File Number:
HR11-D-H

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U.S. DEPARTMENT OF LABOR

DFELHWC-FECA, PO Box 8311
LONDON, KY 40742-8311
Phone: (202) 693-0045

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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 preliminary review has been completed, and it has been determined that the case is not in posture for a hearing at this time. The decision of the Office has been vacated and returned to the office for further action as explained in the attached Remand Order.

Your case file has been returned to your assigned Claims Examiner. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
DFELHWC-FECA, PO Box 8311
LONDON, KY 40742-8311

Sincerely,

Federal Employees Program

PAUL H FELSER, ESQ
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, December 17, 2020

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

Merit Consideration of the case file was completed on). Based on the review, the decision of the Office dated (is set aside for the reasons set forth below.

The issue for determination is whether the Office properly adjudicated the claim for a schedule award by decision dated

born is employed as a I with the . She filed Form CA-1 for a Traumatic Injury alleged to have occurred on On that date she picked up a heavy package. The case was approved for displacement of lumbar intervertebral disc without myelopathy. Appropriate medical and wage loss benefits were paid.

According to the evidence of record, the claimant stopped work on or around and underwent L4-5 and L5-S1 laminectomy. She returned to full duty on or around However, she suffered recurrent disability on On a diagnostic spinal cord stimulator trial placement was done.

On he Office received Form CA-7 which had been filed for a schedule award. In support of this, an impairment rating report dated was received from M.D. He indicated that he examined the claimant on for schedule award purposes and obtained EMG/NCV testing due to the claimant's lumbar disc displacement and peripheral spinal nerve impingement. He attached a copy of the study, performed by , D.O. He proceeded to document the claimant's complaints and perform a review of relevant medical records. On physical exam, he first assessed the neck, documenting decreased range of motion in the *cervical spine*. He noted that gentle pressure on the trapezius muscles increased numbness down the arms, although it did not reproduce tingling she experienced in the thumbs and fingers. Dr. described decreased sensation to light touch, pin prick, two point discrimination and monofilament testing in the thumb and fingers of both hands. Grip strength was very weak. Dr. proceeded to address the lumbar spine and described tightness and tenderness in the paraspinous muscles. Pressure on the right buttock reproduced tingling in the back of the right thigh which was consistent with mild lumbosacral plexus impingement but it did not cause radiculopathy. A sensory examination was performed relative to the lower extremities and Dr. described decreased sensation to pin prick, light touch, monofilament and 2 point discrimination. He also described weakness on toe and heel walking, dorsiflexion of the big toes and plantar flexion of the feet. Straight leg raising and Bragard's sign was weak in both lower extremities. The claimant was said to have an antalgic gait due to weakness of the L4, L5, and S1 spinal nerve motor function. It was Dr. opinion that had reached maximum medical improvement (MMI) as of Impairment was assessed in accordance

with the Sixth Edition of the AMA Guides and the Guides Newsletter July/August 2009. A total of 18% impairment was assigned for the right lower extremity based upon spinal nerve impairment at L4, L5, and S1. For the left lower extremity, a total of 10% was assigned based upon spinal nerve impairment at L4, L5 and S1.

On the Office wrote to the claimant acknowledging receipt of the CA-7 as well as Dr. report. However, they proceeded to outline the requirements necessary to establish schedule award entitlement. The claimant was to ensure that the report he supplied adhered to these guidelines. Thirty days were afforded for the submission of additional evidence in support of the claim.

Concurrently, the Office forwarded the report of Dr. to the District Medical Advisor (DMA) for review. A response dated April 4, 2019 was received from M.D. He acknowledged the impairment rating offered by Dr. but indicated that his findings on exam appeared to be in conflict with other documentation in the file. He made reference to records from Dr. who described sensation "within normal limits" with no motor deficits recorded. This was in contrast to the multilevel deficits described in each extremity by Dr. . Given this, the DMA recommended that the claimant be referred for a second opinion evaluation.

Ms. was subsequently referred for a second opinion evaluation which took place on with board certified orthopedist M.D. He documented the history of injury and performed a review of the medical records supplied to him. Following a physical exam, he addressed the questions posed by the Office relative to impairment. Referencing the Sixth Edition of the AMA Guides, he assigned 12% whole person impairment. This was calculated based on a disc herniation at a single level with documented residual radiculopathy. Attached to this report was a addendum within which Dr. assigned 6% right lower extremity impairment. This was based upon a motor deficiency in the right tibial nerve and sensory deficiencies in the right superficial peroneal and right sural nerves. In another addendum of Dr. I assessed impairment using the Guides Newsletter, July/August 2009. For the left, he assigned 1% impairment for a mild sensory deficit at the L4 level. There was no motor deficit. At the L5 level, 1% impairment was assigned for a mild sensory deficit and 5% for a mild motor deficit. At the S1 level, there was 1% impairment for a mild sensory deficit and no motor deficit. For the right lower extremity, the claimant had 3% impairment secondary to a moderate sensory deficit and no motor deficit at the L4 level. At L5, there was 1% impairment for a mild sensory deficit and 5% for a mild motor deficit. At the S1 level, there was 4% impairment for a sensory deficit and no motor deficit. Final left lower extremity impairment was 8% and right lower extremity impairment was 13%.

The report of Dr. was forwarded to the DMA for review. A response dated was received from Dr. However, he recommended that the Office contact Dr. for a supplemental opinion due to inconsistencies/conflicts in his prior reports. He stated,

> "In his initial examination of 11/6/19, he notes "no significant focal motor weakness is noted on ankle plantar flexion and dorsiflexion, knee and extension and flexion, or hip flexion bilaterally."
>
> He also states, "Sensory examination shows decreases sensation in the right foot compared to the left."
>
> In his calculation of impairment using Table 16-12 (Peripheral Nerve Impairment); he only determines impairment of the right lower extremity, implying no impairment of the LLE, yet he subsequently calculates 8% LLE for nerve deficits in his later reports."

Based upon this, the DMA stated that the impairment rating was not consistent with his prior exam or reports.

Based upon the above, the Office wrote to second opinion examiner Dr. on for a supplemental opinion. They explained that the DMA had pointed to several inconsistencies relative to his reports of

An addendum dated was received from Dr. . He stated that his exam noted increased abnormalities in the right lower extremity compared to the left however he did not state that the left lower extremity was normal. Further, the claimant was intermittently symptomatic in her lower extremities and this was considered in assessing impairment. However. he went on to state that he did not recall the exact questions that were answered in his communication but he believed that it concerned the right lower extremity and this is why the left was not mentioned.

The Office forwarded the above addendum to the DMA and a response dated was received from Dr. . In that report, he concurred with the rating offered by Dr. . Specifically, he agreed with an 8% rating relative to the left lower extremity and 13% of the right lower extremity. He opined that Dr. s report should be given more weight than Dr. as he is a board certified orthopedic surgeon.

On the Office processed a schedule award for 8% impairment of the left lower extremity and 13% of the right lower extremity. The date of maximum medical improvement was The weight of medical evidence was afforded to the second opinion examiner.

The claimant disagreed with this decision and an oral hearing was requested. In accordance with this request, I have conducted an initial review of the file and find that the case is not in posture for a hearing at this time.

Based on my review of the file, the decision of the Office should be *SET ASIDE* and the case *REMANDED* for further development.

5 U.S.C. § 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[1]

The Employees' Compensation Appeals Board has held 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 Board has concluded with the Office's decision to adopt the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA Guides) for determining the extent of permanent impairments.[2]

Section 8107 of the Federal Employees' Compensation Act[3] authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss

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[1] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).
[2] *James E. Archie*, 43 ECAB 180 (1991).
[3] 5 USC § 8107.