

File Number:  
HR12-D-H

RECEIVED APR 02 2012

U.S. DEPARTMENT OF LABOR

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

MAR 28 2012

Date of Injury:  
Employee:

Dear Mr. :

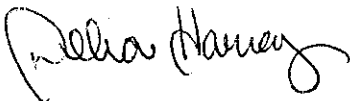
This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A hearing was held on 01/09/2012. 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 H FELSER  
FELSER LAW FIRM, P.C  
PO 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 Department of the Army, Fort Gordon, Georgia. Case No: \_\_\_\_\_ Oral hearing was held on January 9, 2012, in Jacksonville, Florida.*

The issue is whether the District Office properly reduced compensation benefits to zero finding the modified food service position fairly and reasonably represented his wage earning capacity.

The claimant is employed by the \_\_\_\_\_, as a \_\_\_\_\_. He filed the Form CA-1, Notice of Traumatic Injury, stating on \_\_\_\_\_, while moving a 10-gallon pot, he heard a popping sound in his neck and later felt pain down the right arm and tingling down his fingers. His claim was accepted for right shoulder impingement, right shoulder rotator cuff tear, and a right ulnar nerve lesion. He underwent an arthroscopic decompression of the right shoulder on March 25, 2006, and returned to work with limitations. He then had a right anterior ulnar nerve decompression and transposition on July 21, 2006, and stopped working again. He later underwent a right shoulder decompression surgery on October 24, 2007. He has been in receipt of compensation benefits for wage loss on an intermittent basis.

On March 18, 2010, the Office referred the claimant to Dr. \_\_\_\_\_ specialist in orthopedic surgery, for a second opinion evaluation. Dr. \_\_\_\_\_ was provided with a Statement of Accepted Facts (SOAF) and the medical file. Dr. \_\_\_\_\_ stated the claimant had continuing residuals from his work-related injuries to the right shoulder and elbow. He stated he had objective findings of tenderness to the right shoulder and tenderness about the right elbow. He stated the claimant could not work his regular job but did have a partial disability. He stated the claimant could not return to work as a Food Service Worker but could work a sedentary or light job with work restrictions of reaching above the shoulder two hours per day, and two hours per day repetitive movements of the right elbow with pushing, pulling, and lifting two hours per day and to not exceed 20 pounds. The Office determined Dr. \_\_\_\_\_ carried the weight of the medical evidence as the claimant's attending physician had not provided work restrictions and stated in 2008 she could not help him any further. Based on Dr. \_\_\_\_\_ restrictions the \_\_\_\_\_ issued a modified job offer as a food service worker.

The duties of a [redacted] were to set up the food service counters and steam tables with hot and cold food; serve food cafeteria-style; prepare service stands; serve tables; prepare fruits, vegetables, and salads ; prepare and pour beverages; clean tinsels' utilized; dispose of waste; portions and serves salads and sandwiches; measures and counts diabetic items; maintains and cleans the area to which assigned; washes dishes, pots and pans weighing no more than 20 pounds; sets up and clears dining room; unloads supply trucks and places supplies in proper storage area; cleans kitchen equipment; dining room tables and chairs, and washes floors, walls and windows, waxes and buffs floors, maintains and cleans garbage collection area. The claimant's physical effort was stated as follows:

"Work involves light to moderate physical effort. Occasionally lifts or moves objects weighing no more than 20 pounds, e.g., lifting individual dishes or trays in serving or clearing tables; lifting a tray of clean glasses. Involves continuous standing and walking, mainly on concrete floors. Not required to lift more than 20 pounds."

The job offer was notated, "In all job duties worker will not be required to perform any tasks that exceed the restrictions described by Dr. [redacted] on OWCP Form 5c dated 3/21/10."

The claimant returned to work on June 20, 2011. The Rehabilitation Counselor (RC) met with the claimant on July 5, 2011, and his supervisor to discuss his concerns. The Rehab Counselor stated that, "It appears that the employer is working Mr. [redacted] within the accepted work restrictions." The Rehabilitation Counselor stated the claimant's duties were listed verbally in the meeting. The file states that the claimant had to work the serving line between 7 and 9 a.m. and then from 11:00 to 1:00 pm "but only for a short period of time and not for the full two hours." By June 20<sup>th</sup>, the RC stated the claimant was complaining of increasing right shoulder pain since his return to work. He complained that he was having to serve by himself. The agency reported that he might be moved to different areas on the serving line but he never violated the 20-pound lifting restriction.

The claimant stopped working on [redacted], and filed a new claim for DeQuervain's tenosynovitis secondary to his job duties. The claim was denied with the Office finding a causal relationship had not been established between his job duties and a diagnosed medical condition.

On August 31, 2011, the RC reported the claimant had worked for 60 days in the modified position.

On September 1, 2011, the Office issued a formal loss of wage earning capacity finding that the modified food service position fairly and reasonably represented his wage earning capacity. Since he has worked in that position in excess of two months the job

offer was considered suitable. The Office reduced his compensation benefits to zero as there was no wage loss. The claimant disagreed with this decision and requested a hearing before an OWCP Hearing Representative.

On November 11, 2011, the Office received the claimant's daily work schedule from [redacted]. The schedule was as follows:

7-9 am: Serve breakfast on the main line  
9-9:15 am: First 15 minute break  
9:15-11:00 am: Restock main serving line with Styrofoam container and wipes down the main line. Checking temperatures of all refrigerators and warmers.  
11:00-1:00: Serve lunch on the main line  
1:00-1:30: Break  
1:30-2:30: Restock main serving line with Styrofoam containers and wipes down the main line. Checking temperature of all refrigerators and warmers.  
2:30-2:45: Second 15 minute break  
2:45-3:30: Wipes down stainless steel in the kitchen as well as in the server areas  
3:30: End of shift.

A June 23, 2011, memo from Mr. [redacted] was also received that provided the "rules" of his work. He was to report to a manager every morning; he was not to "violate your given profile whether you are assigned to perform a task, requested for assistance or voluntarily on your own, and to tell anyone who asked him to violate his profile that he could not do so. He was to perform his duties "as carefully as possible so as not to injure yourself. You are also required to finish your duties as timely as possible within your limitations," and to report any "negative repercussions."

Prior to the hearing, [redacted], provide a memo pre-hearing. Ms. [redacted] stated when the claimant returned to work on June 20, 2011, he had braces on both wrists, "but no medical documentation was provided as to why." She stated the limitations had been adhered to and the claimant did not provide any new work restrictions. She noted that he stated he had developed carpal tunnel syndrome and filed the new claim.

The hearing was held on January 9, 2012. The claimant did not appear for the hearing but was represented by his attorney, Paul Felser.

Mr Felser stated the claimant disagreed with the decision and had a lack of understanding as to how or why the decision was issued. He stated the claimant was unaware of the documentation that would be needed to prove his disagreement.

Mr. Felser stated he was unaware if the claimant was still working but believed he is still working. He stated that the claimant would provide additional information. The record

was left open for 30 days to allow for receipt of this evidence for consideration. He was advised that a statement concerning the claimant's work status is needed.

The claimant was also asked why he disagrees with the wage earning capacity decision. The evidence stated the claimant had been working since June 2011. The ECAB has ruled in prior cases that the best representation of someone's wage earning capacity is an actual return to work, so "we would need for him to tell us exactly why he disagrees with the wage earning capacity and the return to work, especially if he is continuing to work apparently without problems or we're not aware of problems he might be having."

In addition, the claimant had mentioned other conditions that had not been accepted by the Office. He was advised to formally request an expansion of his claim so the Office could undertake appropriate development for these conditions which include cervical radiculopathy, cervical degenerative disc disease, and cervical spondylosis. He was advised that, "In addition, in order to determine that he would be disabled his wage earning capacity decision would have to be modified, and basically he would have to show a material worsening that prevents him from working, so that would be a medical issue "

A copy of the hearing transcript was sent to the Employing Agency for review and comment on January 20, 2012. There was no response.

The claimant provided a written statement saying he had not worked in the modified job for sixty days. He provided a January 12, 2012, memo from the agency stating that he had worked from June 20 – July 26, 2011. He was off work until October 13, 2011. Once he had returned, he stated he could not "fulfill the duties under the modified PD." She stated he had not provided any medical documentation to support this and stated the claimant was still under Dr. \_\_\_\_\_ restrictions.

I have carefully reviewed all the evidence of record in this case and find that the District Office did not properly reduce the claimant's compensation.

Office procedures state that, after a claimant has been working for 60 days, the claims examiner will determine whether the claimant's actual earnings fairly and reasonably represent his or her wage-earning capacity.<sup>1</sup>

In this case, the Office, in its decision of September 1, 2011, stated the claimant had been working in the modified job for sixty days. This was based on the report of the RC. However, this appears to be erroneous. The Employing Agency stated that the claimant worked from June 20, 2011, through July 26, 2011, which is only 36 days. He then stopped working and filed a new claim. The evidence shows the claimant did not return to work until October 13, 2011, and his work status since that time is unknown. Thus, I

---

<sup>1</sup>*Corlissia L. Sims (Smith)*, 46 ECAB \_\_\_\_ (Docket No 93-371, issued October 28, 1994).

find the claimant did not work the modified job the required sixty days so the Office could determine if this job fairly and reasonable represented his wage earning capacity.

In addition, I find that the evidence shows that the job offer was not in accordance with FECA procedures.

The FECA *Procedure Manual*, Chapter 2-0814-4, states, "If the agency can provide alternative employment, it will make an offer of light duty to the claimant." The *Procedure Manual* continues:

"(1) Any such offer must be in writing and must include the following information:

- (a) A description of the duties to be performed.
- (b) A description of the duties to be performed.
- (c) The organizational and geographical location of the job.
- (d) The date on which the job will first be available.
- (e) The date by which a response to the job offer is required."

A review of the job offered to the claimant shows that it was a general position description of a Food Service Worker with a paragraph included that stated:

"The following describes the duties and environmental requirements of this position: Set up and replenish food service counters and steam tables with hot and cold food. Set up condiments, silverware, and glassware, prepare fruits and vegetables for cooking and serving. Perform a wide variety of duties incident to the maintenance and cleanliness of the area to which assigned. Clean kitchen equipment, dining room tables and chairs, wash floors, walls and windows in kitchen. Maintain garbage collection areas. Work involves light to moderate physical effort, occasionally lift or move objects weighing no more than 20 pounds. In all job duties worker will not be required to perform any task that exceeds the restrictions described by Dr. Kenneth Johnson on OWCP Form 5c, dated 2/21/2010. A copy of your official position description is attached."

In determining the employee's loss of wage-earning capacity, the Office must take the following steps: (1) ensure that the record contains a detailed current description of the employee's ability to perform work in a disabled condition, including capacity to lift, stand, walk, etc.; (2) ensure that the record contains a complete description of all the duties of the offered position, and all its physical requirements; and (3) ensure that the work offered to the claimant is consistent with the work capacity described in the

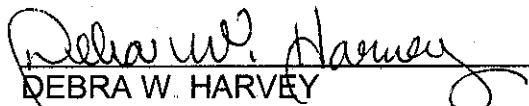
medical report. If there is any question about the compatibility, the case must be referred to the Office medical adviser or the attending physician.<sup>2</sup>

I find the job description to not have been issued according to FECA requirements. The duties listed were very general and not specific to the claimant's work restrictions. There are tasks in the job description that appear to be outside his restriction of only two hours' repetitive movement to include setting up and replenishing the service counters and steam tables, serving food, setting up stations, preparing fruits and vegetables, and cleaning. In addition, the duties of washing walls and windows appear to be outside the restriction of two hours' reaching over the shoulder. This job description appears to be a generic one that is noted that the claimant is not to work outside his restrictions. The claimant is not required to monitor his job duties; the agency is to issue a job offer that is within the provided work restrictions and the Office is to rule on the suitability of that job offer. I find that the job offer issued in this case is too general and vague for a determination of suitability. Thus, I find that the Office did not properly reduce his compensation benefits and the decision dated September 1, 2011, is hereby REVERSED.

Therefore, the Office should reinstate benefits back to the date of reduction as indicated. Since it is unknown if the claimant is still working, the Office should undertake appropriate development to determine the claimant's work status prior to reinstating benefits and noting that he has a denied claim for a portion of the time he did not work.

DATED: MAR 28 2012

WASHINGTON, D.C.

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

---

<sup>2</sup>Anthony Pestana, 39 ECAB \_\_\_ (1988)