

File Number:
HR10-D-H

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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 11/29/2018. 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,

Division of Federal Employees' Compensation

PAUL FELSER, ESQ
FELSER LAW FIRM, PC
7393 HODGSON MEMORIAL DRIVE
SUITE 102
SAVANNAH, GA 31406

If you have a disability and are in need of communication assistance (such as alternate formats or sign language interpretation), accommodation(s) and/or modification(s), please contact OWCP.

Washington DC, February 05, 2019

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
Case No. An oral hearing was held on 11/29/2018.

The issue is whether the evidence establishes that the claimant has permanent impairment of the right upper extremity (RUE) in excess of 26%, for which compensation was awarded, and as determined according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed., reprinted 2009).

The Department of the Air Force employed the claimant, _____ as an _____ at _____ On _____, the claimant, or a person acting on his behalf, timely filed a claim for an injury in the performance of duty on _____, when he was pulling foam from an air conditioner and felt pain and heard popping in his right arm. The claim was accepted by the Office for right shoulder sprain, rotator cuff tear, bicipital tenosynovitis, and right ulnar nerve lesion. The Office authorized several RUE surgeries.

By decision dated March 10, 2017, the district office awarded compensation for 5% impairment of the RUE. The claimant disagreed with that decision and his attorney, Paul Felser, requested a hearing which was held on September 18, 2017. By decision dated December 1, 2018, the hearing representative set aside the district office decision and remanded the case for further development.

The district office undertook additional development and referred the claim for additional review by an Office District Medical Adviser (DMA) with respect to the claimant's right shoulder and right radial nerve injuries and the rating provided by _____ M.D., the treating physician, dated _____. The DMA noted that Dr. _____ provided insufficient findings to determine impairment of the RUE for epicondylitis or compression neuropathy. The DMA found impairment by the ROM method to be greater than by the DBI method but noted information was incomplete.

By letter dated January 29, 2018, the district office requested that Dr. _____ provide the necessary additional information. No response was received and the claimant was referred for a second opinion examination to determine the extent of RUE impairment using both the diagnosis-based impairment (DBI) and range of motion (ROM) methods.

The claimant was examined by _____, M.D., a Board-certified orthopaedic surgeon, on _____. Dr. _____ provided rationalized opinion that the claimant had 25% impairment of the RUE based on the ROM method, which was higher than the rating of 15%

using the DBI method. Dr. Fried provided complete ROM measurements for the shoulder and elbow.

The pertinent case records and Dr. Fried's report were reviewed by a DMA for correlation with the A.M.A., *Guides*.

By memorandum dated May 25, 2018, the DMA, _____, M.D., provided rationalized opinion that the claimant had 13% RUE impairment using the DBI method. The DMA found Dr. _____ provided insufficient and inconsistent documentation by which to accurately assign impairment of the right radial nerve. The DMA incorrectly indicated that Dr. _____ had not provided elbow ROMs other than flexion. The DMA found 26% impairment of the RUE using the ROM method.

By decision dated June 27, 2018, the district office awarded compensation for 26% permanent impairment (an additional 21%) of the RUE. The claimant disagreed with that decision and by letter postmarked July 9, 2018, Mr. Felser requested a hearing.

The telephonic hearing was held on November 29, 2018. Mr. Felser appeared on behalf of the claimant. The hearing transcript is of record.

Mr. Felser argued that the district office did not complete proper development. He noted the DMA found that Dr. _____ had not provided the necessary sensory examination to grade the degree of sensory deficit and could not provide a rating for right radial nerve injury. Mr. Felser also asserted that Dr. _____ had not provided ROM measurements for the right elbow for other than flexion.

The employing establishment did not submit comments.

I have reviewed the evidence of record and find that the decision of the district office dated June 27, 2018, should be set aside as the medical evidence requires additional development.

The schedule award provisions of the FECA set forth the number of weeks of compensation to be paid for permanent loss of the use of the members of the body listed in the schedule. The Act, 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. However, as a matter of administrative practice the Board has stated 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 A.M.A., *Guides* as the standard for evaluating permanent impairment for schedule award purposes, and the Board has concurred with the Office's adoption of this standard.¹ The

¹ _____ 47 ECAB ____ (Docket No. _____, issued _____)

Office adopted the fifth edition of the *Guides* effective February 1, 2001.² The Office adopted the sixth edition of the *Guides* effective May 1, 2009.³

Federal Employees' Compensation Act (FECA) Bulletin 17-06, notes that Chapter 2, page 20, of the A.M.A., *Guides* states that one of the fundamental principles is if the *Guides* provide more than one method to rate a particular impairment or condition, the method producing the higher rating must be used. The Bulletin notes that the interpretive complexities and language used throughout Chapter 15 have sometimes led evaluating physicians to provide inconsistent interpretations for calculating upper extremity impairments. The Employees' Compensation Appeals Board (ECAB) held that in light of the conflicting language in the Sixth Edition of the *Guides* it is incumbent upon OWCP through its implementing regulations and/or internal procedures to establish a consistent method for rating upper extremity impairment. Impairment ratings should be based upon the most recent version of the Sixth Edition *Guides*. Currently, the reprinted 2009 A.M.A., *Guides to the Evaluation of Permanent Impairment*, Sixth Edition is the most recent version. As such, this version should be consistently utilized by the DFEC (Department of Federal Employees' Compensation). The Bulletin directs that the DMA should identify (1) the methodology used by the rating physician (i.e. DBI (diagnosis-based impairment) or ROM (range of motion) and (2) whether the applicable tables in Chapter 15 of the *Guides* identify a diagnosis that can alternatively be rated by ROM. If the *Guides* allow for the use of both the DBI and ROM methods to calculate an impairment rating for the diagnosis in question, the method producing the higher rating should be used. The Bulletin gives further direction regarding development of the evidence to calculate upper extremity impairment as it related to the DBI versus ROM methods.

When the Office develops the medical evidence by referring the case of an Office referral physician, the Office has the obligation to seek clarification from its physician upon receiving a report that does not adequately address the issues that the Office sought to develop.⁴

Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the Office medical adviser providing rationale of the percentage of impairment specified.⁵

The Office referred the claimant for a second opinion examination with Dr. [redacted] to determine the nature and extent of any permanent impairment or the RUE related to the July 16, 2014, work injury. The DMA noted that Dr. [redacted] did not provide sufficient objective findings to accurately assign impairment for radial nerve injury. The DMA also noted an error in Dr. [redacted] impairment sums. The DMA incorrectly indicated that Dr. [redacted] had not provided ROM measurements for all elbow motions. Dr. [redacted] report addendum of

² FECA Bulletin 01-05, issued January 29, 2001.

³ FECA Bulletin 09-03, issued March 15, 2009.

⁴ 8 ECAB 769 (1956).

⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002); 56 ECAB 273 (2005).

noted three measurements for flexion, extension, pronation, and supination which the DMA did not consider.

On remand, the district office should request that Dr. _____ provide an addendum report with the necessary examination findings of monofilament and 2-point discrimination to adequately evaluate the right radial nerve injury. If Dr. _____ did not perform the necessary sensory testing the claimant should be referred for such supplemental evaluation. The district office should then refer the supplemental and original reports to a DMA for review and correlation with the A.M.A., *Guides*. The DMA should be referred to the right elbow range of motion measurements provided by Dr. _____ on _____. Following any additional development deemed necessary, the district office should issue a new decision regarding the claimant's entitlement to an additional schedule award.

Accordingly, the decision of the district office dated June 27, 2018, is set aside and the case record is returned for actions as noted above.

ISSUED:

WASHINGTON, D.C.

Electronically signed

Hearing Representative
For
Director, Office of Workers'
Compensation Programs