

File Number:
HR13-D-H

U.S. DEPARTMENT OF LABOR

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

APR 01 2008

Date of Injury:
Employee:

RECEIVED APR 08 2008

Dear Mr. :

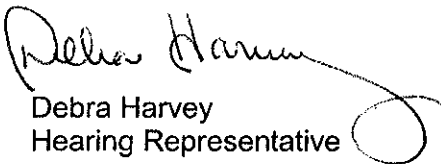
This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of hearings and Review.

A preliminary review was completed on the case. Based upon that review, 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 Washington, D.C. District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 25 WAS
LONDON, KY 40742

Sincerely,


Debra Harvey
Hearing Representative

DEPARTMENT OF THE INTERIOR
NPS-REGULAR EMPLOYEE FUNCTIONS
SHENADOAH NATIONAL PARK
3655 US HIGHWAY 211 EAST
LURAY, VA 22835

PAUL H FELSER
ESQ
FELSER LAW FIRM, P.C.
P.O. BOX 10267
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 United States Department of the Interior, Luray, Virginia. Case No:

Merit consideration of the case file was completed in Washington, D.C. Based upon this review, the decision of the District Office dated October 25, 2007, is hereby set aside for the reasons set forth below.

The issue is whether the District Office properly terminated compensation benefits for the reason that employment-related disability had ceased.

The claimant, date of birth, _____, was employed by the U.S. Department of Interior, Shenandoah National Park, Luray, Virginia, as a Maintenance Worker. He filed the Form CA-1, Notice of Traumatic Injury, on May 15, 2003, for a low back strain that occurred while lifting heavy trash bags from trash cans. The claim was initially accepted for a lumbar strain and expanded to include a herniated lumbar disk.

He stopped working initially on the date of injury and returned to light duty on November 10, 2003. However, he stopped working again on November 26, 2003. He was paid compensation benefits for wage loss during period of work stoppage.

On April 20, 2004, he underwent a Functional Capacity Evaluation that determined he could perform light work.

On June 9, 2004, the Employing Agency made a light-duty job offer performing clerical work. The claimant declined this job offer. However, the District Office found this job suitable on June 22, 2004, and advised the claimant he should either accept the job or provide good cause for not accepting it within 30 days of that date.

The treating physician, Dr. Patrick Ireland, stated the claimant had chronic low back pain and could perform sedentary work. He referred the claimant to Dr. Kimberly Salata who could find no objective basis for the continuing symptoms

The District Office then referred the claimant to Dr. Steven Hughes for a second opinion examination on June 30, 2004. Dr. Hughes diagnosed a lumbar strain, "remote, resolved," mild peroneal neuropraxia and symptom magnification. He stated these conditions were not related to work and the claimant could return to full duty.

On July 26, 2004, the Office denied entitlement to all benefits, finding the claimant had refused suitable employment under Section 8106(c) of the Federal Employees' Compensation Act which provides that a "partially disabled employee who refuses work after suitable work is offered to, procured by, or secured for him is not entitled to compensation." The claimant disagreed with this decision and requested an oral hearing before an Office of Workers' Compensation Programs' Hearing Representative.

The claimant resigned his federal employment effective August 5, 2004.

By decision of May 2, 2005, the Hearing Representative found the District Office did not follow prescribed procedures regarding the job offer. However, the Representative noted that the reports from Drs. Salata and Hughes indicated the claimant was no longer suffering from residuals of the employment injury. The Hearing Representative remanded the case back to the District Office for a formal decision terminating benefits as the claimant no longer had employment-related residuals from his injury.

On April 25, 2006, the District Office issued a formal decision terminating medical and wage loss benefits for the reason the claimant had no remaining employment-related residuals. The Office found the weight of medical opinion lay with Dr. Hughes. The claimant disagreed with this decision and again requested an oral hearing. However, by decision of October 3, 2006, the Hearing Representative found the Office did not afford the claimant due process by advising him at least thirty days in advance of the impending termination of benefits and allowing him a chance to respond to this proposed action. Benefits were to be reinstated and a *de novo* decision was to be issued concerning continuing entitlement to benefits.

The Office issued a proposed notice of termination on November 22, 2006, based upon Dr. Hughes' report. The claimant was advised he could provide additional information for consideration if he disagreed with the proposal to terminate. The Office finalized the termination of benefits on February 23, 2007, effective that date. The claimant disagreed with that decision and requested an oral hearing. The Hearing Representative set aside that decision on June 15, 2007, finding Dr. Hughes' report was nearly three years' old and could not be used for a disability determination. The Hearing Representative instructed the Office to reinstate benefits and refer the claimant for another second opinion examination to determine if he still had residuals from the employment injury.

The Office reinstated benefits and referred the claimant to Dr. Andre Eglevsky, specialist in orthopedic surgery, for the second opinion examination. The exam was performed on August 22, 2007. Dr. Eglevsky stated the claimant sustained a soft tissue injury to his low back as a result of the May 9, 2003, injury. He stated that soft tissues healed after about three months "and at that point could be returned back to full duty. His subjective complaints after August of 2003 are not related to his accident." He stated there were no signs of a herniated disk in the back. He stated perineal nerve palsy in the right side was not work-related and "most likely, as explained by Dr. Ireland, as being related to repetitive squatting." He stated the claimant had a functional or non-organic symptom complex.

On September 19, 2007, the District Office issued a Notice of Proposed Termination of Benefits, finding the weight of medical evidence lay with Dr. Eglevsky's opinion that there was no continuing disability or residuals from the employment injury. The claimant was advised he had thirty days to submit supporting evidence if he disagreed with this decision.

On October 25, 2007, the Office finalized the termination of benefits, effective October 27, 2007, stating, "As of this date, we have not received any additional evidence or argument from you in response to the Notice of Proposed Termination." The Office held the weight of medical evidence lay with Dr. Eglevsky. The claimant disagreed with this decision and through his Attorney, Paul Felser, requested an oral hearing.

I have carefully reviewed all the evidence of record and find the case is not in posture for a hearing.

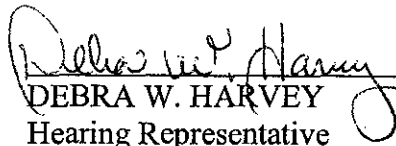
In this case, the Office finalized the termination of benefits on October 25, 2007, stating the claimant had not provided any evidence in response to the Notice of Proposed Termination. However, a review of the case file shows a letter was received on October 25, 2007, from the Attorney, Mr. Felser, responding to the proposal. In addition, medical reports were received, to include a report from Dr. D. Brooke Miller, dated November 3, 2003, a January 3, 2007, report from Dr. Ireland, and a May 15, 2007, report of MRI. These reports were received in the Office on the date the final notice of termination was issued and should have been considered in that decision.

The FECA *Procedure Manual* 2-1400-8 (b), states concerning disallowances and termination, that, "If the evidence reaches the file before the decision is released, either within or beyond the 30-day period, the CE must consider and act upon it accordingly." The Office failed to consider this information prior to issuing the final termination. Thus, the case must be returned to the Office for consideration of the information.

Therefore, the Office's decision of October 25, 2007, is being REVERSED and the case file is being returned to the District Office to reinstate benefits back to the date of termination. The Office should then consider the evidence submitted by the claimant and/or his attorney and issue a *de novo* decision concerning continuing entitlement to benefits.

DATED: **APR 01 2008**

WASHINGTON, D.C.


DEBRA W. HARVEY
Hearing Representative
For
Director, Office of Workers'
Compensation Programs