

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.C. Code 8101 et seq. of Ellsworth Deveaux, claimant; Employed by the Department of the Army, Case no. 06-2016486. Hearing was held on April 20, 2006 by telephone.

The issue for determination is whether the claimant is entitled to a schedule award greater than 9% of the left upper extremity.

The claimant was employed by the Department of the Army as a warehouse worker. The Office accepted that he sustained an employment injury on August 21, 2000 resulting in cervical disc herniation.

On September 23, 2003, Dr. James Lindley noted diminished motion of the neck, normal strength and symmetric reflexes. He concluded a 17% whole person impairment rating "based on the AMA Guidelines."

On November 7, 2003, Dr. Lindley concluded a 15% impairment rating of the left arm based on hypesthesia to light touch and a grade II impairment rating involving the C6, C7 and C8 nerve distribution.

On December 11, 2003 an Office medical adviser concluded a 9% impairment rating of the left arm based on a fifty percent grade of the maximum values for the C6, C7, and C8 nerve distribution. He noted Dr. Lindley's assessment of a grade II rating was "too high."

On December 16, 2003 the Office advised the claimant of entitlement to a schedule award of 9% of the left arm. The claimant disagreed with that decision and requested an oral hearing

On February 16, 2004, Dr. Keith Kirby noted normal strength for all extremities, good grip strength, and diminished sensation of the digits of the left hand. On May 13, 2004 he concluded a 27% whole body disability rating based on loss of cervical motion.

On September 16, 2004 an Office hearing representative remanded the case for impartial examination to resolve the conflict in opinion between Dr. Lindley and the Office medical adviser regarding the degree of permanent partial impairment.

The Office referred the claimant to Dr. Clark Deriso for impartial examination. On December 6, 2004, Dr. Deriso noted review of records revealed complaints of pain and numbness of the hand and "EMG's which show diffuse neuropathy although mild." He noted present complaints of neck pain with numbness and tingling down his left arm. He noted examination showed limited cervical motion, no left upper extremity muscle atrophy, normal reflexes, "some" weakness of the triceps, and mildly limited shoulder motion. He concluded an impression of post cervical discectomy with "residual signs and symptoms" of approximately 12% of the whole person.

On January 7, 2005 the Office advised Dr. Deriso that schedule awards cannot be paid for impairment of the back and requested him to describe any pain, sensory deficit or motor impairment of the upper extremities related to the injury, using the fifth edition of the AMA Guides.

On January 17, 2005, Dr. Deriso noted the fifth edition of the Guides did allow for a rating based on cervical disc surgery and "the impairment is awarded to the cervical spine and not to the extremities . . . I have therefore awarded him the proper impairment." He concluded: "He has no ratable impairment to his upper extremity."

On February 10, 2005 the Office denied schedule award entitlement beyond the previous award of 9% on the basis that Dr. Deriso found no ratable impairment of an extremity. The claimant disagreed with that decision and requested an oral hearing.

During the hearing, held April 20, 2006, the claimant's attorney argued that Dr. Deriso provided a deficient report of evaluation – failing to provide a thorough report of examination, review of records, or acknowledgement of the conflict in opinion. He argued that Dr. Deriso expressed offense at the Office's request for clarification and could not now be relied upon to provide an impartial opinion.

With respect to permanent impairment of the extremities, all factors which prevent a limb from functioning normally should be considered together with the loss of motion in evaluating the degree of permanent loss of use for schedule award purposes. The

specific functional impairments [such as loss of flexion or extension] should be itemized and stated in terms of percentage loss of use of the member in accordance with the AMA Guides tables.¹

The Employees' Compensation Appeals Board has held that, where a case is referred to an impartial medical specialist for the purpose of resolving a conflict between opposing medical reports of virtually equal weight, the opinion of such specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.²

In the present case, Dr. Deriso's opinion insufficient to resolve the issue of the degree of injury-related permanent partial impairment. Dr. Deriso acknowledged the claimant's subjective complaints of tingling and numbness of the left arm and noted EMG reports of mild diffuse neuropathy, but gave no indication that he performed any sensory examination. He made no mention of a sensory deficit in his report and gave no indication that the claimant was examined for a sensory deficit. As the sensory examination formed the basis of Dr. Lindley's left arm impairment rating, Dr. Deriso's failure to report any results of sensory examination significantly diminishes the credibility of his report. He concluded there was no impairment of the upper extremity, but provided no explanation whatsoever in support of his statement. His opinion therefore is not rationalized or based upon a complete and thorough report of examination, and is insufficient to resolve the issue at hand.

Accordingly, the decision of the District Office dated February 10, 2005 is hereby set aside. The Office has made one attempt to seek clarification from Dr. Deriso and I do not believe a second attempt would be productive. Given that Dr. Deriso gave results of physical examination, but made no mention of any sensory examination, it is likely that no sensory examination was performed and a re-examination would be required. Further, Dr. Deriso expressed offense at the Office's request for clarification and insisted that his whole person rating based on the AMA Guides was appropriate. The

¹*James E. Jenkins*, 39 ECAB 860 (1988)

²*Peter Buatti*, 33 ECAB 887, (1982).

fact that he disputed the need for clarification and rejected an upper extremity rating without discussing the relevancy of the physical findings raises question as to whether he is now able to provide unbiased opinion to resolve the issue. For these reasons, referral to a new impartial specialist is appropriate.

The Office should refer the claimant, the case record, and a statement of accepted facts to an appropriate medical specialist for a new impartial evaluation and opinion regarding the extent of the permanent partial impairment of the left upper extremity.

When the specialist's report is received, and after any other case development that may become necessary, the Office should issue a **de novo** decision.

Consistent with the above findings, the decision of the District Office dated February 10, 2005 is vacated and the file returned to the Office for execution of the above actions and a **de novo** decision.

Dated: **MAY 25 2006**

Washington, D.C.



Joe Baumgartner

Hearing Representative

For

Director, Office of

Workers Compensation Programs