

File Number:
CA-181-D-S

U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 13 SFC
LONDON, KY 40742-8300
Phone: (415) 625-7500

September 29, 2010

RECEIVED OCT 04 2010

Date of Injury:
Employee:

Dear Mr. :

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:

AWARD OF COMPENSATION

1. Degree and Nature of Permanent Impairment: 14% Permanent Impairment of Right Lower Extremity (overall 49% right lower extremity less 27% presently being compensated thru 03/08/2011, and less 8% right lower extremity previously paid under 13-1172203)
2. Date of Maximum Medical Improvement: 09/10/2009
3. Period of Award: 03/09/2011 to 12/16/2011
4. Number of Weeks of Compensation: 40.32
5. Weekly Pay: \$2,148.19 X Compensation Rate: 75 % = \$1,611.14
6. Effective Date of Pay Rate: 05/13/2008

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.

DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION & CUSTOMS ENFORCEMENT
SAC-SAN DIEGO
185 WEST F STREET, SUITE #600
SAN DIEGO, CA 92101

✓ PAUL FELSER
7 EAST CONGRESS ST, SUITE 400
SAVANNAH, GA 31401

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*.

The percentage of permanent impairment noted above was based on the medical findings and report of Dr. Yoo dated 05/13/2010 and the report of the District Medical Advisor (DMA) dated 09/18/2010. Copies of these reports are provided for your reference.

The additional percentage of impairment was calculated by a District Medical Adviser, who applied the *Guides* to the medical findings provided by your treating physician and determined the date of maximum medical improvement based on the medical evidence of record. The impairment percentage differs from the percentage provided by your treating physician. Dr. Yoo opined that you should have 46% total right lower extremity permanent impairment and the DMA opined that it should be 49%.

In reviewing the evidence, the District Medical Adviser previously used the Second Opinion Orthopedic Scheduled Award Examination and Evaluation dated 09/10/09 by Thomas J. Sabourin, M.D. who calculated an award based on common peroneal nerve pathology with a total of 35% impairment for a severe motor deficit. The DMA determined that Dr. Yoo assessed your award based on branches of the sciatic nerve (which contains branches of the common peroneal nerve) and assessed a higher award based on utilizing the sciatic nerve rather than the common peroneal nerve). The DMA indicated that he is not readily able to resolve the discrepancies in the two reports other than to mention that utilizing the branches of the sciatic nerve results in a higher award than utilizing branches of the common peroneal nerve. A copy of the District Medical Adviser's calculation, which explains this discrepancy, is attached. The weight of the medical evidence regarding the percentage of impairment is being given to the District Medical Adviser because he correctly applied the *Guides* to the examination findings.

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.
- 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.

File Number:
CA-181-D-S

Sincerely,



Pat Morgan
Senior Claims Examiner

Enclosures: Appeal Rights

Case Number:
Employee:
Date: September 29, 2010

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: HEARING (this includes either an Oral Hearing, or a Review of the Written Record), RECONSIDERATION, and ECAB REVIEW. 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"). Your appeal rights are as follows:

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 hearing. You may request either one or the other, but not both.

a. One form of Hearing is an **Oral Hearing**. An informal oral hearing is conducted by a hearing representative 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. The other form of a Hearing is a **Review of the Written Record**. This is also conducted by a hearing representative. 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 made within one calendar year of the date of the decision**, clearly state the grounds upon which reconsideration is being requested, and be accompanied by relevant evidence not previously submitted. This evidence might include medical reports, sworn statements, or a legal argument not previously made, which apply directly to the issue addressed by this decision. In order to ensure that you receive an independent evaluation of the new evidence, persons other than those who made this determination 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). Effective November 19, 2008, ECAB has changed its Rules of Procedure on the time limit to appeal and has eliminated its practice of allowing one year to file an appeal. **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.

If you request reconsideration or a hearing (either oral or review of the written record), OWCP will issue a decision that includes your right to further administrative review of that decision.

Case Number:
Employee:
Date: September 29, 2010

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. **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:

Submit your request 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. **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 _____

RECEIVED OCT 04 2010

DATE: September 18, 2010
TO: District Medical Director
Department of Labor
REPLY TO
ATTN OF: Leonard A. Simpson, M.D.
SUBJECT:

The file was resubmitted to the undersigned for a review of the records. The claimant was not interviewed, nor examined.

This file was previously reviewed by the undersigned, and I would refer you to prior reports dated 09/30/09 and 10/24/09. In addition, this reviewer reviewed a prior file dated 08/20/00.

The file is currently resubmitted to review additional medical records and to recalculate the award for the permanent partial impairment of the right lower extremity utilizing the Sixth Edition of the Guides. The undersigned is asked to consider all pertinent medical evidence and the prior file, , as well as an 05/13/10 report authored by Kevin Yoo, M.D.

Review of the file, , indicates a history of lumbar surgical decompression with removal of a disc herniation. Noting the documentation of right lower extremity radicular symptoms and grade IV/V right gastrocnemius weakness with 3/8" calf atrophy, this reviewer calculated an 8% impairment of the right lower extremity or leg based on applying data to the Fourth Edition of the Guides.

In the review dated 09/30/09 this reviewer calculated an award involving the right lower extremity based on applying data to the Sixth Edition of the Guides and in particular citing Table 16-12, Peripheral Nerve Impairment--Lower Extremity Impairment assessing a total of 35% impairment. This reviewer noted that an 09/10/09 report, Second Opinion Orthopedic Scheduled Award Examination and Evaluation, identified the common peroneal nerve with both sensory and motor findings affecting this nerve. The total of 35% impairment of the lower extremity was assessed noting a Class III impairment for motor deficit.

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September 18, 2010

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A report dated 05/13/10 notes the clinical history noting the recurrent disc herniation at the L4-5 region with the individual undergoing a re-do right L4-5 lumbar microdiscectomy. The report notes the right "drop foot" and recommends assessing a right lower extremity impairment based on sciatic nerve pathology. The report cites Chapter 16, Table 16-12 and notes a Class I-4% default rating for sensory deficit/pain. The physician identifies this as a Class II but it is actually a Class I with a 4% default rating. Noting Functional History Adjustment there would be a grade modifier II or a +1 net adjustment. Physical Examination Adjustment is non-applicable for this method. Clinical Studies Adjustment would be a grade modifier III or a +2 net adjustment. The total net adjustment would be +3 and this would move the impairment into a Class I, Category E or a 9% lower extremity impairment. For the "very severe motor deficit" described there would be a Class III-47% default rating. Noting Functional History Adjustment there would be a grade modifier II or a -1 net adjustment. Physical Examination Adjustment is non-applicable for this method. Clinical Studies Adjustment would be a grade modifier III or a 0 net adjustment. The total net adjustment would be -1 and this would place the impairment into a Class III, Category B or a 43% impairment. The 43 would be combined with 9 to arrive at an overall 47% impairment. This reviewer would note that this is higher than the physician calculated in the 05/13/10 report, and this reviewer notes that the various adjustment grids would modify the 4% default rating for the sensory/pain findings to a higher level of 9% and not 5% as the physician assessed.

This reviewer would comment that the prior Second Opinion Orthopedic Scheduled Award Examination and Evaluation dated 09/10/09 authored by Thomas J. Sabourin, M.D. calculated an award based on common peroneal nerve pathology with a total of 35% impairment for a severe motor deficit. The subsequent 05/13/10 report authored by Dr. Yoo assessed an award based on branches of the sciatic nerve (which contains branches of the common peroneal nerve) and assessed a higher award based on utilizing the sciatic nerve rather than the common peroneal nerve. This reviewer is not readily able to resolve the discrepancies in the two reports other than to mention that utilizing the branches of the sciatic nerve results in a higher award than utilizing branches of the common peroneal nerve.

This reviewer understands that the Claimant received a prior right lower extremity impairment of 8% and thus was calculated 49% or some 41 percentage points higher. Date of maximum medical improvement would be 09/10/09.

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September 18, 2010

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Finally, the undersigned is asked to comment whether the individual sustained a lumbar herniated disc as a result of the 05/09/08 injury, and review of these records would support a herniated nucleus pulposus with L4-5 degenerative disc disease with right lower extremity radiculopathy. The diagnosis of herniated disc is considered in the impairment rating.

Sincerely,



Leonard A. Simpson, M.D.
OWCP Medical Consultant

LAS:aao

21207-7845 LSI

File Number: '
HR10-D-H

RECEIVED JUN 28 2010

U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
Phone: (202) 693-0045

JUN 22 2010

Date of Injury:
Employee:

Dear Mr. :

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 04/15/2010. 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 San Francisco 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 13 SFC
LONDON, KY 40742-8300

Sincerely,
D. Polonsky
Hearing Representative

DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION & CUSTOMS ENFORCEMENT
SAC-SAN DIEGO
185 WEST F STREET, SUITE 600
SAN DIEGO, CA 92101

PAUL FELSER
7 EAST CONGRESS ST, SUITE 400
SAVANNAH, GA 31401

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 Department of Homeland Security, Immigration and Customs Enforcement, in San Diego, California; Case number _____. A Telephone Hearing was held on April 15, 2010.

The issues for determination are (1) if the claimant's schedule award was correctly calculated and (2) if he is entitled to greater than a 35% permanent partial impairment of the right leg.

_____ born on _____ is employed as a special agent with the Department of Homeland Security, Immigration and Customs Enforcement in San Diego, California. The claimant filed a CA1 Notice of Traumatic Injury claim on May 12, 2008 stating that as a result of biking while participating in an agency physical training program he felt tightening in his lower back and numbness in the right foot and leg with loss of motion in the right foot. On July 8, 2008 a L5 laminectomy, and bilateral foraminotomies were performed. The claimant stopped working on May 12, 2008 and began receiving compensation for disability. The claimant returned to work on May 26, 2009. The claimant was referred for a second opinion examination and in his report dated September 9, 2009 Dr. Thomas J. Sabourin determined that Mr. _____ had a 35% permanent partial impairment of his right leg. Dr. Sabourin's report was referred to the District Medical Advisor (DMA) for review and consideration and in his September 30, 2009 report the DMA determined that the claimant had a 35% permanent partial impairment of his right lower extremity.

The claimant filed a CA7 Claim for Compensation requesting a schedule award on October 6, 2009. On October 19, 2009 the Office advised the DMA that the claimant had previously been paid for an 8% permanent partial impairment of his right lower extremity under case number _____ and asked about the claimant's net permanent partial impairment. The DMA responded in a report dated October 24, 2009; however he was not provided a copy of the 8% calculation. Therefore this was forwarded to the DMA on November 3, 2009 and the DMA was asked to determine the claimant's right leg impairment when considering his prior award. In his report dated November 10, 2009 the DMA determined that Mr. Chaidez was entitled to an additional 27% permanent partial impairment of his right lower extremity. The DMA stated,

"The file is currently resubmitted to review a prior record under a prior claim A _____ (sic) in order to determine if the prior 8% impairment of the right lower extremity would be combined with the current award of 35%.

The 08/20/00 report is available and indicates that the individual was assessed an 8% right lower extremity impairment based on right lower extremity symptoms and findings with the S1 nerve root identified.

The current assessed 35% impairment of the right lower extremity is based in part upon both L5 and SI nerve root involvement with the peroneal nerve currently identified.

After reviewing the prior award and the current award this reviewer would conclude that the current 35% impairment of the right lower extremity would be 27 percentage points higher than the previous award, and that the prior 8% would not be combined with the 35%. The current award of 35% represents an award some 27 percentage points higher than the previous award of 8%. The Office should take this into account in assessing and assigning benefits.”

By decision dated December 14, 2009 the claimant was awarded a 27% permanent partial impairment of his right lower extremity and awarded schedule award compensation benefits for the period September 10, 2009 through March 8, 2011. The decision noted that he had previously been awarded an 8% permanent partial impairment under case number _____ so his total right leg impairment was determined to be 35%.

The claimant disagreed with the December 14, 2009 decision and requested a Hearing. A Telephone Hearing was held on April 15, 2010. The claimant did not appear at the Hearing however he was represented by Paul Felsner at the proceedings.

As required by Office procedures, a copy of the Hearing Transcript was forwarded to the employing agency to afford them the opportunity to comment on the claimant's testimony. No comments have been received and the time allotted to all parties for the submission of additional evidence has now passed.

Mr. Felsner argued that the 8% impairment previously awarded to Mr. _____ should not have been subtracted directly from the 35% permanent partial impairment calculated to award the claimant 27% impairment. On page 10 of the Hearing Transcript Mr. Felsner argued that in his October 29, 2009 report Dr. Sabourin noted that he reviewed his report of September, 2009 and determined that it could not be changed and therefore opined that the claimant had a 35% permanent partial impairment and that he disagreed with the DMA. On pages 11 through 13 of the Hearing Transcript Mr. Felsner argued that because Dr. Sabourin stated on page 9 of his report that clinical studies are not available to him that a net adjustment is minus one that Mr. _____ lost percentage points in his schedule award determination. On page 16 of the Hearing Transcript Mr. Felsner argued that there should be an evaluation that deals with the overall impairment as it relates to the sciatic nerve and that would come up with a higher impairment. On page 17 of the Hearing Transcript Mr. Felsner argued that there were additional conditions identified by the attending physician which include a herniated disc which should be accepted. On page 19 of the Hearing Transcript Mr. Felsner stated that degenerative arthritis of the ankle should also be accepted which could result in a greater

impairment calculation. On page 20 of the Hearing Transcript Mr. Felsner argued that it is not clear that the second opinion physician did the appropriate testing and that a two point discrimination is recommended. On pages 22 and 23 of the Hearing Transcript Mr. Felsner was advised that his arguments regarding the calculation of the schedule award would be considered. It was noted that that the calculation of a schedule award is a medical issue and the claim would be held open for 30 days to afford time to submit additional medical evidence. The claimant subsequently requested additional time to provide medical evidence and was advised that he could submit additional evidence for consideration through June 10, 2010.

Section 8107 of the Federal Employees' Compensation Act¹ authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.²

Before the A.M.A., *Guides* may be utilized, a description of the impairment must be obtained from an examining physician. This description must be in sufficient detail so that a claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.³ The examining physician does not rate the impairment using the A.M.A., *Guides*, it is appropriate for an Office medical adviser to apply the A.M.A., *Guides* to the findings reported on examination.⁴ When the Office medical adviser provides the only evaluation that conforms to the A.M.A., *Guides*, that evaluation constitutes the weight of the medical evidence.⁵

Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.⁶

The evidence of record has been reviewed. A May 13, 2010 report from Dr. Kevin Yoo and June 7, 2010 statement from Mr. Felsner were received. Mr. Felsner stated that Dr. Yoo's 46% right lower extremity impairment calculation should be considered and the decision should be remanded and a new schedule award decision issued.

Mr. Felsner argued that the claimant's schedule award of 35% should not have been reduced by the 8% awarded in case number Mr. Felsner's argument is noted however as procedurally required I find that the District Office properly reduced the

¹ 5 USC § 8107

² 20 CFR § 10.404 (2002).

³ *Roel Santos*, 41 ECAB 1001 (1990)

⁴ *Lena P. Huntley*, 46 ECAB 643 (1995).

⁵ *John L. McClenic*, 48 ECAB 552 (1997). If the clinical findings are fully described, any knowledgeable observer may check the findings with the criteria of the A.M.A., *Guides* A.M.A., *Guides* 17 (5th ed 2001).

⁶ See Federal (FECA) Procedure Manual, Part 2 – Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2 808.6(d) (January 2010).

