

File Number:  
HR11-D-H

RECEIVED OCT 10 2018

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 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 District Office has been vacated and returned to the district office for further action as explained in the attached Remand Order.

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 H FELSER  
FELSER LAW FIRM P.C.  
7393 HODGSON MEMORIAL DRIVE STE 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, October 03, 2018

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 \_\_\_\_\_

*Merit Consideration of the case file was completed on \_\_\_\_\_ . Based on the review, the decision of the district 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.

\_\_\_\_\_, born \_\_\_\_\_, is employed as a \_\_\_\_\_; with the \_\_\_\_\_ . He filed Form CA-1 for a Traumatic Injury alleged to have occurred on \_\_\_\_\_. On that date he was mowing rough terrain when the handlebars of the mower jerked his right arm and shoulder. The claim was initially approved for a right shoulder sprain and right shoulder traumatic arthropathy. It was subsequently approved for a partial tear of the right rotator cuff and a right biceps tendon rupture.

On \_\_\_\_\_ the claimant underwent right shoulder arthroscopic rotator cuff repair, subacromial decompression, and mini open biceps tenodesis.

\_\_\_\_\_ subsequently filed Form CA-1 for a Traumatic Injury which occurred on \_\_\_\_\_. He was at his desk working on a CA-7 form when he dropped a cheese stick from his right hand and tried to catch it with his left. The claim was approved for a left acromioclavicular sprain. This case was assigned file number \_\_\_\_\_ and was administratively combined with the instant case as the master file.

On \_\_\_\_\_ the claimant underwent right shoulder arthroscopy with rotator cuff repair.

On \_\_\_\_\_ he underwent left shoulder scope with extensive debridement for the diagnosis of left shoulder rotator cuff tear, irreparable cuff tear.

In the instant case, \_\_\_\_\_ submitted a CA-7 form for a schedule award. This was developed by letter dated \_\_\_\_\_ and the claimant was advised that he must submit

medical evidence which provided an impairment rating in accordance with the *Sixth Edition of the AMA Guides to the Evaluation of Permanent Impairment (the Guides)*.

The Office subsequently referred the claimant for a second opinion examination which took place on [redacted] with [redacted] M.D., a board certified specialist. Following additional diagnostic testing, a report dated [redacted] was received within which Dr. [redacted] opined that [redacted] had reached maximum medical improvement (MMI) relative to the right shoulder. He offered an impairment rating using the diagnosis based method (DBI) rating method for unilateral shoulder instability Class 1. The default value was 11% however following assignment of applicable Grade Modifiers, impairment totaled 13% of the right upper extremity. Specifically, Dr. [redacted] assigned a Grade Modifier of 2 for Functional History, 1 for Physical Exam and 2 for Clinical Studies. Dr. [redacted] also provided impairment for the left shoulder. Following additional diagnostic testing on June 28, 2016, impairment was calculated to be 13%.

The report of Dr. [redacted] was forwarded to the District Medical Advisor (DMA). A response dated [redacted] was received from [redacted] M.D. He questioned why Dr. [redacted] used shoulder instability to assess impairment when this was not reflected in the Statement of Accepted Facts (SOAF) and the exam did not support instability. Based upon this, the DMA recommended an independent medical exam by an orthopedic surgeon.

The Office wrote to Dr. [redacted] for clarification and he was asked to review the report of the DMA. In an addendum of [redacted] Dr. [redacted] continued to offer the same impairment with no explanation in response to the concerns outlined by Dr. [redacted]. This report was forwarded back to the DMA however in a response of [redacted] Dr. [redacted] still questioned the second opinion examiner's rating and rationale. As such, a conflict was declared between Dr. Rustin and the District Medical Advisor.

[redacted] was seen on [redacted] for an impartial examination with [redacted] M.D., a board certified orthopedic surgeon. In a report of [redacted] he assigned 12% impairment of the left shoulder and 12% of the right.

By decision dated [redacted] the Office issued a schedule award for 12% impairment of the right upper extremity and 12% of the left.

[redacted] disagreed with the above decision and appealed to the Branch of Hearings and Review. In a decision of [redacted] the case was remanded back to the District Office for further development. The hearing representative documented an error with regard to the SOAF. Specifically, the Office stated that the claimant re-injured the right shoulder on [redacted] however this is inaccurate as a left shoulder condition was claimed. Additionally, the decision discussed the report of impartial examiner Dr. [redacted] and noted that while he assigned 12% impairment of each upper extremity, he failed to assign a class or Grade Modifiers and he gave no explanation or calculations to establish how he arrived at the rating provided. Additionally, the hearing representative noted that the claimant's conditions could alternatively be rated using the range of motion (ROM) method therefore further development was required in accordance with FECA Bulletin 17-06. Upon return of the case

file, the Office was instructed to correct the defect relative to the SOAF and refer the claimant back to Dr. [redacted] to obtain a supplemental report. He was to calculate impairment using the reprinted [redacted] version of the Sixth Edition of the Guides using both the DBI and ROM rating methods in accordance with FECA Bulletin 17-06. He was to cite the applicable sections of the Guides and provide medical rationale with a discussion of the evidence to support the opinion rendered. More specifically, he was to identify the injury-related diagnosis selected for rating purposes in each upper extremity and explain the class and grade modifier assignments for the DBI method. For the ROM method, he was to verify that valid range of motion measurements were taken as required by the Guides. He was to show all calculations used in assigning impairment.

Upon return of the case file, the Office prepared a new SOAF to correct the defect documented by the Hearing Representative. Additional questions were also prepared for Dr. [redacted] to obtain clarification of the claimant's impairment. An addendum dated [redacted] was subsequently received. Dr. [redacted] noted that he had originally evaluated the claimant on [redacted] and he was seen for a re-evaluation on [redacted]. He opined that the claimant had reached MMI about 12 months following his last surgery. He assigned impairment based upon residuals of the claimant's rotator cuff surgeries on both the left and right. Dr. [redacted] was also asked to address any permanent impairment which pre-existed the injury. He noted that the claimant had prior cervical surgery although he did not believe that he had any impairment relative to this. In conclusion, Dr. [redacted] re-iterated that Mr. [redacted] had 12% impairment of the left shoulder and 12% of the right.

Upon receipt of Dr. [redacted] supplemental report, the Office issued a decision dated [redacted] within which they noted that there was no entitlement to impairment beyond what had previously been paid.

The claimant disagreed with the decision of the District Office and an oral hearing was requested. Based upon the written evidence of record, I find that the decision of the District Office dated [redacted] should be *SET ASIDE* and the claim *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.<sup>1</sup>

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.<sup>2</sup>

<sup>1</sup> 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).

<sup>2</sup> *James E. Archie*, 43 ECAB 180 (1991).

On review, I find that the decision of the District Office must be set aside as further development is required to properly assess impairment. First, I find that the Office improperly declared a conflict in medical opinion. Specifically, they declared a conflict between second opinion examiner Dr. [redacted] and District Medical Advisor Dr. [redacted]. However, both of these physicians were providing opinions at the request of the Office. In the case of B.J., Docket No. 13-0543, issued June 20, 2013 the Board held that if a conflict exists *between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or OWCP's medical adviser or consultant*, OWCP shall appoint a third physician to make an examination (see [section] 10.502). This is called a referee examination. OWCP will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case."

Further, Part 2-0810-11 of the Federal Employees' Compensation Act *Procedure Manual* states that a disagreement between two attending physicians, two DMAs, or two second opinion specialists may not be considered a conflict.<sup>3</sup>

Based upon the above, I do not find that a conflict was properly declared. As such, the opinion of Dr. [redacted] cannot be afforded special weight. While his opinion is not entitled to the special weight afforded to an impartial medical specialist resolving a conflict of medical opinion, the report can still be considered for its own intrinsic value<sup>4</sup> and can still constitute the weight of the medical evidence.<sup>5</sup> On review, I find that his opinion remains insufficient to constitute the weight of medical evidence.

First and foremost, Dr. [redacted] failed to provide any explanation to support his impairment rating in either the original [redacted] report or his March 29, 2018 addendum. The Sixth Edition of the *AMA Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).<sup>6</sup> Under the Sixth Edition, the evaluator identifies the impairment class for the Class of Diagnosis (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE and GMCS.<sup>7</sup> The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX). *Evaluators are directed to provide reasons for their impairment rating choices, including the choices of diagnoses from regional grids and calculations of modifier scores.*<sup>8</sup>

<sup>3</sup> In *Albert J. Scione*, 36 ECAB 717 (1985), the ECAB held that a conflict in medical opinion under 5 U.S.C. 8123(a) cannot occur between two attending physicians, nor can a conflict of medical opinion occur between two DMA's or two second opinion specialists.

<sup>4</sup> See *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

<sup>5</sup> See *Leanne E. Maynard*, 43 ECAB 482 (1992) (the Board found that a physician's "opinion is probative even though he was not an impartial medical examiner" and that the opinion of this physician and another physician were sufficient to establish causal relation); *Rosa Whitfield Swain*, 38 ECAB 368 (1987) (the Board found that a physician was improperly designated as an impartial medical specialist, but that his opinion nonetheless constituted the weight of the medical evidence).

<sup>6</sup> *AMA Guides* (6<sup>th</sup> ed. 2009), page 3, section 1.3, International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement.

<sup>7</sup> *AMA Guides* (6<sup>th</sup> ed. 2009), pages 494-531.

<sup>8</sup> See *R.V.*, Docket No. 10-1827 (issued April 1, 2011).

Second, when the Office wrote to Dr. [REDACTED] for a supplemental report on [REDACTED] he was asked to provide an impairment rating using both the DBI and ROM methods, in accordance with Bulletin 17-06. However, Dr. [REDACTED] failed to provide this information.

Federal Employees' Compensation Act (FECA) Bulletin 17-06 was released addressing diagnosis based impairment ratings versus range of motion ratings as it relates to upper extremity impairment. Specifically, Chapter 2, page 20, of the *AMA Guides* states that one of the fundamental principles is if the *AMA Guides* provide more than one method to rate a particular impairment or condition, the method producing the higher rating must be used. The Bulletin noted that unfortunately, the complexities of the explanations and the language throughout Chapter 15 has sometimes led physicians who have evaluated claimants 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 *AMA 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).

Additionally, the *Guides* caution that if it is clear to the evaluator evaluating loss of ROM that a restricted ROM has an organic basis, three independent measurements should be obtained and the greatest ROM should be used for the determination of impairment, the CE should provide this information (via the updated instructions noted above) to the rating physician(s).

For the reasons outlined above, I find that further development must be initiated. As explained previously, the claimant had initially been evaluated by Dr. [REDACTED] who acted as a second opinion examiner. While he offered an impairment rating in accordance with the *Guides*, the DMA questioned his findings as he felt that the evidence of record failed to support instability of the shoulders, which Dr. [REDACTED] had used for impairment rating purposes. Despite a request for clarification, the second opinion examiner failed to provide rationale to support his rating. It was for this reason that a conflict was declared and the claimant was referred to Dr. [REDACTED]. As stated above, his opinion can not be afforded special weight as an impartial examiner although it can still be considered on its own merits. However, similar deficiencies exist relative to Dr. [REDACTED] report and despite the Office's clarification request, the examiner failed to provide the information necessary to properly assess schedule award entitlement. Given this, I find that a new second opinion examination must be scheduled to obtain an impairment rating in accordance with the reprinted 2009 Sixth Edition of the *AMA Guides* as well as FECA Bulletin 17-06.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.<sup>9</sup> While the claimant has the responsibility to establish entitlement to compensation, OWCP

---

<sup>9</sup> See Vanessa Young, 55 ECAB 575 (2004).

shares responsibility in the development of the evidence and has the obligation to see that justice is done.<sup>10</sup>

Upon return of the case file, the District Office is instructed to update the Statement of Accepted Facts as appropriate and refer the claimant for a new second opinion evaluation with a Board certified specialist. The examiner must provide an assessment of the claimant's permanent partial impairment of the bilateral shoulders in accordance with the reprinted 2009 version of the Sixth Edition of the AMA Guides, using both the DBI and ROM rating methods in accordance with FECA Bulletin 17-06. Again, if impairment can alternatively be assessed using the range of motion method, three independent measurements should be obtained and the greatest ROM should be used for the determination of impairment. The examiner should be advised that in accordance with Chapter 2-0808 of the FECA, rated impairment should reflect the total loss of the extremity. Specifically, rated impairment should reflect the total loss as evaluated for the scheduled member (i.e. arm, leg, etc.) at the time of the rating examination.<sup>11</sup> There are no provisions for apportionment under the FECA. As such, schedule awards include permanent impairment resulting from conditions accepted by the OWCP as job-related as well as and any non-industrial permanent impairment present in the same scheduled member at the time of the rating examination. The Office should have the specialist cite the applicable sections of the Guides and provide medical rationale with a discussion of the evidence that supports all opinions given. Reference should be made to assignment of Class and Grade Modifiers as well as application of the net adjustment formula. Once the proper impairment rating is established, the DMA should provide the date of maximum medical improvement along with an explanation to support its selection. Following receipt, the report of the second opinion examiner should be forwarded to the District Medical Advisor for review. Upon completion of any further development action deemed necessary the Office is instructed to issue a *de novo* decision on entitlement to a schedule award.

Consistent with the above findings, the decision of the District Office dated [redacted] is hereby set aside and **remanded** for further development. The case file is returned for further processing as noted.

ISSUED:

WASHINGTON, D.C.

Hearing Representative  
Branch of Hearings and Review  
for  
Director, Office of Workers'  
Compensation Programs

<sup>10</sup> See Richard E. Simpson, 55 ECAB 490 (2004).

<sup>11</sup> See Raymond E. Gwynn, 35 ECAB 247, 253 (1983).