for the same part of the body.

8. EXPIRATION OF AWARD – After the ending date of this award noted in item 3, your entitlement to compensation will be based solely on disability for work resulting from the accepted injury. You may claim continuing compensation by submitting evidence showing that the accepted injury prevents you from performing the kind of work you were doing when injured and from earning comparable wages. Please note that compensation for disability cannot be paid for any period during which you receive retirement benefits from OPM.

If you disagree with this decision, you should carefully review the attached appeal rights, and pursue whichever avenue is appropriate to your situation.

Sincerely,

Claims Examiner

Enclosures: Appeal Rights
Second Opinion Medical report dated 01/08/2019
District Medical Advisor report dated 01/30/2019

PAUL H FELSER
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FELSER LAW FIRM PC
QUEENSBOROUGH BANK BUILDING
7393 HODGSON MEMORIAL DRIVE
SUITE 102
SAVANNAH, GA 31406

Case Number:
Employee:
Date: February 11, 2019

FEDERAL EMPLOYEES' COMPENSATION ACT APPEAL RIGHTS

If you disagree with the attached decision, you have the right to request an appeal. If you wish to request an appeal, you should review these appeal rights carefully and decide which appeal to request. There are 3 different types of appeal as outlined below. **YOU MAY ONLY REQUEST ONE TYPE OF APPEAL AT THIS TIME.**

Place an "X" on the attached form indicating which appeal you are requesting. Complete the information requested at the bottom of the form. Place the form on top of any material you are submitting. Then mail the form with attachments to the address listed for the type of appeal that you select. Always write the type of appeal you are requesting on the outside of the envelope ("HEARING REQUEST", "RECONSIDERATION REQUEST", or "ECAB REVIEW").

NOTE - If you have a substantially limiting physical or mental impairment, Federal disability nondiscrimination law gives you the right to receive help from DFEC in the form of communication assistance, accommodation and modification to aid you in the FECA claims process. For example, we will provide you with copies of documents in alternate formats, communication services such as sign language interpretation, or other kinds of adjustments or changes to account for the limitations of your disability. Please contact the appropriate office below to ask about this assistance.

1. HEARING: If your injury occurred on or after July 4, 1966, and you have not requested reconsideration, as described below, you may request a Hearing. To protect your right to a hearing, any request for a hearing must be made before any request for reconsideration by the District Office (5 U.S.C. 8124(b)(1)). **Any hearing request must also be made in writing, within 30 calendar days after the date of this decision, as determined by the postmark of your letter.** (20 C.F.R. 10.616). There are two forms of hearings, both conducted by a hearing representative. You may request either one or the other, but not both.

a. **Oral Hearing.** An informal oral hearing is conducted at a location near your home or by teleconference/videoconference. You may present oral testimony and written evidence in support of your claim. Any person authorized by you in writing may represent you at an oral hearing. At the discretion of the hearing representative, an oral hearing may be conducted by teleconference or videoconference.

b. **Review of the Written Record.** You may submit additional written evidence, which must be sent with your request for review. You will not be asked to attend or give oral testimony.

2. RECONSIDERATION: If you have additional evidence or legal argument that you believe will establish your claim, you may request, in writing, that OWCP reconsider this decision. **The request must be signed, dated and received within one calendar year of the date of the decision.** It must clearly state the grounds upon which reconsideration is being requested, and be accompanied by relevant evidence not previously submitted, such as medical reports, sworn statements, or a legal argument not previously made, which apply directly to the issue addressed by this decision. A person other than those who made this decision will reconsider your case. (20 C.F.R. 10.605-610)

3. REVIEW BY THE EMPLOYEES' COMPENSATION APPEALS BOARD (ECAB): If you believe that all available evidence that would establish your claim has already been submitted, you have the right to request review by the ECAB (20 C.F.R. 10.625). The ECAB will review only the evidence received prior to the date of this decision (20 C.F.R. Part 501). **Request for review by the ECAB must be made within 180 days from the date of this decision.** More information on the new Rules is available at www.dol.gov/ecab.

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APPEAL REQUEST FORM

If you decide to appeal this decision, read these instructions carefully. You must specify which procedure you request by checking one of the options listed below. Place this form on top of any materials you submit. Be sure to mail this form, along with any additional materials, to the appropriate address. **YOU MAY ONLY REQUEST ONE TYPE OF APPEAL AT THIS TIME.**

 ORAL HEARING

Depending on your geographical location, the issue involved in your case, the number of hearing requests in your area, and at the discretion of the hearing representative, we may expedite your appeal by providing you a telephone hearing or videoconference. **Please check here if you would prefer a telephone hearing.**

 REVIEW OF THE WRITTEN RECORD

For each of these options, you must submit this form within 30 calendar days of the date of the decision. You may also submit additional written evidence with your request. Do not mail this appeal request to the District Office. **You must mail your request to:**

**Branch of Hearings and Review
 Office of Workers' Compensation Programs
 P. O. Box 37117
 Washington, DC 20013-7117**

 RECONSIDERATION:

Your request must be signed, dated and received by OWCP within 1 calendar year of the date of the decision. You must state the grounds upon which reconsideration is being requested. Your request must also include relevant new evidence or legal argument not previously made. **Mail your request to:**

**DOL DFEC Central Mailroom
 P. O. Box 8300
 London, KY 40742**

 ECAB APPEAL:

Submit this form within 180 calendar days of the date of the decision. No additional evidence after the date of OWCP's decision will be reviewed. To expedite the processing of your ECAB appeal, you may include a completed copy of the AB 1 form used by ECAB to docket appeals available on the Department of Labor Web Site at www.dol.gov/ecab. Do not mail this appeal request to the District Office. **You must mail your request to:**

**Employees' Compensation Appeals Board
 200 Constitution Avenue NW, Room S-5220
 Washington, DC 20210**

SIGNATURE _____ TODAY'S DATE _____
 PRINTED NAME _____ DECISION DATE _____
 ADDRESS _____ PHONE _____
 CITY _____ STATE _____ ZIP _____