

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

FEB 06 2012

Date of Injury:
Employee:

Dear Mr. _____ :

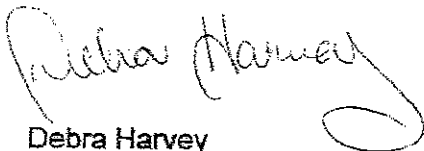
This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A hearing was held on 11/15/2011. 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,



Debra Harvey
Hearing Representative

PAUL FELSER
ATTORNEY-AT-LAW
P O 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
Employed by the Case No:
Telephonic hearing was held on November 15, 2011.*

The issue is whether the District Office properly terminated benefits for medical and wage loss benefit finding no continuing employment-related disability.

The claimant was employed as a _____, He filed a claim for compensation in _____, for a neck condition that he related to lifting, carrying, pulling, climbing, and working overhead on a repetitive basis. Wearing his fire-fighting equipment made performing these duties more difficult. His claim was accepted for a C-5 intervertebral disc disorder with myelopathy. He was paid compensation benefits for wage loss effective June 8, 1992.

On October 19, 2002, he was unable to perform the supervisor firefighter position due to his physical restrictions. He was reassigned as a _____ in February 1993, until that position was eliminated in 1995, and the agency could not otherwise accommodate him. He had been paid compensation benefits due to the loss of wages between the supervisor firefighter and a fire inspector.

The claimant was referred for vocational rehabilitation service for retraining in 1996, and was approved for a two-year program at a local community college. His work restrictions at that time were sitting up to five hours per day intermittently, walking up to five hours per day intermittently, lifting up to two hours per day, standing up to three hours, and no kneeling or climbing. He completed vocational rehabilitation services and located employment. The Office adjusted compensation based on his actual earnings of \$123.45 per week effective December 11, 2000.

In order to determine if he could increase his work capacity or he could work full time, he was referred to Dr. _____ for a second opinion examination on June 1, 2010. The Office prepared a Statement of Accepted Facts (SOAF) on April 19, 2010, stating the claimant was employed as a _____ at _____. "On or about, October 6, 1989, claimant developed a neck condition, which he related to being due to work factors of lifting, carrying, pulling, climbing, and working overhead on a repetitive basis. As well as wearing turn out clothing, air pak, helmet and other equipment made performing these duties more difficult and cumbersome. The claimant was paid compensation retroactive to June 8, 1992." The Office failed to list the accepted condition of herniated nucleus pulposus at C5. However, the Office did list, "Concurrent or conditions pre-dating the accepted condition: history of tobacco usage; history of keratitis, both eyes; history to testicular torsion at age 14; inguinal hernia at

age 4, history of tonsillectomy and appendectomy; lumbar scoliosis; cervical facet syndrome with history of cervical degenerative disc disease; C5 osteophyte; and a history of a heart attack in 1998."

The Office also provided questions to Dr. . He was advised that the purpose of the second opinion examination was, "To ascertain whether the occupational injury, which developed on or prior to 10/16/1989 precludes Mr. from performing normal work activities." Dr. was advised that, "The attached Statement of Accepted Facts (SOAF) provides a factual summary of the relevant facts accepted by this office. Previous medical reports may not have been based on the attached SOAF. You must use the SOAF as the only factual framework for your opinion." He was advised to, "Please read the Statement of Accepted Facts and acknowledge that this is the ONLY FACTUAL information accepted in this individual case."

In his report, Dr. acknowledged that the SOAF had been reviewed and acknowledged and was the only factual information accepted in the case. He diagnosed a temporary aggravation of an underlying degenerative condition of cervical spondylosis and stated the claimant did not continue to experience residuals from the occupational injury. He stated the degenerative condition was a natural progression. Dr. further opined the claimant could perform work activities without restrictions and that requested radio frequency ablations were not indicated. The Office sent a copy of Dr. report to the attending physician, Dr. , for review. On October 23, 2010, Dr. stated the claimant had chronic neck pain secondary to his cervical spondylosis and degenerative disc disease as a consequence of his early injury.

The Office then declared a conflict in medical opinion and referred the claimant to Dr. , on September 28, 2010, for a referee evaluation to determine whether the occupational injury precluded the claimant from performing normal work activity. The same SOAF was sent to Dr. that was sent to Dr. . Again, this SOAF did not advise the doctor of the accepted condition. The instructions and questions to Dr. also advised that the SOAF was the only accepted factual framework and that his opinion should be based on the SOAF.

Dr. indicated there was no evidence of acute disc herniation or fracture that might be caused by a work injury. His diagnosis was cervical pain. He stated the claimant had a cervical spondylosis that is a chronic degenerative condition and not secondary to a repetitive work injury or acute traumatic event. He stated the condition was most likely related to a genetic predisposition, as well as aggravated by smoking. He stated it was likely that the claimant's firefighter duties had aggravated the chronic, underlying condition, but did not cause the spondylosis. He stated the aggravation had resolved without residuals.

The Office found the claimant had been "misdiagnosed," found the weight of medical evidence lay with Dr. , and advised the claimant by notice of May 18, 2011, that his medical and wage loss benefits would be terminated in 30 days unless he provided

evidence to support continuing disability. Additional factual and medical evidence was received but on July 15, 2011, the Office finalized the termination of benefits finding Drs. [redacted] and [redacted] carried the weight of medical evidence. The claimant disagreed with this decision and requested a hearing before an OWCP Hearing Representative.

The telephonic hearing was held on November 15, 2011. The claimant was not present by was represented by his attorney, Paul Felser.

Mr. Felser argued that the claimant had performed heavy duties for approximately 21 years. He stated he had not seen these duties listed in the SOAF. He stated both Drs. [redacted] and Dr. [redacted] had opined for a temporary aggravation but did not present rationale to support when or if the temporary aggravation had ceased. He also stated the claimant suffers from additional conditions not considered by the Office.

A copy of the hearing transcript was sent to the Employing Agency for review and comment on November 23, 2011. There was no response.

A December 27, 2011, report from Dr. [redacted] was received stating the claimant did have a disc herniation and an earlier than expected disc degeneration.

I have carefully reviewed all the evidence of record and I find that the Office's decision dated July 15, 2011, must be REVERSED.

A recent ECAB decision (T.S., Docket No. 10-1362, issued April 26, 2011) stated that, "The Board finds that the Office's failure to provide an accurate statement of accepted facts to the second opinion physician and the impartial medical examiner, advising these physicians that appellant's claim was accepted for permanent aggravation of degenerative disease of the right knee constituted error. Pursuant to the Office's regulations, a statement of accepted facts must clearly and accurately address the relevant information. An essential element of the statement of accepted facts is listing the accepted conditions. As pointed out by counsel, the statement of accepted facts did not contain a complete list of accepted conditions, the second opinion physician and the impartial medical examiner did not have the complete information to make a reasoned and informed opinion."

In this case, the SOAF does not contain the accepted condition. While the Office stated that this condition was "misdiagnosed," the fact remains that the claim was accepted for a herniated nucleus pulposis at C5. The Office failed to convey this fact to either Dr. [redacted] or Dr. [redacted]. Thus, according to the Board, the medical examiners did not have the complete information to make a reasoned and informed decision.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that, an employee has disability causally related to her employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer

related to the employment.¹ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.²

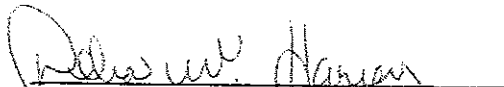
The Office relied on the report of Dr. _____ (and Dr. _____, as well), office referral physicians, in terminating the claimant's compensation benefits. I find, however, that the opinion is of diminished probative value and is insufficient to represent the weight of the medical evidence. The physicians were not advised of the accepted condition and were not asked if this condition had been misdiagnosed, whether he ever had a herniated disc, or if the claimant had recovered from residuals of a disc herniation. The treating physician continues to argue that the claimant had or has a herniation.

Medical conclusions based on inaccurate or incomplete histories are of little probative value.³ The Office failed to provide Dr. _____ and Dr. _____ with a complete statement of accepted facts so he could base his opinion on a proper factual and medical history. (In addition, the *FECA Procedure Manual*, Chapter 2-0809, states that the accepted condition is an essential element and required in any SOAF).

Therefore, I find that the Office failed to meet its burden of proof to properly terminate medical and wage loss benefits since the termination was based on a medical report that did not contain a proper medical and factual background. The Office's decision of July 15, 2011, is hereby REVERSED and the file is returned to the District Office for reinstatement of benefits.

DATED: FEB 06 2012

WASHINGTON, D.C.


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

¹ Jason C. Armstrong, 40 ECAB 907 (1989).

² Del K. Rykert, 40 ECAB 284, 295-96 (1988).

³ James A. Wyrick, 31 ECAB 1805 (1980).