File Number:
HR10-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

APR 23 2010

Date of Injury:
Employee:

RECEIVED APR 26 2010

Dear Ms. :

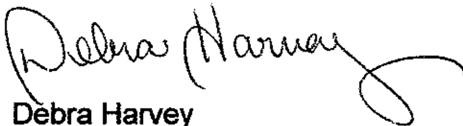
This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A hearing was held on 02/22/2010. 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 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,



Debra Harvey
Hearing Representative

DEPARTMENT OF VETERANS AFFAIRS
VETERANS HEALTH ADMINISTRATION
WJBD-ATTENTION: HRMS (05G)
6439 GARNES FERRY ROAD
COLUMBIA, SC 29209

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, U.S. Code 8101 et seq. of , Claimant; Employed by the Department of Veterans Affairs in Columbia, South Carolina. Case No: . Oral hearing was held on February 22, 2010, in Jacksonville, Florida.

The issue is whether the evidence of record establishes the claimant sustained an injury that was causally related to employment.

The claimant, date of birth, , is employed by the Department of Veterans Affairs in Columbia, South Carolina, as a Cook. She filed the Form CA-1, Notice of Traumatic Injury, on September 8, 2009, stating on August 13, 2009, she injured her left hand, arm, and extremity after pushing two food delivery carts from the kitchen. Medical reports from Doctors' Care submitted with the initial claim stated she was treated for left arm pain on August 10, 2009, (three days' prior to the date of injury) and provided a diagnosis of left arm injury and radicular pain.

The Employing Agency challenged the claim, stating the "investigation of incident does not support employee's statement no medical documentation available; employee reports accident happened at 6:30 am while pushing carts the food carts do not come off theretherm module until 7 am. Employee states starting working at 6a; tour was not until 6:30 a."

On September 21, 2009, the District Office requested additional factual and medical evidence to support the claim. In response, the claimant provided her written statement, saying:

> "I went to work on the morning of the August 13th 2009 as usual, ready to perform my job assignment, I am a W/G-6 cook according to my job description. There are other paying positions specially involved pushing or bring the food carts for the feeding of the patients who are residence at the nursing home also called the Community Life Center. On this particular morning No one whose job it was to bring the food over was here at the time my patients was required to eat their breakfast. I proceed to perform my job retrieving (2) two food carts by pushing them both to the nursing home by myself pushing them up an include for there was no one here to help me so that the patients would eat on time, after feed the patients I went to retrieve the patients food trays for cleaning again this is not what is in my job description but because no one was here to do the job they were hired to do not even the supervisor I did it myself, it was at this time excruciating pain shot down from my shoulder down thru to my elbow arm, hands and fingers

on my left side. The pain was so intense that it took everything inside of me to stop what I was doing and walk back over to the main hospital. When I got back to the kitchen I asked Dietician Specialist Mrs. Coley if I could go to the hospital. I went to the emergency room at Richland Memorial Hospital there I was treated and was given a pain medication called prednisone I was also given instructions to follow up with my primary health care provider and then I was released. I have followed up with my Internal medicine doctor and have been under a physicians care since this event."

Medical reports were also received. The physician's discharge summary dated August 13, 2009, provided a diagnosis of cervical radiculopathy. She was returned to full duty effective September 9, 2009. An October 19, 2009, physician's note stated she was prescribed prednisone.

The District Office denied the claim on October 28, 2009, finding the medical evidence did not establish a causal relationship between the diagnosed medical condition and the employment incident described. The claimant disagreed with this decision and through her Attorney, Paul Felser, requested an oral hearing before an OWCP Hearing Representative.

Additional medical evidence was submitted along with the hearing request. Questionnaires from the Columbia Clinic were received from August 14, 2009. A September 14, 2009, report from Dr. Usama A. Gabr of the Physiatry & Rehabilitation Associates was received. Dr. Gabr stated the claimant was treated for neck pain along with left arm numbness and weakness. Dr. Gabr stated, "symptoms started about a month ago and aggravated about one weak [sic] earlier, she stated that she never had surgery to the neck or the shoulder. . . . Mrs. was referred to me for an evaluation under her regular BCBS health insurance, however, during the interview she stated that this might be a work related injury where she was pushing an equipment but I do not have any further information about the claim being submitted to the workers' comp commission." She diagnosed a cervical radiculopathy syndrome likely associated with disc herniation. Conservative treatment was recommended.

A left shoulder x-ray of September 16, 2009, was negative. A cervical spine x-ray of that same date showed chronic degenerative changes.

By September 28, Dr. Gabr had diagnosed "thoracic or lumbosacral neuritis or radiculitis unspecified," degeneration of cervical intervertebral disc, pain in shoulder, and "disturbance of skin sensation." There was no mention as to the cause of these conditions. On October 13, Dr. Gabr ordered an MRI scan and Electrodiagnostic testing. The Electrodiagnostic studies showed a chronic left C6-7 cervical radiculopathy with no neuropathy, myopathy, or brachial plexopathy. The MRI showed a mild disuse disc bulge at the C2-3 and C3-4 levels without stenosis; osteophytes at the C4-5 level with mild stenosis; C5-6 diffuse disc osteophyte complex with a small protrusion and minimal to mild stenosis and a C6-7 bulging disc with severe stenosis. Dr. Gabr recommended a cervical fusion.

A November 9, 2009, letter was received from Dr. Thomas Gibbons, Jr., of Doctors Care. Dr. Gibbons stated the claimant was seen on August 10, 2009, for left arm pain from the inner shoulder to her left hand with numbness in the left middle finger and a "little numbness" in the left index finger. Cervical spine films from September 2008 showed cervical arthritis. His diagnosis on August 10, 2009, was cervical arthritis with left arm radiculopathy. "On 13 August 2009, Mrs. Blanks reported an on the job injury when she started having left hand pain after picking up trays." She was given prednisone and began treatment with Dr. Gabr. He stated after testing, her diagnoses were neck injury, cervical radiculopathy and degeneration of cervical intervertebral disc. "It is most probably that the degenerative cervical disc disease and resulting neuropathy were aggravated by her injury. Dr. Gabr or other consulting specialists will determine questions regarding whether this is a temporary or permanent aggravation." He recommended a neurosurgical consultation. Mr. Felser provided a letter stating he believed this report constituted a *prima facie* claim.

She was held off work from November 10, 2009, through December 10, 2009, by Columbia Clinic Spine Specialists.

The hearing was held on February 22, 2010, in Jacksonville, Florida. The claimant was not present at the hearing but was represented by Mr. Felser.

It was noted during the hearing that clarification of fact of an injury portion of the claim was needed.

It was explained that the initial cause of the injury on the claim form was described as "pushing two food delivery carts from the kitchen to CLC twice a day, up and down a steep hill and over carpet, leading to Ms. feeling a sharp pain in her left hand running up in her arm into her shoulder."[1] It was explained that this description appeared to be repetitive and occurred over more than one work shift. However, in her written statement submitted on September 21, 2009, the claimant stated that "on this particular morning,"[2] which was assumed to be August 13, "no one whose job it was to bring the food over was here at the time my patients were required to eat their breakfast. I proceeded to perform my job, retrieving two food carts by pushing them both to the nursing home by myself, pushing them up an incline. There was no one to help. After breakfast there was still no one to pick up the trays. She did it herself and felt pain from her shoulder down through her fingers on the left side."[3]

Mr. Felser was advised that clarification was needed as to whether the incident occurred on one day or over more than one day. He was asked if this task was something the claimant usually does either by herself or with assistance; whether she took it on herself to perform this job; whether any supervisor was aware she was doing this task, and where were the other persons who usually performed this task. In addition, he was advised the

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[1] Hearing transcript, page 7.
[2] Transcript, page 7.
[3] Transcript, pages 7-8.

Form CA-1 stated the incident occurred at 6:30 a.m., but the VA stated the units did not come off their module until 7:00 a.m., a half hour after she stated the injury occurred.

Mr. Felser then discussed the causal relationship issue and discussed medical reports to include those from Drs. Gabr and a new report from Dr. Gibbons. He stated he believed these reports substantiated a work-related aggravation. He argued that "this claim, from a medical point of view, presents one involving a threshold evaluation of Claimant's medical allegations. It's our contention that the Claimant need only establish an aggravation of her pre-existing condition to some degree. She need not establish the full extent of her injuries as far as this claim is concerned, not today; simply that she has experienced a threshold aggravation. Additionally, if she is able to establish even a prima facie case, we would contend that this case should be remanded for further development.[4] He referenced Dr. Gabr's and Dr. Gibbons' reports and argued the evidence supported an aggravation of a pre-existing condition.

Mr. Felser was advised that an August 10, 2009, report from Dr. Gibbons was needed since he examined the claimant three days' prior to the employment injury for left arm pain from the shoulder into the fingers. In addition, he was asked for medical records beginning with August 2008 to complete the record.

The record was left open for 30 days for receipt of additional evidence for consideration. A copy of the hearing transcript was sent to the Employing Agency on March 10, 2010, for review and consideration.

Additional evidence has been received for consideration. Ms. provided a written statement that her injury occurred on August 13, 2009, when she experienced excruciating pain from the performance of duty. She stated, "However, the symptoms began to manifest on the 10th of August 2009 as we were pushing the Conduvection Serving Cart over to the Community Living Center which is the nursing home for Veterans this would normally take three people to manipulate the Conduvection over the heavy carpet and include that we had to go thru which led me to go see Dr. Gibbons who is my primary care physician. Prior to this we did not push any food carts over to the CLC, feeding was from the conduvection food warming cart. It was my job to feed the patience [sic] breakfast and lunch (see attached work schedule) On the 13th of August when I got to work at 6:30 am I was informed that we would be pushing food carts over to the Community Living Center and my fellow co-worker did not report to work and my Supervisor was not there also. . . As the lead person it was my job to make sure that I followed my work schedule to the letter in order to accomplish the mission which was to feed the patience's I am a wage grade 6 cook it was not in my job description to push carts at all but on this particular morning I had no choice, for if I had not done what I did I would have been written up for insubordination." She provided an illustration and description of the cart and provided a "WG-4 Cook/Health Tech 8 hr shift Job Outline" that said at 6:30 a.m., "Add on any last minute items and push food cart to CLC."

[4] Transcript, page 10.

An additional written statement from the claimant said, "My food was pull from the conduvection oven and serve open to each patient each meal. Breakfast & lunch. There w no need for food cart to be sent to CLC."

Mr. Felser also submitted a brief summarizing his arguments. He stated that Dr. Gibbons had established a *prima facie* claim for an aggravation of degenerative cervical disc disease and resulting neuropathy. He noted Dr. Gabr's reports and opinion that the claimant had aggravated a pre-existing cervical spondylosis and chronic degenerative disc disease.

He stated the claimant's written statement clarified her job duties and noted that a claimant's statement holds great probative value unless refuted by "strong or persuasive evidence." He argued the claimant had met her burden of proof to establish her claim.

This claim was initially denied with the Office finding causal relationship was not established. However, I find that decision should be SET ASIDE and further development on fact of an injury should be undertaken.

A claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he or she claims compensation was caused or adversely affected by employment factors.[5] To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[6] Part of a claimant's burden of proof includes the submission of rationalized medical evidence, based on a complete factual and medical background, showing causal relationship.[7]

In this case, the clamant has stated that she was required to push food carts but neither the other person who was to assist her nor her supervisor came in to work so she had to push this cart by herself. The Employing Agency has not been afforded a chance to review the claimant's statement or provide any comments as to whether she was working alone on August 13, 2009, and whether she was assigned to push the cart as stated. In addition, the job description states that the food cart is to be loaded at 6:30 a.m. while the Agency stated the food did not arrive until 7 a.m. I find that the agency must be provided with a copy of the claimant's statement dated March 22, 2010, along with the accompanying documentation to include the job outline. The Agency should be asked to provide comments concerning this statement to include whether the claimant was working alone on the date of injury, whether she did have to push this cart as alleged, and whether the cart was to be pushed starting at 6:30 a.m. The Employing Agency should be advised that a response is needed within a definite timeframe. If the Agency does not respond within this timeframe, the claimant's statement will be taken as factual. Once this timeframe has expired, the Office should determine if this is a traumatic injury or an occupational disease claim. The Office should also determine if fact of an injury is

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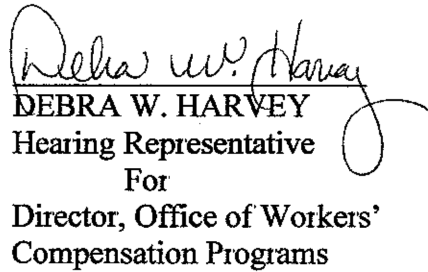
[5] *Sherman Howard*, 51 ECAB ___ (Docket No. 98-599, issued March 24, 2000).
[6] *Bonnie Goodman*, 50 ECAB ___ (Docket No. 97-353, issued November 13, 1998).
[7] *Calvin E. King*, 51 ECAB ___ (Docket No. 98-922, issued March 24, 2000).

supported and then evaluate the medical evidence of record to determine if causal relationship has been established. A *de novo* decision should then be issued.

For the reasons set forth above, the Office's decision dated October 28, 2009, is hereby SET ASIDE and the case file REMANDED for action as described.

DATED: APR 23 2010

WASHINGTON, D.C.



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