

File Number:
HR12-D-H

U.S. DEPARTMENT OF LABOR

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

RECEIVED APR 06 2010

MAR 31 2010

Date of Injury:
Employee:

Dear Ms. :

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 02/17/2010. Based upon that hearing, it has been determined that the decision of the District Office should be reversed as outlined in the attached 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,


Joe Baumgartner
Hearing Representative

DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMN
GREENVILLE-SPARTANBURG AIRPORT
181-C JOHNS ROAD
GREER, SC 29650

PAUL H FELSER
ATTORNEY AT LAW
PO BOX 10267
SAVANNAH, GA 31412

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, USC 8101 et seq.
of _____, claimant: Employed by the Transportation Security
Administration. Case no. _____ Hearing was held on February 17, 2010.*

The issue for determination is whether the claimant refused suitable light duty employment.

The claimant was employed as a security screener. The Office accepted that she sustained an employment injury on January 5, 2004 resulting in lumbar strain and depression.

The Office referred the claimant to Dr. Harrison Latimer for second opinion examination. On December 11, 2008 Dr. Latimer concluded an impression of failed back syndrome with resulting depression. He concluded she was capable of light duty four hours daily with lifting to twenty pounds, intermitting sitting, standing and walking to one hour, no twisting or bending, no repetitive motion of the wrists or elbows, no pushing or pulling over 20 pounds, and no squatting, kneeling or climbing.

On May 18, 2009, Donald Hinnant, Ph.D, noted "was told that she is going to be expected to work four hours per day in addition to being a full-time student. I do not believe this is realistic. _____ has paid for school out of her own pocket and she has done very well. ...I do not believe that it is clinically appropriate for her to be expected to work an additional four hours in some type of job. In fact, I wonder what type of work would be available for someone who is currently on workers compensation through the federal government, and who has her physical limitations as well as ongoing depression and pain."

The Office referred the claimant for rehabilitation services in April 2009. On May 24, 2009 a vocational rehabilitation counselor noted the claimant stated she was injured on January 5, 2004 and requested rehabilitation services for almost two years, but never received it, and started taking classes at USC. She stated she was expected to graduate in May 2010 with a BS degree in business management.

On July 21, 2009 the employer offered employment as a modified security screener, four hours daily, with intermittent walking and standing limited to one hour, lifting limited to ten pounds, no squatting, kneeling, bending, stooping or climbing, pushing and pulling limited to 20 pounds.

On July 27, 2009 the rehabilitation counselor noted the claimant stated she refused to read the job offer and "does not plan to return to work there."

On August 10, 2009 the Office advised the claimant that the offered job was suitable and accorded her thirty days to accept the position or give reasons for refusing it.

On August 13, 2009 Dr. Hinnant noted "she has really had a setback emotionally, focused on being a 'failure', feeling like she has been accused and 'convicted' by the Feds for fraud for trying to do a week of work study to earn tuition. It is difficult to move her off this negative course due to ongoing intimidation from Fed Work Comp."

On September 24, 2009 the Office accorded the claimant fifteen days to accept the light duty job offer and advised her of the provisions of 5 USC 8106[c] regarding termination of compensation for refusal of light duty employment.

On October 7, 2009 Dr. Philip La Tourette concluded the claimant could perform light duty work based on review of a recent functional capacity evaluation. He noted he reviewed the light duty job description and observed that the FCE indicated "she should be able to perform the duties mentioned." He noted her pain medications could affect her ability to perform her job.

On October 13, 2009 the Office terminated compensation on the basis that the claimant refused suitable light duty employment.

By letter dated November 18, 2009, addressed to agency employee _____, the claimant stated she called Ms. _____ on October 9, 2009 stating that she was accepting the job offer, but received no response. She stated she called again on October 12, 2009 and spoke with Ms. White, who advised that she was on vacation and "someone in the Columbia office would be notifying me." She stated she heard nothing further and reported to work on October 16, 2009, where she spoke with "_____" and was told that she would be hearing from Ms. _____. She stated she still had heard nothing and requested Ms. _____ to "please response and let me know when to report to work."

The record contains a letter dated October 9, 2009, sent to the employing agency by facsimile, in which the claimant's attorney advised of the claimant's formal acceptance of the job offer.

The claimant disagreed with the termination of compensation and requested an oral hearing. During the hearing, held February 17, 2010, the claimant's attorney argued that the medical evidence showed the offered position was not suitable from a psychiatric basis and cited a report from Dr. Hinnant dated September 29, 2009. Though the attorney stated the report was forthcoming, it has not been received in the record to date. The attorney argued that, notwithstanding her objections to the job offer, the claimant accepted it on the October 9, 2009, the fifteenth day following the Office's September 24, 2009 letter. He argued that because the claimant accepted the offer within fifteen days of the letter, she could not be subjected to the provisions of 5 USC 8106[c].

Agency Representative _____ was present at the time of the hearing and provided testimony in response to the claimant's November 18, 2009 letter. She disputed that the claimant mentioned accepting the job offer in her October 9, 2009 phone message or during the conversation on October 12, 2009. She stated she indicated only that she wanted to discuss it. Ms. _____ stated she was on personal leave on October 9, 2009, which was a Friday, as well Monday, October 12, 2009. However, she confirmed that the agency received the letter of acceptance of the job offer by facsimile on October 9, 2009.

Section 8106(c)(2) of the Federal Employees' Compensation Act provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation.

In the present case, the Office has not met its burden of proof to terminate compensation under 5 USC 8106[c] because the evidence shows that the claimant did not refuse suitable light duty employment. The claimant submitted a letter to the employing agency accepting the job offer on October 9, 2009, the fifteenth day following OWCP's fifteen-day warning letter dated September 24, 2009. The employer confirmed receiving that letter on October 9, 2009. Thus, the claimant did accept the job within the mandatory fifteen-day period allotted by OWCP. Further, when she heard nothing in response to her letter, she physically reported to her place of employment on October 16, 2009. She was advised that she would be hearing from Ms. _____, but received no further response from the employing agency. On November 18, 2009 she wrote to her employer and asked when she was supposed to report to work. The evidence reflects that she did what was required of her to accept the position. She therefore did not refuse light duty employment.

Drs. Latimer and La Tourette concluded the claimant could perform light duty consistent with the light duty job offer. The job offer was therefore suitable based on her physical limitations. The claimant's attorney argued that the position was not suitable and cited a report dated September 29, 2009 from the claimant's psychologist, Dr. Hinnant. That report is not in the record. Dr. Hinnant's treatment notes during the period in question reflect the claimant's distress regarding the

actions of her employer and OWCP, but do not provide reasoned opinion disputing the job suitability. Nonetheless, the Office did accept an emotional condition in connection with the employment injury and did have the obligation to obtain medical opinion supporting that the light duty job offer was suitable in consideration of the claimant's emotional condition. Thus, a second opinion psychiatric examination would be required prior to any further offer of light duty employment.

As the Office failed to meet its burden of proof to terminate compensation, the decision dated October 13, 2009 is hereby reversed. On return of the case record to the District Office, the Office should reinstate compensation effective with its termination. As it appears the claimant is in arrears with respect to recovery of the overpayment on the record, the Office should reduce her retroactive compensation by the amount of any arrearage.

Dated: MAR 31 2010

Washington DC



Joe Baumgartner
Hearing Representative
for
Director, Office of
Workers
Compensation Programs